[1-4] There were a few Chinese settlements on the island at that time, mostly on the south side, around Shek O. A larger number of people, estimated to be between 2 to 7 thousand, lived on boats. British and foreign settlers, mostly merchants who were then living in Macau, arrived soon after in Hong Kong to inspect the land with the intention of constructing buildings to facilitate 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.

[1-5] 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.

[1-6] 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.

[1-7] 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.

1.2 The first land sales

[1-8] The first land sales took place in 1841 (in Macau) and a Land Officer was appointed to deal with these sales. The sale of 100 lots had been planned. However, only 50 marine lots were prepared for sale.

[1-9] 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 were 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.

1.3 The forms of leases

1.3.1 Hong Kong Island

[1-10] 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, title to the land on which St John's Cathedral is built was granted as freehold tenure;[2] in essence, this land remains the only freehold title to alienated land in Hong Kong. Leases subject to a building covenant, were to be granted for 75 years, whilst others were to be for a maximum of 21 years. 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.

1.3.2 Kowloon Peninsula

[1-11] 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 lands; 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

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).

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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.

1.4 Land Registration Ordinance

[1-12] What then is the system that 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.

[1-13] 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 piece of legislation, largely unamended, in force. Although the system is that of the registration of deeds, and not of title, the land registers that 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.[4]

[1-14] Universal use of the register is now the norm with the result that registration of memorials evidencing dealings has become, in practice, almost mandatory,[5] despite the fact that the legislation does not make registration compulsory.

[1-15] Up until 1991, the legislation was enforced strictly to require registration to give priority. Some decisions however confused the effect of registration and so in 1991, the Court of Appeal in *Wong Chim Ying v Cheng Kam Wing*[6] permitted an unwritten, and thus unregistered, equity to have priority over a subsequent purchaser with notice. This resulted in a parallel system of priority; for written documents concerning interests in land registration under the Land Registration Ordinance was necessary for the protection of priority, but priority of an unwritten interest affecting land was to be tested by reference to common law rules.

[1-16] From the earliest days, the form of title favoured by the Government had its critics who argued that title should be freehold. This was inappropriate

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

5 *Yeung Shu v Alfred Lau & Co* [1997] 2 HKC 153.

6 [1991] 2 HKLR 253, [1991] HKCU 428.

in respect of New Territories land because of the length of the British lease of the New Territories. Despite several complaints from time to time, the system introduced in 1841 (and in 1898 in the New Territories) has continued to remain intact. There have been one or two attempts to convert the system to that of a *registration of titles*.[7] A Land Titles Ordinance (Cap 585) was enacted in 2004 but it has not been brought into force. A substantially amended version has yet to be introduced into the Legislative Council. If enacted, and brought into force, it is anticipated that the new system will be a registration of title system.

1.5 Leasehold terms

[1-17] By 1898, there was 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.

[1-18] Renewal of renewable leases, and from 1972 of certain non-renewable leases, is provided for in several Ordinances.[8] 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.[9] In addition, the Government has a right to resume the land for public purposes.[10]

[1-19] 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 (from 1991, previously 20 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*[11] and *Lai Chung Yue v Chau Shing*.[12]

[1-20] 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

7 See JE Sihombing, 'The Torrens System in the New Territories' (1984) 14 HKLJ 291.

8 See the Government Leases Ordinance (Cap 40); New Territories (Renewable Government Leases) Ordinance (Cap 152); Government Rent and Premium (Apportionment) Ordinance (Cap 125).

9 Government Rights (Re-entry and Vesting Remedies) Ordinance (Cap 126).

10 Lands Resumption Ordinance (Cap 124).

11 [1984] HKLR 181, [1985] 2 HKC 299.

12 [1987] 3 HKC 406.

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People's Republic of China which provides for the automatic termination of all Government leases on 30 June 2047 if not before.

2. Sources of Hong Kong Land Law

2.1 The sources of land law in Hong Kong

[1-21] 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:

2.1.1 Common law of England

The common law was received into Hong Kong from 5 April 1843, being of general application to the then Colony, and as 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 Hongkong, except where the same shall be inapplicable to the local circumstances of the said Colony, or of its inhabitants.

[1-22] 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 s 3 of the Application of English Law Ordinance (Cap 88) (the 'AELO'), 1966, in which 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 had 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.

[1-23] Some traditional English law principles have been applied in Hong Kong despite apparent inconsistency between the two systems. The point has been made by the Court of Final Appeal in *China Field Ltd v Appeal Tribunal (Buildings) & Anor*[13] that:

> **[76]** Prior to 1 July 1997 'common law' was defined as 'the common law of England'[51], but this was not limited by reference to any particular time. The common law as it was developed by the judges applied in Hong Kong provided that it was suited to local circumstances. This did not give Hong Kong judges a discretionary power to legislate by modifying the common law. They were required to apply English law, but a modified form of English law suited to local circumstances. On appeals to the Privy Council, the Board would defer to the views of the local courts on what was and what was not suited to the circumstances of Hong Kong.
>
> **[77]** On 1 July 1997 the 1966 Ordinance ceased to apply in Hong Kong as being contrary to the Basic Law. But the continuity of existing laws was of fundamental importance in the establishment of the Hong Kong Special Administrative Region

13 [2009] 5 HKLRD 662, [2009] 5 HKC 163 (CFA).

> under the principle of 'one country two systems' and constituted a vital element of the Joint Declaration and the Basic Law. Article 8 of the Basic Law: See …
>
> Section 3 of the Interpretation and General Clauses Ordinance now defines 'the common law' as 'the common law in force in Hong Kong'.
>
> **[78]** The disappearance of any reference to local circumstances and the modification of English law was an inevitable consequence of the resumption by China of the exercise of sovereignty over Hong Kong. But it should not inhibit the courts of Hong Kong, and in particular this Court which has succeeded the Privy Council as the final appellate court of Hong Kong, from developing the common law in the context of Hong Kong. The language of the 1966 Ordinance was appropriate when Hong Kong was a British colony and Hong Kong judges were obliged to apply an occasionally modified version of English law. This is no longer the case. … [I]n future our judges must develop the common law of Hong Kong to suit the circumstances of Hong Kong. It is well recognised that the common law is no longer monolithic but may evolve differently in the various common law jurisdictions.
>
> **[79]** The status of English and other common law decisions as binding precedents in Hong Kong was authoritatively set out by Li CJ in this Court in *Solicitor (24/07) v Law Society of Hong Kong* [2008] 2 HKC 1. The effect of that case may be shortly stated. Decisions of the Privy Council on Hong Kong appeals before the 1 July 1997 remain binding on the courts of Hong Kong. This accords with the principle of continuity of the legal system enshrined in Article 8 of the Basic Law. Decisions of the Privy Council on non-Hong Kong appeals are of persuasive authority only. Such decisions were not binding on the courts in Hong Kong under the doctrine of precedent before the 1 July 1997 and are not binding today. Decisions of the House of Lords before the 1 July 1997 stand in a similar position. It is of the greatest importance that the courts of Hong Kong should derive assistance from overseas jurisprudence, particularly from the final appellate courts of other common law jurisdictions. This is recognised by Article 84 of the Basic Law.
>
> **[80]** In that case the Chief Justice made it clear that this Court has the power to depart from previous decisions of the Privy Council on appeals from Hong Kong and its own previous decisions, but observed:
>
> 'The doctrine of precedent is a fundamental feature of our legal system based on the common law. It gives the necessary degree of certainty to the law and provides reasonable predictability and consistency to its application. Such certainty, predictability and consistency provide the foundation for the conduct of activities and the conclusion of business and commercial transactions. But at the same time, a rigid and inflexible adherence by this Court to the previous precedents of Privy Council decisions on appeal from Hong Kong and its own decisions may unduly inhibit the proper development of the law and may cause injustice in individual cases. The great strength of the common law lies in its capacity to develop to meet the changing needs and circumstances of the society in which it functions. ….'
>
> **[81]** On the resumption of the exercise of sovereignty by China the Privy Council ceased to be the final appellate court of Hong Kong and its place was taken by this Court. The jurisdiction to ascertain, declare and develop the common law of Hong Kong formerly exercisable by the Privy Council is now exercisable by this Court. It will continue to respect and have regard to decisions of the English

courts, but it will decline to adopt them not only when it considers their reasoning to be unsound or contrary to principle or unsuitable for the circumstances of Hong Kong, but also when it considers that the law of Hong Kong should be developed on different lines.'

[1-24] Two such matters have been: (a) adverse possession; and (b) prescriptive rights. The general common law principle on *adverse possession* involves the barring of the right of recovery of possession by the true owner.[14] There is some difference in the general principles applicable to establishing adverse possession in England, from those applicable in Hong Kong, apart from the fact that in Hong Kong land is held only by leasehold. Following the decision in *JA Pye (Oxford) Limited v United Kingdom*,[15] 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 ss 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 Freedoms. Action is taken against Governments rather than individuals under that Convention. In 2012, the Hong Kong Law Reform Commission issued a Consultation Paper on recommendations for the reform of the law relating to adverse possession. The proposed legislation will alter the existing law, making it more in line with current English provisions, including the requirement to give notice (two years before the end of the limitation period) to the paper title owner of the claim, thereby allowing the paper title owner to object within the remaining two years. To date (May 2018) no legislation has yet been enacted, although it is under consideration,

[1-25] Following *JA Pye (Oxford) Limited v Graham*[16] the elements of adverse possession were re-stated. To gain title to land of another through possession it is now required to show:

(a) A sufficient degree of physical control and custody; and
(b) An intention to exercise such custody and control on one's own behalf and for one's own benefit;

thereby seeking to exclude all from the land, including the true owner.[17]

[1-26] It goes without saying that there must be the absence of any consent on the part of the true owner allowing the occupation of the land. The *JA Pye* re-statement has been adopted in Hong Kong in part.

[1-27] Neither the Land Registration Ordinance (Cap 128) nor the terms of The Basic Law or of the Hong Kong Bill of Rights Ordinance (Cap 383) provide similarly to the relevant clauses in the European Convention.

[1-28] The second area of land law which has been uncertain over the years is that of *prescription*, ie especially in relation to the obtaining of an easement over the land of another either by lost modern grant, or as long user, or under the

14 *Lau Wing Hong & Ors v Wong Wor Hung & Anor* [2006] 4 HKC 221.
15 [2005] ECHR 921.
16 [2002] UKHL 30, [2003] 1 AC 419.
17 *Wong Tak Yue v Kung Kwok Wai David* (No 2) (1997–98) 1 HKCFAR 55, [1998] 1 HKC 1.

Imperial Prescription Act of 1832 (which had the effect of reducing the extent of the 'perpetuity' period). One reason for the uncertainty has always been that the doctrines behind long user and lost modern grant were predicated on the easement being held over land held in fee simple.[18]

[1-29] Originally, to obtain an easement by 'long user' it was necessary to show user since time immemorial, and this was dated back to 1189; however, in 1786 the courts set a minimum of 20 years as the timing necessary to show long user. However, even though the length of user was reduced, the claimant had to show that the right could have existed prior to 1189: *Angus v Dalton*.[19] Lost modern grant is a fiction whereby it is said that a grant of the easement was presumed to have been made by the owner of the servient land to the owner of the dominant land in modern times, but that the deed had now been lost. If the use of the alleged easement can be proved back for 20 years, then the fiction can operate to give enjoyment of the right claimed: *Bryant v Foot*.[20] In England, the Prescription Act of 1832 set the time required for 'long user' at 20 years.

[1-30] Common law prescription is predicated on the presumption that there was a grant in the past by the owner of the fee simple. Both lost modern grant and prescription under the 1832 Act are also based on this view.

[1-31] Was prescription part of Hong Kong law? And especially was it part of Hong Kong law which could continue post-1997? The question has now been decided by the Court of Final Appeal in *China Field Ltd & Anor v Appeal Tribunal (Buildings) & Anor*[21] to the effect that, when considering traditional principles of common law, the court:

> will decline to adopt them not only when it considers their reasoning to be unsound or contrary to principle or unsuitable for the circumstances of Hong Kong, but also when it considers that the law of Hong Kong should be developed on different lines. (paragraph 81)

[1-32] The result has been that easements can be obtained by prescription in appropriate circumstances.

[1-33] Another area of interest in relation to the application of English common law principles has been that of the operation of the *rule against perpetuities*. Whilst reliance on the rule is not commonplace, early doubts were raised as to whether or not the rule applied in the case of the Chinese customary trusts such as a the t'ong and the t'so. It has now been settled that these trusts are outside the operation of the Ordinance. In relation to transactions with other property, the Ordinance does apply to prevent the postponement of vesting of interests.

[1-34] In *Re Estate of Lau Wai Chau*,[22] Bokhary PJ in the Court of Final Appeal, at 683, observed:

18 See for example *Simpson v The Mayor etc of Godmanchester* [1897] AC 696 (HL).
19 (1878) 4 QBD 162.
20 (1867) LR 2 QB 161.
21 [2009] 5 HKLRD 662, [2009] 5 HKC 231 (CFA).
22 [2000] 1 HKC 681.

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Ancestral worship trusts, being endowments in perpetuity for the purpose of ancestral worship, exist under Chinese law and custom as an institution of that legal system dating from Qing times. In regard to certain matters and in certain circumstances, Hong Kong law makes room for Chinese law and custom to apply in Hong Kong. Our law even disapplies the rule against perpetuities where such application is necessary for the purpose of enforcing Chinese law and custom in Hong Kong. One of the matters in respect of which Chinese law and custom has application in Hong Kong is New Territories land unless exemption from the provisions of Pt II of the New Territories Ordinance (Cap 97).

[1-35] And as decided, in *Chan Kong v Chan Li Chai Medical Factory (HK) Ltd & Ors*[23] Chinese custom and customary rights can only prevail in respect of land held under Part II of the New Territories Ordinance, ie now largely rural land in the New Territories.

[1-36] The provisions of the Perpetuities and Accumulations Ordinance (Cap 257) were repealed from 01 December 2013, pursuant to the Trust Law (Amendment) Ordinance 2013, subject to certain reservations.

2.1.2 The rules of equity

[1-37] These rules were developed by the Court of Chancery, received in 1844, and as amended by the Courts of Hong Kong since then. In recent years there has been much resort to decisions in equity from jurisdictions other than that of England. See for example the successful reliance on unconscionability, linked to estoppel, in *Pacific South (Asia) Holdings Ltd v Million Unity International Ltd.*[24]

2.1.3 Hong Kong legislation

[1-38] Hong Kong legislation, including subordinate or delegated legislation, since 1844 which is still in force, and that made by LegCo. From 1844 onwards, some early Imperial legislation was applied in Hong Kong by reference to the Supreme Court Ordinance. Some of these Imperial statutes were not referred to in the Schedule to the AELO and are thought to be part of the law of Hong Kong. This is mainly because the underlying principles which have evolved from the legislation have become part of the common law.

[1-39] For land law, the more important local Hong Kong legislation includes:

(a) the Conveyancing and Property Ordinance (Cap 219);
(b) the Land Registration Ordinance (Cap 128);
(c) the Building Management Ordinance (Cap 344);
(d) the Landlord and Tenant (Consolidation) Ordinance (Cap 7), although as the security of tenure and rent control provisions have now been repealed, this ordinance has lost much of its effect;
(e) the New Territories Ordinance (Cap 97) – as well as several others concerning New Territories land, such as:

23 [2006] HKCU 1035 (unreported, HCA 4101/2001, 10 March 2006).
24 [1997] 1 HKLRD 1238, [1997] 3 HKC 440.

(i) the New Territories (Renewable Government Leases) Ordinance (Cap 152);
(ii) the New Territories Land Exchange Entitlements (Redemption) Ordinance (Cap 495);
(iii) the New Territories Land (Exemption) Ordinance (Cap 452); and

(f) a series of legislation relating to the regulation of Government leases, rent and other matters, including the Government Rent (Assessment and Collection) Ordinance (Cap 515) for the payment of rent in respect of renewed, renewable, Government leases, the Government Leases Ordinance (Cap 40) providing for various matters concerning Government leases including covenants therein, and the Government Rent and Premium (Apportionment) Ordinance (Cap 125) which deals with the apportionment of Government rent on the sectioning or division of land.

2.1.4 Chinese custom and customary law

[1-40] Article 8 of the Basic Law provides that 'customary law', previously in force, is to be maintained post 1997. However, s 13(1) of the New Territories Ordinance empowers the Court of First Instance and the District Court 'to recognize and enforce any Chinese custom or customary right affecting land' in Part II of the Ordinance, ie now primarily rural land in the New Territories which has not been exempted from the provisions of Part II. Section 13(1) has long been interpreted as applying to Chinese 'customary law' when considering what proprietary rights exist over land in the New Territories, or perhaps more correctly what rights an indigenous New Territories villager may have, in respect of land, because of that status.[25]

[1-41] Note that the reference to custom or customary law varies dependent on the legislation in which it is found. For example:

(a) Art 8 of the Basic Law preserving 'the law presently [ie 01 07 1997] in force in HK [ie]...*customary law*';
(b) Art 41 of the Basic Law protecting '*lawful traditional rights and interests of the indigenous inhabitants* of the New Territories'; and
(c) Section 13 of the NTO provides:

> the Court of First Instance or the District Court in relation to land in the New Territories, the court shall have power to recognize and enforce any *Chinese custom or customary right affecting such land*.

[1-42] In general, the distinction between custom and customary law is that custom represents established patterns of behaviour, of traditional practices, accepted by the community, or specific groups within the community, which can be verified. By contrast where these practices have the force of law binding on the members of the community, and it is possible to ascertain some precedent in

25 *Tang Yau Yi Tong v Tang Mou Shau Tso* [1996] 2 HKLR 212, [1996] 2 HKC 471; *Kan Fat-tat v Kan Yin-tat* [1987] 4 HKLR 516, [1987] HKCU 258.

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how the principles of these particular practices operate, then the practices have become customary law.

[1-43] For example, in *Wong Sui Yeung v Chiu Kwong Wing & Ors*,[26] action had been taken for compensation for the destruction of a lychee tree which a landowner claimed was his family's fung shui tree, even though it was not growing on his land. In the event, expert evidence was unavailable, for various reasons, and the court held that the interest in such a tree may represent 'traditional practices'. But no evidence was produced which indicated such practices had been 'elevated into the status of custom or customary rights enforceable by law' [paragraph 29]. In the event no cause of action was disclosed.

[1-44] Article 8 does provide for possible amendment to these laws as they are 'subject to any amendment by the legislature of the Hong Kong Special Administrative Region'. In addition, Article 84 does permit judges in applying Hong Kong SAR law to 'refer to precedents of other common law jurisdictions'. The courts do make use of this facility. In Hong Kong, the common law and principles of equity are robust as a consequence. But when and in what circumstances will the court adopt overseas developments? The decision in *China Field* seems to have answered this question.

2.2 Alienation of land

[1-45] Historical factors, such as Chinese custom in the New Territories and the fact that land holding from 1841 has been by way of leasehold, continue to be relevant. The current practice for the alienation of land in Hong Kong by the Government is for the land to be sold at a public auction, although in certain cases the tender system is used.

[1-46] The form of title is that of a Government lease, initially entitled Conditions, the form of which varies, depending on the circumstances. The reason for the use of the term 'Conditions' is that a formal Government lease has not been issued since the late 1960s.

[1-47] Generally, Conditions provide that on observance of the terms of the contract between the Government and the purchaser, the equitable interest of the purchaser will convert into a legal estate as Government lessee.[27] If the purchaser sells the land prior to the conversion, he is selling only an equitable interest under the Conditions of Sale.[28] For example, the usual conditions in the Conditions of Sale include payment of the premium (ie the purchase price for the land), and construction of a building in accordance with the building covenant. On observance of the conditions, the purchaser is entitled to a Certificate of Compliance which is issued, by the Lands Department, if the purchaser's building is compliant with the Approvals and Consents of the Building Authority under the Buildings Ordinance (Cap 123), where observance of the Consent scheme is required. In other cases, the

26 [2005] 3 HKLRD 495.
27 Section 14(1) of the Conveyancing and Property Ordinance (Cap 219).
28 See *Paul Chen v Lord Energy Ltd* [2002] HKCU 396 (unreported, FACV 14/2001, 4 March 2002).

Certificate of Compliance will be required if the land is not to be used for multi-storey buildings. Compliance with the conditions causes s 14 of the Conveyancing and Property Ordinance to operate and convert the equitable title of the purchaser into the legal estate of the 'owner' as Government lessee.

[1-48] The practice for land in the New Territories may differ, depending on whether the land is subject to compliance with the building regulations. In cases where land is not so subject, a Certificate of Exemption will be necessary.

[1-49] There are various forms of Conditions. The most usual are the Conditions of Sale under which the purchaser 'buys' the land from the Government. Other forms include the Conditions of Exchange where one piece of land if exchanged for another, or where Old Lots in the New Territories are consolidated; Conditions of Grant where land is alienated for a particular purpose, and Conditions of Re-Grant where the former Government Lease is leased to a former lessee, or where the former Government Lease originally held by one lessee has come into the ownership of several co-owners.

3. Land Law in the New Territories

3.1 Before and after 1898

[1-50] The 'New Territories', 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; but the Walled City was not included. Many aspects of Chinese custom and customary law which had previously been in force prior to 1898 continued thereafter.

[1-51] 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 not the norm in the New Territories, so the law recognised custom on intestate succession and females continued to be excluded. It was not until the 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.

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[1-52] 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 ownership remained with 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.[29]

[1-53] 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, ie 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 land devoted to the support and upkeep of a temple for a particular idol through profits realised in renting out 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.

[1-54] 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*,[30] and *Lai Chi Kok Amusement Park Co Ltd (No 2) v Tsang Tin-Sun*.[31]

3.2 The Land Court 1900

[1-55] There were many title difficulties facing the Government in 1900 mainly because as a consequence of irregular transactions, of possessory claims to land, and of the absence of any survey. Many claims to titles were unsubstantiated. In respect of New Territories land, the British Government had responsibility not only for land alienated after 1898 but also for land held prior to then. The first step in the regulation of land tenure was for the Government to assume title to or

29 *Beautiglory Investment Ltd v Tang Yet Tai Tong* [1993] 2 HKC 591.
30 [1970] HKLR 276, [1970] HKCU 25.
31 [1966] HKLR 124, [1966] HKCU 11.

property in the land. This was later deemed to have occurred from 23 July 1900 as provided in 1910 in s 8 of the New Territories Ordinance to the effect that:

> All land in the New Territories is hereby declared to be and to have been from 23 July 1900, the property of the Government.

[1-56] The next step was to produce a title in conformity with Hong Kong law. Traditionally, many titles had been held 'in perpetuity'; as evidenced by red deeds. However, as the British had only a lease for 99 years in the territory, any title granted by the Government could only be for a lesser period, and must have resulted in a downgrading of the existing rights.

[1-57] Apart perhaps from titles held by way of red deeds, it was impossible to clearly establish title to land because of a multiplicity of claims to the same piece of land. In 1898, rumours had been started to the effect that the British would take over privately owned lands without compensation, and so many landholders sold to ready buyers. The Governor had to tour the New Territories assuring landholders that the Government would not confiscate property and that existing ownership would be recognised.

[1-58] Some landholders were so impressed with his explanation that they registered all subsequent dealings with their lands in the registry office on Hong Kong Island, pursuant to the Land Registration Ordinance, even though their titles were not compatible with Hong Kong titles at that stage. The last deed before the 1860 Convention of Peking acted as the root of title, supported by the previous title, ie the red deeds. Those registering thought that registration would secure title which would become absolute if the owner remained in possession for 20 years, thereby confusing adverse possession with rights currently held.

[1-59] To settle these questions, and to enable investigation of squatters' rights, a Land Court was established by the New Territories Land Court Ordinance (No 18 of 1900). The court's first task was to undertake supervision of the demarcation of the lands. However, language between the surveyors and the population was a problem. The training of Chinese demarcators delayed the work considerably.

[1-60] The basic, prevailing, principle was that land was held in perpetuity. However, there were several variations of tenure in accordance with Chinese custom. Although land could be owned by individuals, ownership by males was more common in this patrilineal system, and much land was held by the clans or families. Land could be dealt with by sale or mortgage, yet much land was also subject to specific trusts which prohibited dealings, or at least those without the consent of the 'beneficiaries'. Land was also dedicated to special purposes, such as ancestral land, temple land or land held by associations. Ancestral land was that dedicated to ancestral worship and held in the name of the ancestor. Profits received from the rent of such land were used for various social purposes, including education of members of the clan. It could not be alienated without the consent of the representatives and elders of the clan.

[1-61] To assist in the determination of the form of title to be issued for these lands, the Land Court looked at:

(a) a cadastral map which showed the exact position of the area of land claimed by each applicant;
(b) a statement from the Survey Department of the size of each claim although the scale of the survey varied; and
(c) a demarcation book, prepared by demarcators, giving particulars of ownership, the nature of cultivation of the land and the rents collected.

[1-62] Any title decided upon had to take into account the fact that Britain had a lease for 99 years only. The solution arrived at was that land would be held on a Government lease, usually for 75 years, but in some cases with a right of renewal for a further 24 years less the last three days. That lease would be back-dated to 1 July 1898.[32] Later developments under the New Territories (Renewable Government Leases) (Cap 152) 1969 extended leases up to 27 June 1997, and the New Territories Leases (Extension) Ordinance (Cap 150) extended these leases to 30 June 2047.

[1-63] Section 15 of the Land Court Ordinance recited that all land was deemed to be the property of the Government.[33] The Government would then alienate to successful claimants either by way of Government lease, other form of title, or by licence. By and large, the successful claimants were those who had held the land prior to 1898 so that the title granted reflected their former rights. Where it was considered inexpedient that a title should be issued to a successful claimant, compensation would be awarded instead.[34] As a complementary function to its designated functions, the Court also updated the rent roll to enable the collection of land revenue.

[1-64] The solution, to the fact that Britain had a lease for 99 years only, was to issue Government leases to a whole area of land rather than to individual lots were issued. These were the Block Crown (now Government) leases. Individual ownership of lots was scheduled in these block leases.

3.3 Block Government leases

[1-65] The Land Court decided that the New Territories was to be divided into Demarcation Districts which, in turn, were subdivided into Blocks containing proven claims to ownership. A Block Crown Lease was issued for each Block.[35] The Block Government lease thus related to a number of lots which, in most cases, were owned by the traditional owners. Each Block Government lease contained a Schedule detailing the separate ownership of the lots, together with the user to which the land was put at the date of the survey and the amount of tax payable at that time.[36] The reference to 'user' in the Block Government leases was merely an aid to description of the particular lots, and had not resulted in the imposition

32 See the New Territories (Renewable Government Leases) (Cap 152) 1969 extending the leases up to 27 June 1997; and the New Territories Leases (Extension) Ordinance (Cap 150) extending these leases to 30 June 2047.
33 See also s 8 of the New Territories Ordinance
34 Section 14 of the Land Court Ordinance.
35 *Winfat Enterprise (HK) Co Ltd v Attorney General* [1985] 1 AC 733 (PC).
36 *Lintock Co Ltd v Attorney General* [1985] 2 HKC 555.

of restrictions on the use of the land. Block Government leases were issued in respect of 354,000 lots. Unoccupied land, and land to which no claim was proven, vested in the Government.

[1-66] The administration of the New Territories was effected by District Officers who also became responsible for registering transactions in land within their districts. Thus, dealings in land, scheduled under Block Government Leases, were registered at a local District Office rather than at the Land Office. But in 1982, the Registrar General assumed responsibility for land registration in the New Territories. To facilitate registration, regional land offices were opened in the larger New Territories towns. These land registries have now been centralised and computerised.

[1-67] In later years, the documents of title to many Block Government Leases were lost or had become illegible. To assist in identifying claims, courts could consider:

(a) field sheets showing the various plots of land in the Demarcation District surveyed after 1898;
(b) field area statements which set out the Lot number, its area in acreage, and a description of the nature of the land in each Lot; and
(c) Demarcation District Land Control sheets which are documents prepared by the Land Office for its own administrative purposes.[37]

[1-68] The Block Government lease in respect of Cheung Chau was terminated in 1995, pursuant to the Block Government Lease (Cheung Chau) Ordinance (No 97 of 1995). This lease had been granted in 1905; the amendment treated scheduled lessees as if they originally had been granted as a Government lease.

3.4 The Block Government lease, the New Territories Ordinance and the user provisions in the lease

[1-69] The New Territories Ordinance (Cap 97) was enacted in 1910 to regulate New Territories land, and especially to preserve Chinese custom and customary law in respect of that land. For this purpose, an 'indigenous villager', entitled to exercise customary rights, was later defined as one who could trace his patrilineal descent from an ancestor who had lived in a New Territories village prior to 30 June 1898: *Secretary for Justice & Ors v Chan Wah & Ors*.[38]

[1-70] Block Government leases were subject not only to the Government Leases Ordinance but also to Chinese customary tenure. Chinese custom was preserved in Part II that provided that several of the incidents of customary law were to continue to apply to any land in the New Territories which had not been exempted from the provisions of that Part. District Officers enforced custom within their district, and were the arbiters of disputes relating to custom.

37 *Nishimatsu Constructions Co Ltd & Anor v Tang Hon Keung & Ors* [1996] HKCU324 (unreported, HCA 8568/1995, 19 July 1996).
38 [2000] 3 HKLRD 641, [2000] 4 HKC 428.

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[4-300] There have been several decisions to the contrary since those cases. The question would now seem to have been settled by the decision of the Court of Appeal in *Wong Hing Cheong & Anor v Wah E Investment Ltd & Anor*[260] where the Court of Appeal ruled that it is:

> Simply untenable that the provisions of section 45(1) and the Tenth Schedule when taken together can be interpreted as giving exclusive jurisdiction to the Lands Tribunal in respect of matters falling within the Tenth Schedule. I see no basis for construing … the Tenth Schedule in a restricted way. … I can see no basis for holding that the Lands Tribunal has exclusive jurisdiction in respect of matters falling within the Tenth Schedule.[261]

[4-301] Thus it can now be taken that s 45 does not result in exclusive jurisdiction being given to the Lands Tribunal for multi-storey building matters, despite the understanding at the time it was enacted that this would be so.

[4-302] The Court of Appeal in *Provident Commercial Investments Ltd v The Incorporated Owners of Provident Centre & Ors* upheld the non-exclusivity of the jurisdiction of the Lands Tribunal in respect of maters referred to in Schedule 10. The issue in dispute concerned certain parts of the commercial section of the development. Were these parts common parts or were they areas over which the plaintiff had exclusive possession? The Court of Appeal acknowledged that the Lands Tribunal does not have exclusive jurisdiction over these matters. Accordingly, the appellant could have sought to have the proceedings transferred to the Court of First Instance. However, it had not done so and instead it had disputed the jurisdiction of the Lands Tribunal. This was because it claimed that the result of any decision by the Lands Tribunal would be that it would be to substantially alter a document registered in the Land Registry, and therefore would have been a judgment outside s 45. But the Lands Tribunal held that this would not have been so, as the Lands Tribunal would merely be interpreting the DMC.

[4-303] The Court of Appeal agreed with the judgment of the Lands Tribunal. Therefore, the submission of the appellant was 'groundless'. The Court of Appeal refused to ask the Lands Tribunal to exercise its discretion because the claimant had not requested this of the Lands Tribunal, had not explained its complaint about the interpretation of the DMC, and had not been able to indicate to the Court of Appeal that there had been any change in circumstances since the heading in the Lands Tribunal. Hence the appeal was disallowed.

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8.2 Complaints against the DMC manager

[4-304] By and large, the complaints by the owners against the manager appointed by the DMC relate to mismanagement in financial matters: that the manager had misused the management fund; that excessive management fees had been charged; that the manager had been inefficient; that the manager had sub-contracted his duties to another subsidiary of the developer with consequent additional levy; that the manager discriminated against certain owners in enforcing breaches of the covenants whilst allowing others to continue; that the manager failed to keep the premises in a fit state of repair; that the manager used poor accounting practices; and that the manager levied charges excessively against some owners contrary to the terms of the deed of mutual covenant. The compulsory implication of the terms of Schedule 7 alleviated most of these problems by regulating the powers of the manager where the owners have incorporated, and to a lesser extent where they have not. Where the owners have incorporated, financial management can be in the hands of the management committee (subject to review by the owners committee) and is usually in the hands of professional managers appointed by the management committee. The relationship of the manager to the owners is largely contractual but the manager also owes fiduciary obligations and duties to them as their agent. In some cases there will also be a trust relationship, as for example in relation to money paid by the owners, and held by the manager for future expenditure. The depth of the agency will depend on the terms of the DMC, and how the common law interprets those terms.

[4-305] Complaints can also be made against the management committee that is established when the owners incorporate. In *Chan Sai Kwong v The Incorporated Owners of Respondent Great George Building*[262] the management committee had failed to stop many owners using their units, zoned for domestic purposes, for commercial purposes. The applicant was appointed administrator by the Lands Tribunal for two months. However, when the appointment lapsed, a new management committee was elected but it too failed to prevent misuse of the units. The applicant sought a further term as administrator or, failing that, to have a named person appointed for one year. Various factors were discussed on the suitability of the applicant as administrator and it was thought that although he had caused the election to be held for a new management committee, he unfortunately instituted action against 16 owners immediately prior to the termination of the original appointment. It was thought that these actions had not been contemplated by the owners and would cause difficulties if the applicant was again appointed administrator. The alternative he had suggested was similarly considered 'to be an over sensitive person and is therefore not suitable for decided that the recently elected management committee should remain in force to manage the building.

[4-306] A similar complaint was made in *The Incorporated Owners of Greenland Villas v Wong Sui Fung & Anor*[263] where the defendants had refused to pay outstanding management fees largely because the management committee had failed to take action to end breaches of the DMC by other owners. In one case, the defendants themselves had taken action and obtained a mandatory injunction against the defaulting owner. However, in this case the court found that details of the breaches were 'of no assistance to any party to the issues of this trial apart from providing for the general background of the dispute'.[264] The court considered that whilst the Owners' Incorporated can 'be compelled to take legal action

260 [2002] 2 HKLRD 175, [2002] 3 HKC 59.
261 [2002] 2 HKLRD 175, 184 per Rogers VP; Le Pichon and Cheung JJA concurred.
262 (unreported, LDBM 38/2000, 9 October 2001).
263 [2004] HKCU 683 (unreported, LDBM 321/2000, 15 June 2004).
264 [2004] HKCU 683 (unreported, LDBM 321/2000, 15 June 2004) at para 4.

against an [sic] recalcitrant owner in breach'[265] yet there was no mandatory duty on an owners' incorporation to take legal action. Depending on the circumstances, whilst there is no absolute duty to take that action to enforce the terms of the DMC, the Owners' Incorporated has 'a residuary right to manage the building the way it chooses so long as the minority is not oppressed'.[266]

[4-307] The defendant owners in *The Owners' Incorporated of Seaview Estate v Adsin Development Ltd & Ors* were similarly unsuccessful in avoiding payment of levies fees. Their defence was that as no annual budgets had been prepared on which the levy was based, they had no obligation to pay. They claimed the absence of an annual budget was contrary to the terms of the DMC. However, the Tribunal found that neither the DMC, not the Building Management Ordinance (Cap 344), protected the owners from non-payment in this case.

[4-308] The fact situation in *Grande Properties Management Ltd v Sun Wah Ornament Manufactory Ltd*[267] was different but ultimately, the action taken was for non-payment of fees. In that case the owners had not incorporated. Management was a member of the corporate group comprising the majority owners of the units. An owners' meeting had been arranged at which a renovation programme was agreed upon by those present. A levy was made against the owners. The defendant claimed not to have notice of the meeting, and in any case the notice which the court accepted had been posted on a notice board was defective. Accordingly as the resolution for the renovations and the levy were improperly resolved the defendant refused to pay. On appeal to the Court of Final Appeal, it was held that the 2001 resolutions were valid and binding on all owners. Chan PJ (with whom the other members of the court agreed) said:

> A resolution is contrary to the provisions of the DMC under clause 10(iii) if it contradicts or inconsistent with any provision in the DMC. Resolution (3) of the 2001 resolutions which purported to charge interest in excess of that allowed under clause 16 of the DMC is such an example. There is nothing in the DMC which in any way prohibits the owners from passing any resolution which takes retrospective effect. Such a resolution cannot be regarded as contradicting or opposed to or inconsistent with any provision in the DMC.
>
> In the management of multi-storey buildings, it is important that the manager and the owners are entitled to make appropriate decisions unless such decisions are prohibited by the DMC. Numerous matters, whether trivial or important, may surface from time to time and on very short notice. They need to be attended to. Things need to be done very quickly. However, here are procedural requirements for convening an owners meeting where approval can be obtained before action can be taken. That is why the manager is given wide powers by the DMC. But however detailed and comprehensive the DMC may be, it cannot cover all exigencies. There must be occasions when it is necessary to sanction what has been done before the owners can meet, discuss and approve it. Subsequent sanction or approval is also necessary to correct mistakes, cure defects or remedy oversight. Resolutions for such purposes are very often retrospective in effect. If resolutions which take retrospective effect

265 [2004] HKCU 683 (unreported, LDBM 321/2000, 15 June 2004) at para 21.
266 [2004] HKCU 683 (unreported, LDBM 321/2000, 15 June 2004), para 26.
267 [2004] 3 HKC 621.

> are to be regarded as invalid simply because they deal with matters which are not expressly empowered by the DMC, it would hinder the efficient management of the building.[268]

[4-309] Accordingly the resolutions taken in 2001 were valid as they did not contradict and were not opposed to or inconsistent with the terms of the DMC. His Lordship could:

> see no reason why resolutions with retrospective effect should be any different from those with prospective effect unless by their retrospectivity they are against the law or contrary to the provisions of the DMC or unfair as to amount to minority oppression.[269]

[4-310] In the circumstances, none of these grounds were present and they were held to be binding on the owner.

[4-311] Clause 17 of the DMC provided that a notice could be served by posting it up in a conspicuous part of the building. This notice could be used to convene a meeting of owners. Even though the court accepted that the notice had been posted up, the defendant claimed not to have seen it because it was posted up in a lobby in the building which he did not frequent. The problem for the plaintiff related to the absence of necessary details which were not contained in the notice. Clause 10 of the DMC required any such notice to specify the intention of the management to propose and pass specific resolutions. The court analysed the wording and effect of the clause 10 and concluded that:

> It is a cardinal principle in the law of meetings that the notice of meeting must be sufficiently detailed to enable a member who knows nothing of the matter to decide whether he needs to attend the meeting, or whether he can safely let the resolution be passed without further enquiry.

[4-312] Clause 12 then went on to excuse accidental omissions from that notice. The court said that the plaintiff here could only rely on clause 12 if it could show that the omission of the relevant details was accidental and would not prejudice the owner who had failed to attend the meeting. Here the notice simply said that the meeting would discuss issues concerning improvement works. So even though the defendant had not seen the notice, had he done so it would have been defective. Even though the renovations may have been necessary the levy was ineffective against the defendant due to the defective notice so that the resolution was ineffective.

[4-313] The insertion of the compulsory terms of Schedule 7 into the DMC is designed to eliminate many of the causes of these complaints. In most cases, where owners are dissatisfied, the remedy sought is that the DMC manager be removed, often because the owners have incorporated and now wish to employ their choice of manager. The court will be reluctant to terminate the DMC manager's contract unless it is clear that the breach is of such a nature to have repudiated the contract.

[4-314] A frequent defence of an owner against whom action has been taken by the manager has been that whilst the defendant agrees that he has breached the

268 [2006] 3 HKLRD 473, 482–483.
269 [2006] 3 HKLRD 473, 484.

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covenants in the DMC, yet action has not been taken against other owners who similarly breached the deed of mutual covenant. For example, in *Dandenong Estate Co Ltd v Yu Kai To*, the manager sought an injunction against the defendant who had affixed a canopy to the external wall of the building. The defendant claimed that other owners had done the same thing but that no action had been taken against them. Thus, he claimed that the manager had acquiesced in the breach or was estopped from seeking relief. Deputy Judge Bokhary QC held that there:

> is a substantial difference between the defendant's structure and the ones being tolerated. The difference is, in my judgment, such that acquiescence in the erection of the latter does not, in all the circumstances, amount to acquiescence in the erection of the former.[270]

[4-315] A similar claim was raised in *IO Hoi Luen Industrial Centre v Ohashi Chemical Industries (HK) Ltd*,[271] where the defendant owner had erected an air-conditioning system which was not authorised under the deed of mutual covenant. When action was taken for its removal, he claimed that it was 'unfair and unjust to single out' the defendant when others who had also breached the deed of mutual covenant were not so dealt with.

[4-316] In his judgment, Godfrey JA said:

> When ... that there is a breach of a covenant being perpetrated by one of the owners, it is not only their right but their duty to seek to enforce the covenant. [T]he plaintiffs were not only entitled but bound to take proceedings ... It follows, too, that they could not have granted expressly to this defendant or any other owner of any unit in the building the right to act in contravention of the deed of mutual covenant as this defendant has done. What cannot be done expressly cannot be done impliedly. Although equity will sometimes restrain a plaintiff in the exercise of his legal rights because it would be inequitable and unjust in all the circumstances to allow him so to exercise those legal rights, equity will not hold him bound by acquiescence to allow something which he could not have allowed by express grant.[272]

[4-317] As the defendant could not prove acquiescence, then:

> no question of injustice or unfairness arises at all, no case for the intervention of equity having been established.[273]

[4-318] However, the underlying complaint remains in many cases where there is no finding that the defendant's breach is more gross than that of owners against whom no proceedings have been taken.

[4-319] Is one owner then to stand as an 'example to all'? Is it inequitable to punish one but not all? In *IO of Hamilton Mansion v Yu Kiem Chiu*,[274] it was said that the question concerned more whether the covenant was no longer enforceable, and the test for this was 'similar to estoppel'.[275] He added that:

270 [1989] 1 HKC 587, 591.
271 [1995] 2 HKC 11.
272 [1995] 2 HKC 11, 13.
273 [1995] 2 HKC 11, 14.
274 [1998] 1 HKC 112.
275 [1998] 1 HKC 112, 119 per Deputy Judge YW Yung, Presiding Officer.

Acquiescence in breaches by others often leads the court to find it inequitable to grant the injunction. However, it is not a necessary consequence in every case. There is no rule of law or principle that acquiescence in the past would automatically confer a licence to anyone to commit similar breaches. It is true to say that if breaches are no less serious than those condoned in the past, the court is more likely or on many occasions compelled to find it inequitable to grant the injunction. However, other circumstances have to take [sic] into account and it is [sic] matter of degree and a question of fact in each case.[276]

8.3 Illegal structures: Effect on Government lease and DMC

8.3.1 Introduction

[4-320] The basic problem raised by the presence of illegal structures, or unauthorised building works, is two-fold:

(a) is the illegal structure such as to enable the Government to re-enter and forfeit the lease (and would this forfeiture cover the whole of the land, or merely the unit concerned)[277] or for the Building Authority to take action.[278] The question here is whether or not there is a real risk or possibility of enforcement by the Government or authorities;[279] and

(b) is the illegal structure a title defect enabling the purchaser to avoid the contract? The answer to this question will differ where the Building Authority has registered a first charge against the title (clearly an encumbrance) than where it has not (where the answer depends on whether there is a real risk of enforcement). See *Lam Mee Hing v Chiang Shu Yin*[280] on the registered charge, and see *Kay Kam Yu v AIE Co Ltd*[281] where there is no registered first charge.

[4-321] Even if there is no registered charge, the illegal structure may act to deny title if it is so extraordinary having regard matters such as its nature or magnitude as to be wholly outside the contemplation of a reasonable purchaser.[282]

[4-322] This means that regardless of the nature of the claimed encumbrance, one which is totally unexpected by a reasonable purchaser can act to defeat the vendor's title. Further if the Authority has issued any type of order, such as an order for reinstatement, or order for repair of a slope, then this will constitute a 'real and subsisting liability enabling a purchaser to avoid the contract.[283]

276 [1998] 1 HKC 112, 120.
277 *Active Keen Industries Ltd v Fok Chi Keong* [1994] 2 HKC 67.
278 *Incorporated Owners of Hipway Towers v Wong Chi Kit* (unreported, LDBM 164/2000, 29 November 2000) (LT).
279 *Wong Kwok Yun v Pon Chi Lok* [2008] 4 HKC 558.
280 [1995] 3 HKC 247.
281 [1997] 1 HKLRD 161, [1996] 1 HKC 239.
282 *Lucky Health International Enterprise Ltd v Chi Kit Co Ltd* [2000] 2 HKLRD 503, [2000] 3 HKC 143.
283 *Lam Mee Hing v Leung Hing Wah* [1995] 3 HKC 247.

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[4-323] Often, the building on the land is subject to two different sets of restrictions, one will be the covenants in the Government lease and the other will relate to the requirement of complying with the relevant terms of the Buildings Ordinance (Cap 123). The Ordinance requires that building plans be those prepared by an 'authorised person' and that approval be granted for these plans before the building work is commenced. The Building Authority cannot approve plans if construction has been commenced without consent or if the building has already been built. In such a case, any structure will be unauthorised and will be treated as an 'illegal structure'.

[4-324] Where the owners have incorporated, s 18 of the Building Management Ordinance (Cap 344) casts the duty and obligation on the incorporated owners to enforce the provisions in the DMC relating to matters of illegal structures, and to prevent them from acquiescing in any breach of the Government lease, legislation, or the terms of the DMC.[284]

8.3.2 Breach of the covenants

[4-325] Where the construction of the building has breached the covenant in the Government lease, the land is liable to be re-entered by the Government. However, construction in contravention of the terms of the Ordinance may require its demolition, and on failure to do so the Building Authority can carry out such demolition itself. An order may be made closing the building, and the lessee may be liable for a fine and/or imprisonment. However, these provisions alone do not provide grounds for the Government to forfeit the land.

8.3.3 Section 24

[4-326] On re-entry of the Government lease, all tenants in common will be affected. However, where there is a breach of the terms of s 24 of the Buildings Ordinance (Cap 123), then the right of the authority to take action generally is enforceable only against the owner of the offending unit.[285] Section 24(1) of the Buildings Ordinance (Cap 123) provides in part that contravention of the terms of the Ordinance can result in:

> (a) the demolition of … the building works;
>
> …
>
> (c) such alteration of the building, building works … as may be necessary to cause the same to comply with the provisions of the Ordinance, or otherwise to put an end to the contravention thereof … .

[4-327] A notice under this section is to be served on the owner of the building works concerned rather than on the owners of the building in which the offending unit has been illegally constructed. If the work carried out without permission is drainage work which does not affect the structure of a building, then no approval is necessary.

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284 The *Incorporated Owners of Champion Court v Pang Ping Fan Peter* [2008] 5 HKC 312 (CA); and see *Yick Fung Holdings Ltd v Sand wood Ltd* [2009] 4 HKC 43 (CA).

285 *Cheung Yuet v IO Oriental Gardens* [1979] HKLR 536, [1977-1979] HKC 168.

[4-328] This section was considered by the Court of Appeal in *Active Keen Industries Ltd v Fok Chi Keong*,[286] where a vendor/purchaser summons was taken out by the purchaser to ascertain whether the vendor's answers to requisitions had been satisfactory. The query related to the strength of the vendor's title in light of the presence of two units, not shown in the plan annexed to the deed of mutual covenant, and occupation permit, on the floor on which the purchaser was buying a unit. The purchaser thought this discrepancy indicated the vendor was not giving good title.

[4-329] The Court of Appeal considered the question of whether any order served under s 24 would affect all tenants in common or merely the owner of the building works illegally constructed. The answer was no for the 'Building Authority had no claim of right, legal or equitable, by way of charge or anything else'.[287] Instead, whilst the Authority could take action against the owner of the offending units, no action could be taken against the owners of other units in the same building.[288]

[4-330] However, the power of the Authority to take action against the owner of the offending unit might well cause loss to the other tenants in common. If the party served does not comply with the order and the authority takes action, then all tenants in common might be involved in any payment due to the Authority.

8.3.4 Breach of Buildings Ordinance

[4-331] In most cases, the presence of the 'illegal structure' will constitute a breach of the covenants in the Government lease. This will also be a breach of the terms of the Buildings Ordinance (Cap 123). However, in most cases, action will be taken only by the Building Authority. In taking action, the Authority:

(a) may serve a notice requiring the demolition of the illegal structure. On default, the authority may carry out the work itself and require the owner to pay the costs of doing so. Failure to pay these costs will allow the Building Authority to register a first charge against the title of the owner in the Land Registry. This will then interfere with the priority of any existing mortgage or charge; or

(b) may make an order closing the building, usually on safety grounds. There is no right in the Government to forfeit the Government lease on breach of these statutory provisions alone. That right comes from breach of the covenants in the Government lease and those covenants may not correspond to the terms of the Building Ordinance.

[4-332] The Law Society Circular 382 of 1993 (PA) enclosed a press release from the Buildings Department of the possible consequences for failure to remove illegal structures (unauthorised building works). The Building Authority noted

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286 [1994] 2 HKC 67.

287 [1994] 2 HKC 67, 83 per Litton JA.

288 See also *To Kam Kwong v Tseung Yuk Chu* [1995] HKLY 501, [1997] 3 HKC 542; and *Chan Chik Sum v Great Pearl Industries Ltd* [1997] 1 HKC 27.

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that if the Authority had carried out the work required and the owners failed to pay, then the Authority would create a first charge over the property. To ensure that all mortgagees are aware of the Authority's rights to charge the property (s 33(9) of the Buildings Ordinance (Cap 123)), the press release stated that:

> From 1 December, all lending institutions with mortgages on properties involved will be notified shortly after an order has expired, if the owner has not commenced/completed the removal of the UBW, and has not notified the Building Authority of his or her intention to appeal against the order.[289]

[4-333] The press release noted that the removal order is now registered in the Land Office to give notice to potential purchasers of the subject property.

8.3.5 Breach of DMC

[4-334] In addition to the restrictions in the Government lease and under the Ordinance, the DMC will restrict the power of the owner to make any alterations or to do anything which would infringe the Ordinance or the terms of the Government lease. Where an owner does do so, the DMC manager will be entitled to take action against the defaulting owner to ensure that the Government does not re-enter. In addition, the DMC manager will be entitled to take similar action to prevent any penalty under the Ordinance being effected not only against the unit of the defaulter but also against the building as a whole. This power has been the subject of complaints by some owners against whom action has been taken on the basis that that action is not taken against other owners committing similar breaches. For the owners' incorporation, the management committee will take appropriate action to prevent breach of the Government lease or the DMC.[290]

8.3.6 Re-entry by Government

[4-335] The question of the possibility of the Government re-entering for breach of the building covenant is often referred to in the context of whether or not the owner as vendor is providing a good title. However, there have been contrary decisions.

[4-336] In *Giant River Ltd v Asia Marketing Ltd*,[291] Cruden Dep J said that the test in such cases was whether there was a 'real possibility' or 'real risk' of the Crown exercising its powers.[292]

[4-337] In *Kok Chong Ho v Double Value Developments Ltd*,[293] Godfrey J (as he then was) said the test was 'whether there is a real rather than fanciful risk of enforcement'.[294] In that case, the effect of re-entry was also referred to: would the Government re-enter the unit of the offending owner or the entire Government lease? He said that:

289 Press Release from the Office of the Building Authority, 23 November 1993.
290 *Yick Fung Holdings Ltd v Sandwood Ltd* [2009] 4 HKC 43.
291 [1990] 1 HKLR 297, [1990] HKCU 267.
292 [1990] 1 HKLR 297, 309–316.
293 [1993] 2 HKLR 423, [1993] HKCU 529.
294 [1993] 2 HKLR 423, 430.

> It seems to me that if the Crown were to re-enter, it would re-enter upon the premises comprised in the Crown Lease, which included all the land on which the building stands.[295]

[4-338] Re-entry of a unit only would be difficult 'where the co-owners own the whole building between them but have only a right of exclusive possession as to part'.[296] The Court of Appeal in the *Kok* case held that the vendor had not satisfactorily answered the requisition, entitling the purchaser to terminate the agreement and recover the deposit.

[4-339] The *Kok* case and that of *Giant River* were considered by the Court of Appeal in *Active Keen Industries Ltd v Fok Chi Keong*,[297] where Litton JA said:

> Hopefully this decision will lay to rest the problems caused by the discovery plans as common areas have been enclosed (usually by the original developer) and sold off as individual units. In the latter case, the powers of enforcement of the Building Authority can be directed at the owners of these offending units, but not at owners of other units in the same building. Generally speaking, therefore, the title of the other flat owners would not be affected by the presence of 'illegal structures' within the same building.[298]

[4-340] The *Active Keen* decision was considered in *Lam Mee Hing v Leung Hing Wah*,[299] where a purchaser sought a declaration (by way of a vendor/purchaser summons) that the sale and purchase agreement had been cancelled by service of a notice from the Building Authority requiring the repair of a slope behind two blocks in the complex. Whilst:

> [T]he liability arising out of the … order was not a potential one. It was real and subsisting and could be a claim or charge imposed on the said premises … [and as such it] constituted an encumbrance on the said premises and unless discharged could cause a blot or possibility of litigation to the purchaser. … [However] I do not accept that there was any real risk of the said premises being charged with the entire costs of the remedial works.[300]

[4-341] Consequently, the purchaser would be liable only to a proportionate charge for his share of the work done. This amount could be a matter of apportionment between the purchaser and the vendor. The order did not constitute a defect in title. His Lordship added:

> The Government, through the Building Authority, had started the mechanism of ordering the [IO] … to comply with the provisions of the Building Ordinance and on the evidence, there is no risk at all that the Crown would reenter. One was entitled to assume that the Government would act in a reasonable and responsible manner.[301]

295 [1993] 2 HKLR 423, 430.
296 [1993] 2 HKLR 423, 430.
297 [1994] 2 HKC 67.
298 [1994] 2 HKC 67, 87.
299 [1995] 3 HKC 247.
300 [1995] 3 HKC 247, 252 per Yeung J.
301 [1995] 3 HKC 247, 252.

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[4-342] This comment should not interfere with the general proposition that there is no possibility of estopping the Government from re-entering if it so wishes. And see *Jumbo Gold Investment Ltd v Leung Yuen Cheong Warren & Anor*;[302] and see *Leung Tsang Hung v The Incorporated Owners of Kwok Wing House*.[303]

8.3.7 Enforcement of Buildings Ordinance

[4-343] Enforcement of a Building Authority order was considered in *Ho King Kwan v AG*,[304] where the Building Authority had certified that work required to be done to remove a fire hazard (the subject of a notice from the Authority) had been completed satisfactorily. Later, the Authority obtained a closure order from the District Court in respect of further fire hazards. The Court of Appeal said that the earlier communication did not mean that the Authority later had 'acted in bad faith or outrageously in the exercise of its statutory powers'.[305] Thus, the later action was proper and the land owner could not have expected no further action for later breaches for such 'expectation would imply an intolerable fetter on the Authority's discharge of its statutory duties';[306] *Building Authority v Owners of the Illegal Structures on the Roof of 9/Floor … 105 Austin Road*.[307]

[4-344] With the possibility of action being taken, the ultimate effect of which would be for the land to be forfeited, it is not surprising that the deed of mutual covenant will provide the mechanism for the manager to take appropriate action to prevent this happening. The most usual tool for this purpose is that of the injunction. The most usual defence in such cases is that the owner, against whom it is being sought, will complain of unequal treatment.

8.3.8 Section 26

[4-345] Section 26 of the Buildings Ordinance (Cap 123) empowers the Director to declare a building to be dangerous or liable to become dangerous, thereby requiring the owner to demolish it, undertake work to render it safe, or other necessary orders. Similarly to the terms of s 24, the Director may carry out the necessary work and require the owner to compensate the Authority. On default, the Authority may register a first charge against the land.[308] The Court of Appeal considered both s 24 and s 26 in *All Ports Holdings Ltd v Grandfix Ltd*.[309] It was held that the observations of Litton JA (as he then was) in *Active Keen Industries Ltd v Fok Chi Keong*[310] were applicable not only to s 24 but also to s 26. These observations were that: an order served on all the owners under s 24(2) would in

302 [2000] 1 HKLRD 763, [2001] 1 HKC 539.
303 [2007] 4 HKLRD 654, [2007] 5 HKC 227.
304 [1986] 6 HKLR 1148, [1986] HKCU 313.
305 [1986] 6 HKLR 1148, 1151 per Kempster JA.
306 [1986] 6 HKLR 1148, 1152.
307 [1987] 2 HKC 413.
308 Buildings Ordinance (Cap 123), s 33(9).
309 [2001] 2 HKLRD 630, [2001] HKCU 617.
310 [1994] 2 HKC 67 at 82.

law be effective, and could bring in its train the consequence that, eventually, the apportioned cost of removal is charged against the title of the individual owners under s 33(9). This would then constitute an encumbrance. Consequently, the operation of s 26 would be the same as that of s 24.

[4-346] In *Lo Yu Chu v Kam Fu Lai Development Co Ltd*,[311] the Court of Appeal noted the efforts of the owner of a unit to pursue a complaint against excessive noise from an air-conditioning plant. Penlington VP (in delivering the judgment of the court) noted:

> [S]he eventually consulted solicitors and a formal complaint was made by them to various government departments. These were the Buildings Ordinance Office, the Urban Services Department and the Environment Protection Department. However, as is not uncommon, she got little satisfaction from these various departments. The Building Ordinance Office did write to her saying that the air-conditioning plant was an illegal structure in that it was not approved when the plans were submitted but that to quote the letter, 'this had low priority'. That clearly meant that they would not do anything about the air-conditioning plant.[312]

[4-347] Obviously, in the spirit of the *Ho King Kwan* decision, this 'delay' in taking action would not impede any later action taken by the building office.

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8.3.9 Injunction sought by the manager

[4-348] The manager, in seeking to enforce the provisions of the deed of mutual covenant against an owner who has constructed, or permitted to remain, an illegal structure, will usually seek a mandatory injunction. The injunctive process is an interim procedure to maintain the status quo until hearing of the dispute. However, the injunction received by the manager is usually mandatory and usually the final remedy sought.

[4-349] In general, the court is often reluctant to grant a mandatory injunction as it is similar to an order for specific performance but given ex parte. Instead of granting such an injunction, the court might make a declaration of the owner's breach having obtained an undertaking that the owner will remove the illegal structure or stop its construction.

[4-350] If the manager takes action against one defaulting owner but allows others to be 'forgiven' in respect of illegal structures they have erected, the owner against whom action is being taken will complain that this represents a waiver of the breach by those other owners. But this defence overlooks the fact that all defaulting owners are in breach of the Government lease and the DMC, although some breaches may be more egregious than others; *Incorporated Owners of Hipway Towers v Wong Chi Kit*[313] where the defendant's illegal structure infringed upon the common area and because the structure enclosed a gas pipe it was regarded as dangerous. Other owners who had constructed illegal structures did so on the areas over which they had exclusive possession.

311 [1994] 3 HKC 18.
312 [1994] 3 HKC 18, 21.
313 (unreported, LDBM 164/2000, 29 November 2000) (LT).

[4-351] In general, the Building Authority will not be treated as having waived breaches of the Buildings Ordinance (Cap 123) unless the Authority has knowledge of the existence of the illegal structure, and there is clear evidence of the express or implied waiver of the breach or of the abandonment of the right to take action: *AG v Fairfax*;[314] *Jumbo Gold Investment Ltd v Leung Yuen Cheong Warren*.[315] In *Jumbo Gold*, although there was no clear evidence of waiver, yet it was said that there was no real risk of enforcement against innocent owners because 'it is simply not in the nature of good government to harm innocent people unconscionably'.[316]

8.4 Actions by manager against owners

[4-352] One area of concern for the DMC manager in particular is where the owner of a unit constructs an illegal structure or an unauthorised building work over the unit or over the common parts. In the latter case, the question is often as to whether or not that area is owned by the owner of a unit, or whether it is really common parts. Usually it is the manager who initiates the action because the nature of tenancy in common makes the action by the individual against another owner more fraught with problems. The DMC, the sale and purchase documents, and the Building Management Ordinance (Cap 344) can all be considered to determine which parts of the property are within the exclusive use, occupation and enjoyment of the owner, and which are common parts. In recent years there has been a long line of such cases where the manager, especially the DMC manager, will seek an injunction against an owner on the basis that he has breached the DMC as well as the Government lease.

8.4.1 Trespass

[4-353] In most DMCs the manager will be given authority to take action for all breaches of the DMC. Because of the nature of multi-storey ownership, the owner of may be precluded from the types of action he would take against another if they were not tenants in common. The most usual action in respect of which the owner loses his right to take action is that of trespass. Another such action is that of nuisance. The inappropriateness of these actions taken by one tenant in common against another is because they both have the same right of possession to the land, and the actions rest on possession. Consequently the manager, rather than the owner affected, will often take action in cases of breaches of the terms of the DMC which amount to trespass or nuisance.[317] The reason for this is that as the plaintiff and defendant would be co-owners, there are inherent difficulties with one co-owner suing another where the basis of the action involves possession; this would produce damage to the unity of possession and the appropriate result may well be partition. Consequently, the manager will be the appropriate plaintiff in

314 [1997] 1 HKC 17.
315 [2000] 1 HKLRD 763, [2001] 1 HKC 539 (CFA).
316 [2000] 1 HKLRD 763, 771 per Bokhary PJ.
317 *Lea Tai Property Development Ltd v IO of Leapoint Industrial Building* [1996] 1 HKC 193; and *Lai Sai Kee and Chow Sui Wa Betty v Yim Ping Wai* [1997] HKCU 13 (unreported, HCA 5351/1997, 6 June 1997).

such cases, although taking action for the benefit usually of one owner against another rather than for the benefit of all other owners against that one owner.

[4-354] The difficulty for one owner to succeed in trespass was referred to in *Wing Ming Garment Factory Ltd v IO Wing Ming Industrial Centre*,[318] where Mortimer JA noted that counsel:

> recognised the difficulty that as all the owners including the plaintiff are tenants in common, the plaintiff could not maintain an action in trespass save in very limited circumstances.[319]

[4-355] The plaintiff had complained about 'trespass' due to the installation of a water pipe above the parking spaces which were in his exclusive use. However, the court dismissed the plaintiff's appeal against the refusal of the trial judge to grant an injunction, especially as the pipe was necessary for the main water supply for the fire service installation.

[4-356] Action was taken by one owner against another rather than against the incorporated owners in *John So & Anor v Lau Hon Man*.[320] In that case, water from a flat above leaked to the flat below and caused nuisance, damage and inconvenience. The affected flat owners sued the owners of the offending flat. The defendants claimed that the water pipe was the responsibility of the incorporated owners as part of the common property. However, the Court of Appeal held that the correct way to decide this was by reference to the law of easements. As 'the sole purpose of the pipe was to serve the respondents' flat' then 'the benefit of proprietary rights to the three-dimensional space through which a water pipe runs, together with the ownership of the pipe itself' belonged to the respondents and they were liable for the damages. Those damages included an amount for inconvenience suffered by the plaintiffs. 'As there is no scientific way of translating inconvenience into a sum of money, it has to be a conventional sum'.[321] This was calculated at $10,000. The award of damages for mental distress/loss of enjoyment/or similar grounds in such cases is probably subject to the decision of *Hardwick v Spence Robinson*[322] where it was said that these damages are awardable where there is a 'very personal element' involved in the contract.

[4-357] In *The Incorporated Owners of Tak Fat Building v Silver Carnival Ltd*[323] the owner of a unit had installed three wireless transmitters to the wall of the water tank. The applicant claimed that this wall was part of the common property so that the installation resulted in trespass. The owner claimed that when the property was originally sold to owners under a Deed of Mutual Grant, the part of the wall was shown as a ROW to which he was entitled. However, when the DMG was replaced by a DMC, no provision was made for exclusive rights to be given to the owner. Indeed it was held that the ROW was merely a 'quasi' right to enable access for repairs. In the event there was trespass but there was no urgency as the transmitters had been affixed in 1997. In the event, the court adjourned.

318 [1994] 2 HKC 748.
319 [1994] 2 HKC 748, 750.
320 [1993] 2 HKC 356.
321 [1993] 2 HKC 356, 359.
322 [1975] HKLR 425.
323 (unreported, LDBM 374/2001, November 2001) (LT).

8.4.2 Injunctions

[4-358] One of the most usual remedies received for breach of the terms of the DMC is the injunction, and usually a prohibitory injunction to restrain the defendant from performing the act complained of. By contrast, a mandatory injunction requires the defendant to perform acts. In rare cases the court will grant a mandatory injunction: see for example, *Incorporated Owners of Mirador Mansions v Europe Direct Trading Ltd & Ors* where both mandatory and prohibitory injunctions were granted; and *Incorporated Owners of Hipway Towers v Wong Chi Kiy* where a mandatory injunction was granted to require the owner to demolish and remove illegal building works and to reinstate car parks to their original form.

[4-359] In *Koo Cheuk Son v Tang Wai Chun*, the defendant had, contrary to the terms of the DMC, installed a food lift on the projecting flat roof of the building, operated by an electric motor, to carry supplies from the ground floor to the mezzanine floor. The plaintiff who had exclusive use of the first floor flat objected to the installation and to the noise of the motor; however, the plaintiff had rented out the unit. The plaintiff sought injunctions to remove the installation and to restrain the defendant from making any alterations without the consent of the plaintiff. The basis of the action was nuisance, but in contract, not in tort; the plaintiff relied on the terms of the DMC which prohibit the causing of nuisance and similar inconvenience to other owners. However, the action was dismissed, inter alia, on the ground that the installation did not infringe the DMC, and that the nuisance caused was to the occupier of the plaintiff's unit not to the plaintiff himself.

8.4.3 Action by Owners' Incorporation/Incorporated Owners

[4-360] Where the owners have incorporated, the IO will take action in accordance with the terms of s 19 of the BMO. Where action is taken against the IO, judgment can be enforced against IO, or in limited cases against an individual owner.

8.4.4 Breach of covenant for 'Private Residential Purposes'

[4-361] In *May King Development Co Ltd & Hok Tak Lee Investment Co Ltd v Young Ching Huo Ltd*,[324] an injunction was sought to restrain the defendant breaching the DMC. The plaintiff owned shares in the building, which was on land subject to a covenant in the Government lease to use the land only for private residential purposes. The DMC reflected this restriction. The question for the court was whether certain units were being used as a 'lodging house' and thus in breach of the DMC and the covenant in the Government lease, or whether the owner of the units was in effect renting them. The conclusion, which was not wholly clear, was that the flats were used as 'service flats' and so the use was not in breach of the covenants.[325] However, in reaching the decision, the

324 [1981] HKLR 280, [1981] HKCU 33.
325 [1981] HKLR 280, 288 per Fuad J.

question of exclusivity of possession was considered. At that time, following *Isaac v Hotel de Paris Ltd*,[326] the question of intention was said to be the deciding factor in distinguishing a licence from a lease. In *May King*, the incidents of the relationship were more like licences than leases. On the question of the distinction, the court would now probably follow *Street v Mountford*,[327] which followed the earlier Australian decision of *Radaich v Smith*,[328] which had held that the grant of exclusive possession is the fulcrum for treating an interest as a lease rather than merely a personal interest, ie a licence.

[4-362] In *Golden Chance (Hang Cheong) Properties Ltd v The Incorporated Owners of Gold Mine Building*,[329] the plaintiff was the service company which had carried out management functions at the request of the management corporation. On default of payment for those services, the plaintiff obtained judgment and sought to enforce it against individual owners. However, Power J held that s 17 should be read together with s 16 with the result that the action did not arise in respect of the common parts of the building and so could not be enforced against individual owners.

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8.4.5 Enforcement of money judgment against IO/OI and individual owners

[4-363] Section 17 was considered in a somewhat unusual case, that of *Chi Kit Co Ltd v Lucky Health Enterprise Ltd*[330] where a purchaser had sought to rescind Sale and Purchase Agreement on the basis that the vendor's title was potentially defective because a third party had obtained an award of damages for personal injuries against the owners' incorporated. The Court of Final Appeal[331] held that if the sale was completed, then the purchaser would come within the definition of 'owner' in s 2 of the Ordinance. The consequence would be that the purchaser would become liable to make a contribution fixed by the management committee which in view of the fact of its magnitude would be beyond the usual liability to which a purchaser would be subject. Further, the purchaser claimed that this award could be enforced against the owners' incorporation and that he would be purchasing a unit which would be subject to a charge in favour of that plaintiff against all units in the building. However, it was held that the vendor would have potential liability only if the owners' incorporation defaulted, and that a charging order would result only if the court so determined.

[4-364] On appeal, the Court of Appeal overturned the judgment of the Court of First Instance on the vendor's appeal, and the Court of Final Appeal dismissed the vendor's appeal. The Court of Final Appeal held that the purchaser would be the 'owner' within the terms of s 17, by reference to the definition in s 2 which referred to the owner as a person:

326 [1960] 1 All ER 348.
327 [1985] AC 809.
328 (1959) 101 CLR 209.
329 (unreported, HCA 6749/1983, 17 January 1984) (HC).
330 [2000] 2 HKLRD 503, [2000] 3 HKC 143.
331 [2000] 2 HKLRD 503, [2000] 3 HKC 143.

> who for the time being appears from the records at the Land Registry to be the owner of an undivided share in the land on which there is a building.
>
> The meaning of 'owner' is not restricted to such person at the time the event occurs but Includes the 'owner for the time being' so that: liability to meet a notice of contribution fixed by the management committee goes with the unit and is imposed upon the owner for the time being.

[4-365] This liability is not merely personal and so it attaches to and 'runs with the land'.

[4-366] Section 17 was relevant in *Aberdeen Winner Investment Co Ltd v The Incorporated Owners of Albert House & Anor*[332] where the same issues arose in both appeals. The first appeal concerns an appeal against a summary judgment made in favour of the plaintiff against the IO and the second defendant. The second appeal concerned a judgment by which it had been held that the appellant was not liable to contribute to the IO's costs. The underlying action had involved judgment against various persons held liable to compensate the estate of a passer-by and several passers-by injured by a falling concrete canopy. Those sued had included the appellant who as developer had retained several units, the contractor who had constructed the canopy, several unit owners and the IO. One of the main problems was that of contribution by the defendants where three of those found liable were insolvent. Liability for the awarded damages was thus held to be shared amongst those not bankrupt or insolvent. It was also held that the appellant was not liable to contribute to the IO costs, and that liability for the damages was to be shared between the appellant and the respondents.

[4-367] Le Pichon JA considered that s 19(2) of the Law Amendment and Reform (Consolidation) Ordinance (Cap 23) ('LARCO') 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.

[4-368] Her Ladyship then added that s 17 does enable an order to be made against 'selected individual owners'.[333] However, the Court of Appeal did not accept that the appellant should not be liable to contribute to the costs of the Owners' Incorporated:

> 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.[334]

332 [2004] 3 HKLRD 910, [2004] HKCU 311 (unreported, CACV 42/2004 & CACV 236/2004, 12 November 2004).

333 [2004] 3 HKLRD 910, 920.

334 [2004] 3 HKLRD 910, 921.

8.4.6 Criminal liability

[4-369] Although conviction for the offences referred to in *HKSAR v The Incorporated Owners of No 10 Bonham Strand & Anor*[335] 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 that, inter alia, required the incorporation of a sprinkler system into the building.

[4-370] 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.

9. Termination, Variation, or Change in Effect, of DMC

9.1 Introduction

[4-371] 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 OI, *fourth* partition, *fifth* by a court determination of rights, *sixth* by variation under general contract principles, and *seventh* by incorporation.

9.2 Change in neighbourhood

[4-372] 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*,[336] 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:

335 [2004] HKCU 644 (unreported, HCMA 239/2004, 28 May 2004).

336 [1987] 2 HKC 257.

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> 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.[337]

[4-373] On appeal, the statement was that:

> This present case is not one where there can be any question of a change of the character of the neighbourhood.[338]

[4-374] In *Attorney General v Fairfax Ltd*[339] 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',[340] 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 rendering the covenants in the Government lease no longer sensible. But until something more than mere speculation is available on the enforceability of Government lease covenants, the similar covenants in the DMC should be enforced.

[4-375] The decision of *Jumbo Gold Investment Ltd v Leung Yuen Cheong Warren*[341] has provided some comfort for those no longer observing the covenants in the Government lease but probably only if the covenants were breached decades previously. In that case the covenant had been breached 40 years previously and the Court of Final Appeal held that whilst 'the evidence did not exclude a reasonable possibility of an unwaived breach of condition which gives the Government a right of re-entry', it was thought that the Government would not take this action against innocent owners because:

> it is simply not in the nature of good government to harm innocent people unconscionably like that. Accordingly, it is safe to proceed on the basis that the Government would never do so.[342]

[4-376] Similar to the *Fairfax* case, the breach was over 40 years old; but no time limit was given in either judgment to indicate what length of time would be considered appropriate in such circumstances.

337 See *Chatsworth Estates v Fewell* [1933] 1 Ch 224.
338 [1987] 2 HKC 257, 259.
339 [1997] 1 HKC 17.
340 [1997] 1 HKC 19–20.
341 [2000] 1 HKLRD 763, [2001] 1 HKC 539 (CFA).
342 [2000] 1 HKLRD 763, 771 per Bokhary PJ.

9.3 Termination of Government lease

[4-377] The second manner in which the DMC can be terminated concerns the determination of the Government lease. As the multi-storey building is constructed on land held under a Government lease, the owners are concerned with the possibility of the determination of the Government lease. The term is extinguished on the expiry of a Government lease, resulting from the passing of time. When the term is extinguished, dependent interests are also extinguished, so that the DMC will automatically terminate on the expiry of the Government lease. Whilst it may be possible, at common law, to remain in possession of such land and thereby obtain a tenancy at will, which can be converted into a periodical tenancy in certain cases, this result, if ever possible against the Government, will no longer be possible pursuant to the terms of the Joint Declaration and the Basic Law because all leases are due to expire on 30 June 2047 and there is no provision, at present, for the grant, renewal or regrant of extinguished Government leases.

[4-378] In the past, where a new Government lease was granted in respect of the land, the owners, as tenants in common of that new lease, needed to enter into a new DMC. The form of the former DMC was used as the basis for the new. However, in such a case, after 1993 it would have been prudent to insert the clauses contained in Schedule 7 into that DMC, and it would have been sensible to insert the clauses of Schedule 8, if not inconsistent with the terms of the proposed DMC. Some early multi-storey buildings were constructed on land alienated in the last century for which the Government lease was expressed to be 'non-renewable'; this was so especially in cases of developments under the 1963 Demolished Buildings (Re-development of Sites) Ordinance (Cap 337). The owners would then not be compensated for improvements on the land on the termination of the lease, and would have little to show for their expenditure on the land. Changes in Government policy allowed certain of these leases to be renewed. However, in many cases of renewal, the tenants in common were unable to agree to the taking up of a new Government lease; this was so especially in the larger developments where there were many absentee owners. If agreement was reached, the expiry of the DMC caused problems.

[4-379] Renewal of a Government lease involves not simply an extension of the existing term but instead a new lease. **Originally,** the procedure adopted in replacing the existing lease in respect of a multi-storey building was the same for renewable and those formerly non-renewable leases of land, that is, the Government issued a new Government lease to the Colonial Treasurer Incorporated (now the Financial Secretary Incorporated), which offered an assignment of a share in the Government lease (equivalent to the share held formerly) to the former owner on the payment of Government rent and premium. On acceptance of all offers, the Government rent and premium was apportioned under the Government Rent and Premium (Apportionment) Ordinance (Cap 125).

[4-380] Continuation of the DMC was a more difficult problem for, in effect, the expiry of the lease meant the expiry of the contractual obligations expressed in the DMC which had been applied to successors in title of the original contracting parties. There may not have been the same problem in respect of Owners'

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Incorporation because the corporation would continue in existence until wound up under the provisions of s 33 of the BMO earlier, s 4(1) of the Law of Property (Enforcement of Covenants) Ordinance had provided for the revival of those covenants on the issue of a new Government lease, whether the original lease had been renewable or non-renewable. However, the Law of Property (Enforcement of Covenants) Ordinance (No 56 of 1956) only applied to those restrictive covenants which 'ran with the land' and not to those which were positive in nature.

[4-381] Section 42 of the CPO replaced s 4 of the 1956 enactment and expressly provides for the continuation of the covenants in the DMC on the renewal of a Government lease or its replacement by a new Government lease.

[4-382] However, where the DMC was not continued in these ways, the owners could then agree to adopt the form and terms of the former DMC, with perhaps all owners now being signatories. Alternatively, a new form of a DMC could be drafted with terms which were biased in favour of the owners. The extinction of the former DMC meant that there were no obligations retained in favour of the manager or of the developer unless these parties were owners who had accepted an assignment as tenants in common with all other owners. If no DMC was entered into, then the parties would have to approach the court, either in the form of a nominate claim, for example, an injunction to prevent the continuation of a tort or in the form of an application for a declaration of the rights of the owners under Order 15 r 16, to determine any dispute; as Godfrey J (as he then was) had said in *Goodtex Land Co Ltd v Lung Kwong Emporium Co Ltd*,[343] where there is no deed of mutual covenant, then 'the law will provide as and when necessary for what is to be done when any problem arises as between the co-owners'.[344]

9.4 Winding up of owners' incorporation

[4-383] The third method is that of winding up the owners' incorporation. The owners incorporate by registering under the LRO but no provisions of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) apply, except Part X (ss 226 to 231A). Prior to 3 March 2014, this ordinance was referred to as the Companies Ordinance (Cap 32). From 3 March 2014, the main ordinance regulating companies is that of the Companies Ordinance (Cap 622).

[4-384] The *IO can be wound up* under the terms of ss 33 to 34B of the BMO (Cap 344). This, and any other method of dissolution of the corporation, leaves the problem of a multiplicity of ownership in the one building. The solution is then to partition the land under the Partition Ordinance (Cap 352) leaving the manner of partition to the court: *Forda Investors Ltd v UOB Finance (HK) Ltd*.[345] Where the owners have not incorporated, partition would be the only solution. It is inconceivable that in a large building the co-owners could function adequately without some formal agreement or promises as to conduct of that building. Thus, if the DMC is extinguished by consent of all the owners or there is sufficient

343 [1993] 1 HKC 645.
344 [1993] 1 HKC 645, 648.
345 [1979] HKLR 382, [1979] HKCU 50.

waiver of its terms to constitute termination, then unless something akin to a DMC replaces it, partition would seem to be inevitable.

[4-385] The *IO may dissolve the management committee* under ss 30 to 32 of the BMO whereby:

(a) an administrator can be appointed under s 30 at the request of owners to oversee the dissolution of the corporation; or
(b) an administrator can be appointed by the court under s 31 at the request of owners or the administrator appointed under s 30 to oversee the dissolution of the corporation; or (c) under s 33 the corporation can be wound up by reference to the terms of Part X of the former Companies Ordinance (Cap 32).

[4-386] In *The Matter of The Incorporated Owners of Foremost Building*,[346] the court granted the petition of three creditors of the IO to wind up the corporation. In considering the jurisdiction of the court under ss 33, 34 and 34A of the BMO the Court of First Instance was satisfied that it had jurisdiction and that the Lands Tribunal did not have exclusive jurisdiction. Consequently, the immediate effect of the winding up was that the owners were liable to contribute, according to their respective shareholding in the incorporation, to satisfy the debt. See also the *Incorporated Owners of Ka Wing Building v Chan Chui Chui*.[347]

[4-387] Winding up of the IO, under s 34 of the BMO, was considered in *Wong Tak Man Stephen v Chang Chin Wai & Anor* [2017] 6 HKC 226 where it was said that:

> There were two possible and mutually exclusive interpretations of BMO s 34. The difference between the two interpretations lay in where the risk of non-payment fell. Under interpretation (2), the owners were jointly and severally liable for all of the corporation's debts and liabilities and might be pursued individually for the whole amount. The court agreed with interpretation (2) that the risk of some owners not contributing would lie with their co-owners. First, BMO s 34 was enacted in 1993 to replace the old s 34 of the Multi-Storey Buildings (Owners Incorporation) Ordinance (Cap 344) . Under the old s 34, the liability of the owners to contribute to the assets of the corporation was quite clearly limited to their respective shares in the building. The addition of the phrase 'both jointly and severally' must have been intended to change the limit and extent of an owner's liability under the old regime. *Re Incorporated Owners of Foremost Building.*
>
> **[44]** Hence, for the above reasons, I am satisfied that interpretation (2) is the proper interpretation of BMO s 34 such that the owners are jointly and severally liable for all of the corporation's debts and liabilities, and that such liabilities are not limited to their respective shares in the building (even though they would have the right to seek contribution from other coowners afterwards).

346 [2005] 3 HKLRD 509, [2005] 4 HKC 67.
347 [2016] 6 HKC 44 (CA).

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[5-245] A further illustration is provided in *Incorporated Owners of Morlite Building v Asia Century Ltd*.[364] In this case a co-owner of a unit in a multi-storey building had blocked up an entrance and corridor by erecting a brick wall in the common parts in breach of the deed of mutual covenant. It was resolved at an owners' meeting that enforcement action would be taken and that a special fund should be raised to cover the legal costs involved in the litigation and that each co-owner should contribute to the fund. Some co-owners objected to making such a contribution and the Incorporated Owners ('IO') said that it would sell the units of the objecting co-owners unless they paid their required contribution. Recorder Pow ruled that the IO was entitled under the deed of mutual covenant to require each co-owner to contribute to such a fund and, if they refused, the IO could proceed to impose a charge and sell the units in question. The owners who refused to contribute then paid the required contribution and appealed. The Court of Appeal dismissed the appeal.

[5-246] Of course, if the owner can establish that the co-owners have acquiesced in the breach, there will be no real risk of enforcement action.[365] The fact of acquiescence by the co-owners cannot, however, affect the right of the Building Authority to exercise its own powers in an appropriate case.

[5-247] Accordingly, a prudent vendor will ensure that any breaches of the deed of mutual covenant are either rectified before completion or he must provide expressly for them in the sale and purchase agreement by a suitably drafted exclusion or limiting clause.

8.8 Title defeasible because extent of property unclear or boundaries do not correspond with plan

[5-248] The vendor may also be unable to give and show good title where the extent of the property to be assigned is unclear or the boundaries do not correspond to the plan. As regards unclear boundaries we have seen in *Tam Mo Yin v Attorney General*[366] the problems faced by Yam J where he was forced to rely upon extrinsic evidence including the oral testimony of villagers to ascertain whether fish ponds lay within the boundaries of the land in question.[367]

[5-249] Problems affecting title will also arise where the actual boundaries of the property do not correspond with a plan in accordance with which the property has been granted by the Government or subsequently assigned. This principle would also extend to a plan forming part of the relevant deed of mutual covenant.

364 [2016] 6 HKC 467 (CA).

365 See, for example, *Hong Kong Land Co Ltd v Cheung Chi-moon* [1976] HKLR 214, [1976] HKCU 27 (HC); *Cheung Yuet v Incorporated Owners of Oriental Gardens* [1979] HKLR 536, [1977–1979] HKC 168; *Hang Yuan Management Ltd v Kishinchand Chellaram (Hong Kong) Ltd* [1987] 2 HKC 257; and *Dandenong Estate Co Ltd v Yu Kai To* [1989] 1 HKC 587.

366 [1996] 1 HKC 379 (HC).

367 See further at para **[2-23]**, above.

The need for such conformity, albeit not in the context of showing or giving good title, is shown in *Fan Tony v Incorporated Owners of Kung Lok Building*.[368] The case involved the plaintiff's car park which was clearly marked on the deed of mutual covenant to the building. In fact, the car park had been moved and a guard room, built many years previously, now occupied the space. The plaintiff as owner of the car park sought a mandatory injunction against the incorporated owners to remove the guard post and reinstate the plaintiff's car parking space. Deputy Judge Muttrie had no difficulty accepting expert evidence that the guard post encroached on the plaintiff's car parking space. The owners' corporation was bound by the terms of the deed of mutual covenant[369] and had a duty to enforce the terms of the deed of mutual covenant under s 18(1)(c) of the Building Management Ordinance (Cap 344). Nor, because of its duty to enforce the deed of mutual covenant, could the owners' corporation acquiesce in its breach.[370] The mandatory injunction sought was accordingly granted.

8.9 Title defeasible because of encroachment into the common parts of the building

[5-250] A title may be rendered defeasible because of encroachment into the common parts of the building. The vendor's title was found to be so defective by reason of encroachment in *Profit World Trading Ltd v Ho So Yung*.[371] The purchaser agreed to purchase from the vendor a town house in Sai Kung. A representative of the purchaser visited the house and saw on the ground floor a spacious sitting room of about 350 square feet in area with a glass-roofed area of about 100 square feet. The purchaser paid the initial deposit and executed a provisional sale and purchase agreement. Later the vendor sent to the purchaser the title deeds and a plan. It was obvious from the plan that the glass roofed over area was an encroachment into the common areas of the development and that the sitting room had been enlarged by converting about one third of the car park into the sitting room. Although the encroachment was subsequently removed by the vendor, Bharwaney J concluded that the purchaser would not be receiving substantially what he had contracted to purchase and the agreement had been repudiated by the vendor.

[5-251] A further illustration is *Widely Success (HK) Ltd v Hollywood Land Ltd*.[372] The vendor agreed to sell three units in a multi-storey commercial building but the purchaser raised a requisition alleging that the main doors to the properties had been altered and extended into the common areas (specifically the corridor) of the building. The common areas (which included the corridors) were delineated in the deed of mutual covenant and the offices had been assigned to the vendor

368 [2006] 3 HKC 240.

369 *Wing Ming Garment Factory Ltd v Incorporated Owners of Wing Ming Industrial Centre* [1994] 2 HKC 748.

370 See *Incorporated Owners of Hoi Luen Industrial Centre v Ohashi Chemical Industries (Hong Kong) Ltd* [1995] 2 HKC 11.

371 [2010] 5 HKC 301.

372 [2010] HKCU 2114 (unreported, DCCJ 5851/2008, 4 October 2010) (DC).

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as more particularly delineated in the plan attached to the assignment. The plan showed that the areas in dispute were indeed common areas. HH Judge Simon Leung held that the encroachment constituted a defect in title and the vendor had, therefore, failed to give good title.

8.10 Other examples of defeasible titles

[5-252] There are many other situations in which a title may be rendered defeasible but space permits only a brief survey of such instances.

8.10.1 Title defeasible under Conveyancing and Property Ordinance, Bankruptcy Ordinance or Companies Ordinance

[5-253] A further potential danger for an assignee is that the title assigned to him might be defeasible by virtue of the provisions of the Conveyancing and Property Ordinance (Cap 219), the Bankruptcy Ordinance (Cap 6) or the Companies Ordinance (Cap 622). Examples include fraudulent conveyances,[373] dispositions by a bankrupt person after presentation of a bankruptcy petition,[374] a transaction at an undervalue by a person who is subsequently adjudged bankrupt,[375] an unfair preference given by a person who is subsequently adjudged bankrupt[376] and an unfair preference made by an insolvent company.[377]

8.10.2 Title Defeasible under other legislation

[5-254] For example, an assignment by way of security for a loan that is illegal under the Money Lenders Ordinance (Cap 163) is voidable and may be set aside under s 25(1) of that Ordinance.[378] A title would also be rendered defeasible where the Government was empowered to demolish a building under s 6(1) of the Land (Miscellaneous Provisions) Ordinance (Cap 28) as having been built upon or protruding over unleased Government land.[379]

[5-255] Similarly, a title could be rendered defeasible by virtue of s 17(1)(b) of the Matrimonial Proceedings and Property Ordinance (Cap 192) on the grounds that the disposition was intended to defeat the claims of the wife against the husband for financial provisions in matrimonial proceedings brought against the husband.[380]

373 A disposition made to defraud creditors will be voidable under ss 60 and 61 of the Conveyancing and Property Ordinance (Cap 219), unless the property has been disposed of for valuable or good consideration and in good faith to any person not having, at the time of the disposition, notice of the intention to defraud: ibid s 60(3).

374 See s 42 of the Bankruptcy Ordinance (Cap 6).

375 Ibid s 49.

376 Ibid ss 50 and 51.

377 See ss 266, 266A and 266B of the former Companies Ordinance (Cap 32).

378 See *Leo Lee, alias Lee Hok Yuen v Cheong Oi Sum Ader* [1993] 2 HKC 736 (DC).

379 See *Chan Hong Chung v Mak Kiu* (unreported, HCMP 1961/1995, 1995); cf *To Kam Kwong v Tseung Yuk Chu* [1997] 3 HKC 542.

380 See *Ho Chan Yuet Lan, nee Chan Yuet Lan v Ho Kai Hung* [1995] HKCU 406 (unreported, CACV 34/1995, 26 April 1995).

8.10.3 Title defeasible as a result of breach of fiduciary duty owed by purchaser to vendor

[5-256] An assignment is liable to be set aside where there is a breach of fiduciary duty owed by the purchaser to the vendor, such as where the purchaser is the solicitor representing the vendor.[381] The same situation may arise in respect of gifts from the client to his solicitor.[382]

8.10.4 Title defeasible by reason of sale of property by mortgagee to himself

[5-257] Title may also be defeasible where a mortgagee has sold the property to himself.[383]

8.10.5 Title defeasible by reason of gift of property by attorney to himself or to another person

[5-258] A title may also be rendered defeasible where a person appointed under a power of attorney gives the property to himself or to another person in breach of his powers under the power of attorney.[384]

8.10.6 Title defeasible by reason of duress or undue influence

[5-259] Title may also be defeasible where the owner has acquired his title as a result of duress or undue influence. Equity provides that, where property is gifted, sold at undervalue or mortgaged or charged as a result of duress or undue influence exercised by the donee, purchaser or chargee, the assignee or chargee will acquire only a defeasible title.[385]

9. Matters of Mere Conveyance

[5-260] The duty to give a good title does not, however, extend to matters of mere conveyance. What this means is that good title is not adversely affected by a defect which the vendor can remove independently of the concurrence of a third person. The most common example of a matter of mere conveyance would be the discharge of a mortgage over the property by the vendor – *Re Jackson*

381 See *Demerara Bauxite Co Ltd v Hubbard* [1923] AC 673, 675 (PC); *Chiu Che Kuen v Or Yue Ling* (unreported, HCA A5543/1990, 1995).

382 In the case of a gift inter vivos from the client to the solicitor, there is a presumption of undue influence: *Wright v Carter* [1903] 1 Ch 27.

383 See *Tang Ying Ki v Maxtime Transportation Ltd* [1996] 3 HKC 257 (HC).

384 See *Lo Hung Biu v Lo Shea Chung* [1997] HKLRD 721, [1997] 2 HKC 723.

385 See *Barclays Bank plc v O'Brien* [1994] 1 AC 180 (HL) at 195; *Ho Yung Hon v Ho Kam Cheung* [2002] HKCU 585 (unreported, HCA 15909/1999, 9 May 2002); *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 3 WLR 1021 (HL); *Li Sau Ying v Bank of China (Hong Kong) Ltd* (2004) 7 HKCFAR 579, [2004] HKCU 1481; and *Bank of China (Hong Kong) Ltd v Well Lok Printing Ltd* [2008] 1 HKC 416.

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and Oakshott.[386] In *Chan Pak Ho v Standard Chartered Asia Ltd*[387] a vendor agreed to sell a property to a purchaser. A predecessor in title to the vendor had previously assigned the property to a bank by way of mortgage and the property had been reassigned under a power of attorney. The court held that the attorney had no authority under the power of attorney to reassign the property and the title, therefore, remained vested in the bank, although the mortgagor had the beneficial interest in the property. This defect, however, was a matter of mere conveyance, since the vendor could compel the bank to reassign the mortgage.

[5-261] The existence of a trespasser or licensee on the premises before completion, where the vendor has agreed to give vacant possession, may also be a matter of mere conveyance since the vendor has the right to evict them. A clear illustration of the presence of trespassers constituting a matter of mere conveyance is *City Chain Properties Ltd v Speedy Port Ltd*.[388] The vendor had agreed to sell a ground floor shop in Chungking Mansion to the purchaser. The purchaser discovered, however, that stalls outside the shop were occupied by other persons and raised a requisition alleging that the existence of third party interests in the stalls constituted an encumbrance rendering the vendor's title defective. It was accepted that the vendor had never collected any rent or licence fee from the occupants of the stalls. Sakhrani J held that the occupants of the stalls were trespassers and had acquired no rights in the property. They could be evicted at any time by the vendor. The existence of the trespassers was a matter of mere conveyance and not a matter of title so that the vendor was able to give a good title to the property.

[5-262] The position would be otherwise, however, where the occupants are in occupation by way of a tenancy agreement by virtue of which they enjoy security of tenure. Thus Davies J said in *Sharneyford Supplies Ltd v Edge*:[389]

> If the occupants of the farm were trespassers or licensees, it was within the vendor's power to have them removed so as to be able to give vacant possession; so that there was no inability to show a good title. But if the occupants were tenants, for a term of years or yearly, then it was not within the vendor's power to have them removed by the completion date so that there is an inability to show good title.

[5-263] This dictum was cited with approval by Deputy Judge Gill in *Ip Fai Man v Lui Kit Man*,[390] who pointed out that, while the existence of a tenancy might in some circumstances be a matter of title, where the termination of the tenancy and cessation of the tenant's rights were within the power of the vendor to enforce, then the existence of the tenancy was a matter of mere conveyancing and did not go to title. In this case the tenancy was an in-house tenancy that the vendor could lawfully terminate and, although the purchaser had been invited to inspect the premises to assure himself that they were vacant, he had declined to do so. Since this was a matter of mere conveyance, the purchaser had no right to insist upon the production of a surrender agreement.

386 (1880) 14 Ch D 851. See also *Re Daniel* [1917] 2 Ch 405.
387 [1988] 1 HKLR 216, [1987] 3 HKC 241 (HC).
388 [2001] HKCU 1088 (unreported, HCA 2221/98, 7 November 2001).
389 [1985] 1 All ER 976.
390 [2000] HKCU 25 (unreported, HCA 13661/1998, 16 February 2000).

[5-264] Failure to stamp a document of title that is chargeable with stamp duty under the Stamp Duty Ordinance (Cap 117) may only be a matter of mere conveyance provided that the counsel or solicitor gives an undertaking to the court that the document will be stamped and any penalty paid: see *Town Bright Industries Ltd v Bermuda Trust (Hong Kong) Ltd*.[391]

10. OTHER TITLES

[5-265] Finally, we will consider good holding (possessory) titles and titles based upon proprietary estoppel.

11. GOOD HOLDING (OR POSSESSORY) TITLE

11.1 Nature of a good holding title

[5-266] A good holding or possessory title is one which looks back to the origin of ownership, namely possession. To acquire a good holding title, the 'owner' must enjoy 'adverse possession' of the required quality for the required period of time. Adverse possession operates by way of 'negative prescription', in that, where the person having adverse possession has enjoyed that possession for a period of time sufficiently long to bar the rightful owner's right of recovery of the land, the title of the rightful owner is extinguished. This result is the combined effect of two sections of the Limitation Ordinance (Cap 347). Section 7(2) of the Limitation Ordinance provides that:

> No action shall be brought by any ... person to recover any land after the expiration of 12 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

[5-267] Further, s 17 of the Limitation Ordinance provides that:

> ... at the expiration of the period prescribed by this Ordinance for any person to bring an action to recover land ... the title of that person to the land shall be extinguished.

[5-268] A squatter who claims to have obtained a possessory title so that the title of the owner has been extinguished may apply to the court[392] for a declaration that he now holds a possessory leasehold title over the land. In the words of Cozens-Hardy MR in *Re Atkinson & Horsell's Contract*:[393]

> Wherever you find a person in possession of property that possession is prima facie evidence of ownership in fee, and that prima facie evidence becomes absolute when once you have extinguished the right of every other person to challenge it.

391 [1998] 2 HKC 445.
392 Subject to the annual rent or rateable value of the land, the District Court has jurisdiction to determine adverse possession claims: see ss 35 and 36, District Court Ordinance: *Lam Man Lau v Secretary for Justice* (unreported, DCCJ 1682/2012, 25 July 2016). Otherwise the action must be commenced in the Court of First Instance.
393 [1912] 2 Ch 1, at p 9.

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[5-269] The principle extends to the situation where the vendor has a doubtful title or one suffering from a mere technical defect. In such a case, provided there has been possession of the required quality for the required period of time, the vendor will have a good holding title on the basis that such possession is likely to remain undisturbed.[394] Provided that the vendor informs the purchaser of the nature of his holding title, preferably by way of an express provision in the sale and purchase agreement, his title will be readily saleable.

[5-270] Adverse possession does not as a general rule vest in the person in possession good title but merely a good holding title: see *Chan Chu Hang Arden v Man Yun Sau*,[395] per Le Pichon J.

[5-271] To similar effect in *Leung Pak Ki v The Estate of Pang Kau, deceased*[396] Dty Judge Paul Lam SC observed that, under the common law, a squatter did not succeed to or take over the title of the paper owner whom he had dispossessed. Further, the Limitation Ordinance did not operate as a statutory conveyance of that title to the squatter: see *Wong King Lim v Incorporated Owners of Peony House*.[397] A squatter would, accordingly, only be entitled to a declaration that he had acquired 'a possessory title' or 'an indefeasible possessory title' to the property: see *Lai Wai Kuen v Wong Shau Kwong*.[398]

11.2 Constitutional challenge to title by adverse possession

[5-272] The issue to be considered here is whether the acquiring of title by adverse possession breaches the constitutional right to private ownership of property guaranteed by article 6 of the Basic Law[399] or constitutes a lawful taking of the paper title owner's land so as to require the squatter to pay compensation to the paper title owner in accordance with Article 105 of the Basic Law.[400]

[5-273] As a result of the decision of the European Court of Human Rights in *JA Pye v The United Kingdom*[401] requiring squatters who had acquired possessory titles to pay compensation to their disposed landlords, the issue became live in Hong Kong as to whether the same position would apply here.[402]

394 *Lai Chung Yue v Chau Shing* [1987] 3 HKC 406 (HC).
395 [1997] 2 HKC 144 (HC).
396 (unreported, HCA 624/2009, 1 March 2016).
397 [2013] 4 HKC 295.
398 [2004] 4 HKC 528.
399 Article 6 of the Basic Law provides: 'The HKSAR shall protect the right of private ownership of property in accordance with law'.
400 Article 105 of the Basic Law provides: 'The HKSAR shall, in accordance with the law, protect the rights of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property'.
401 (2006) 43 EHRR 3.
402 This decision was subsequently overruled by the Grand Chamber of the European Court of Human Rights in August 2007.

[5-274] This issue was first considered in *Hong Kong Buddhist Association v Occupiers and Cheng Ka Leung Michael*[403] where Deputy Judge Saunders at first instance ruled, obiter, that the regime in the Limitation Ordinance conferring possessory titles on persons who had been in adverse possession for the relevant limitation period contravened the protection afforded by Articles 6 and 105 of the Basic Law. On appeal the Court of Appeal upheld the decision on the ground that the defendant had not established a possessory title, but made no comment on the constitutional issue.

[5-275] The question whether the provisions in the Limitation Ordinance relevant to adverse possession conflicted with the constitutional guarantees laid down in the Basic Law came squarely before the court in *Harvest Good Development Ltd v Secretary for Justice*.[404] The applicant, having unsuccessfully contested an action against an adverse possessor of its land, sought, inter alia, a declaration that ss 7(2) and 17 of the Limitation Ordinance were inconsistent with Articles 6 and 105 of the Basic Law. Counsel for the respondent, the Secretary for Justice, raised two preliminary arguments; first that, because the adverse possessor had already acquired an accrued right before the Basic Law came into force in 1997, the provisions of the Basic Law were inapplicable; secondly, that the application for a declaration constituted an abuse of the process of the court because the constitutional issue should have been raised in the earlier substantive adverse possession proceedings. Only if these preliminary points were dismissed, would the court be called upon to determine whether the provisions of the Limitation Ordinance were unconstitutional as contravening the guarantees in the Basic Law. Hartmann J first considered the nature of land holding in Hong Kong. The learned judge observed that Hong Kong did not have a system of title registration under which the fact of registration constituted proof absolute of title. The Land Registration Ordinance (Cap 128) merely facilitated proof of title but did not itself give title. It was, therefore, fundamental that, in Hong Kong land law, possession was at the root of title. An individual who possessed land was presumed to have leasehold ownership unless a better title could be demonstrated. This was because title to unregistered land was relative and depended ultimately on possession. Turning to the first preliminary point raised by the respondent, in the earlier adverse possession litigation the Court of Final Appeal had made a declaration that possessory title had been lost by the applicant in 1982. There was a common law presumption that statutes were not intended to have any retrospective effect[405] and the court was not persuaded that the drafters of the Basic Law had intended that Articles 6 and 105 would operate retrospectively. Since title by way of adverse possession had been lost by the applicant many years before the Basic Law came into effect, the provisions of the Basic Law were, therefore, inapplicable and the application would have to be dismissed on this ground. As regards the second preliminary issue raised by counsel for the respondent that the application for a declaration constituted an abuse of the process of the court because the constitutional issue should have been raised in the substantive adverse

403 [2006] HKCU 1520 (unreported, HCMP 4108/2003, 8 September 2006) (HC).
404 [2007] 4 HKC 1.
405 See *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816 (HL).

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possession proceedings, it was well established that, when a material issue of a substantive nature could and should have been raised in earlier proceedings, the creation of fresh proceedings for the purpose of having those issues resolved might constitute an abuse of the process of the court.[406] In the instant case the constitutional issue should have been raised in the earlier substantive proceedings and the application for the present declaration constituted an abuse of the process of the court. The application should be dismissed on this ground also. The learned judge, however, went on to consider, in case he was wrong on the preliminary issues, whether the relevant articles of the Basic Law had been breached. Counsel for the respondent contended that Articles 6 and 105 of the Basic Law were not concerned with regulating rights between private individuals, but only applied to the expropriation of land by Government for public purposes. Drawing the attention of the court to the Chinese word 'zhengyong' which corresponded to the English word 'deprivation' in Article 105, counsel contended that the Chinese word meant 'expropriation'. This had been the conclusion reached by Tang V-P in *Weeson Investment Ltd v Commissioner of Inland Revenue*.[407] Further Albert Chen had said 'zhengyong seems to be confined to situations where title, possession, control or use of the property has been acquired by Government. Dictionary definitions of zhengyong refer to the state acquiring or using the property of others'.[408] It appeared, therefore, that there was a clear difference in meaning between the English and Chinese texts. In this event, according to the decision of the Standing Committee of the National People's Congress made on 28 June 1990, the Chinese text was to prevail. Article 105 should, therefore, be interpreted as only entitling individuals to compensation upon the expropriation of their property by Government or a Government agency. The loss of property by an individual by reason of the effect of the provisions of the Limitation Ordinance did not, therefore, constitute an expropriation by Government for public purposes and the provisions of that Ordinance were not unconstitutional. The learned judge, however, again went on to consider, in case he was wrong on the earlier issue, whether the provisions of the Limitation Ordinance did conflict with the constitutional guarantees laid down by the Basic Law. He first noted that the effect of ss 7(2) and 17 of the Limitation Ordinance did not simply bar claims to recover land by the paper title holder, but gave effect to that bar by transferring possessory title to the adverse possessor. These provisions of the Limitation Ordinance might, therefore, have draconian consequences for the paper title owner whose title could be extinguished without notice to him. To this effect Lord Hope had said in *JA Pye (Oxford) Ltd v Graham*:[409]

> The unfairness in the old regime which this case has demonstrated lies not in the absence of compensation, although that is an important factor, but in the lack of safeguards against oversight or inadvertence on the part of the registered proprietor.

406 See *Barrow v Bankside Agency Ltd* [1996] 1 WLR 257; and *Johnson v Gore Wood & Co* [2002] 2 AC 1 (HL).
407 [2007] 2 HKLRD 567.
408 In '*The Basic Law and the Protection of Property Rights*' (1993) HKLJ 31 at p 60.
409 [2002] 3 All ER 865 (HL).

[5-276] The regime had also been criticised at first instance by Neuberger J who had said at 710:[410]

> A frequent justification for limitation periods generally is that people should not be able to sit on their rights indefinitely and that is a proposition to which at least in general nobody could take exception. However, if as in the present case the owner of land has no immediate use for it and is content to let another person trespass on the land for the time being, it is hard to see what principle of justice entitles the trespasser to acquire the land for nothing from the owner simply because the has been permitted to remain there for 12 years. To say that in such circumstances the owner who has sat on his rights should therefore be deprived of his land appears to me to be illogical and disproportionate.

[5-277] Further, in Hong Kong, the owner not only lost his title but did so whilst remaining liable on the covenants in respect of the land – to pay rates, Government rent and other covenant responsibilities that might have to be met. Thus Lord Hoffmann NPJ had said in *Chan Yuk Yin v Harvest Good Development*[411] that there was much that was troubling in the proposition that a squatter could, simply by wrongful occupation for a specified period, in effect if not in legal theory, acquire a valuable property, leaving the registered leasehold owner with the sole privilege of paying the annual rent to the freeholder.[412] *Pye* was, however, distinguishable on a number of grounds. Most importantly *Pye* was concerned with registered land where proof of title rested solely on the fact of registration. In Hong Kong there was a system of unregistered land, proof of title depending ultimately on possession. Indeed, the European Court of Human Rights had acknowledged in *JA Pye (Oxford) Ltd v United Kingdom*,[413] when referring to the aims of the Limitation Act, that 'while the court accepts the undoubted relevance and importance of these aims in the case of unregistered land, their importance in the case of registered land is more questionable'. The Hong Kong limitation regime had been justified on several grounds: first, it had long been a matter of policy that there was need to ensure that land – a scarce resource in Hong Kong – was utilised and not left abandoned for an extended number of years; in other words, a leaseholder was to be discouraged from 'sleeping on his rights'. Secondly, in the absence of a system of land titles, the concept of adverse possession had always been a material aid to conveyancing. Thirdly, the system helped protect against stale claims which might be refuted by a claim to adverse possession. Fourthly, the scheme of adverse possession promoted certainty as to title. Especially in a situation where boundaries were in dispute (and this was particularly pertinent in respect of New Territories land), a title defect could be removed by proof of the required period of adverse possession. In conclusion the court would accept that the scheme of adverse possession contained in ss 7(2) and 17 of the Limitation Ordinance pursued a legitimate aim. The real issue was whether a fair balance

410 [2000] Ch 676.
411 (unreported, FACV No 13/2005).
412 Hartmann J pointed out that the practice might not be quite so harsh as the Rating Ordinance (Cap 116) provided that both the leaseholder and the occupier of a tenement were liable to pay rates and, in the absence of agreement, the rates had to be paid by the occupier.
413 (2005) 19 BHRL 705 at para 64.

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had been struck between the aims of the statutory scheme and the hardship visited upon those whose leasehold titles were extinguished. There was no doubt that the mechanism was clumsy and on occasions worked inequitably. Parliament in England had devised a more equitable system of notice and perhaps the same might be introduced into Hong Kong. It could not be doubted, however, that land was a scarce resource in Hong Kong and the system of adverse possession, which had been integral to the system of land law in Hong Kong, played and continued to play a constructive role. The court was satisfied that, if articles 6 and 105 of the Basic Law were engaged, the statutory scheme of adverse possession was nevertheless consistent with the guarantees contained in those articles. The application was accordingly dismissed.

[5-278] The constitutionality of the limitation provisions giving rise to possessory titles was further considered by Lam J in *Hong Kong Kam Lan Koon Ltd v Realray Investment Ltd (No 5)*.[414] In 1964, Dr Cheung agreed to donate a piece of land within his estate upon which the plaintiff, a member of the Hong Kong Taoist Association, was to construct a temple. The temple was completed in 1967, but the only access to the temple lay across Dr Cheung's estate (the estate). Unfortunately, the parties fell out in 1967 and the footpath was sealed off. Soon afterwards, however, the parties reached an agreement by which the plaintiff was permitted to construct a new footpath across the estate leading to the temple. In 1971 the estate was given by way of gift by Dr Cheung to his brother Cheung Kung Wing (CKW) and modifications to the temple were carried out with the support of CKW. The estate was sold to the defendant in the 1990s and the plaintiff now sought a declaration from the court that it had acquired a possessory title to the footpath and other nearby land having used that land for more than 20 years. The defendant resisted the claim arguing first that the limitation provisions (ss 7 and 17 of the Limitation Ordinance) offended Articles 6 (protection of right to private ownership of property) and 105 (right to compensation for lawful deprivation of property) of the Basic Law. Lam J held first that the right to compensation provided by article 105 was restricted to cases of deprivation of property by the state and did not extend to cases where paper title owners lost their right to assert their title against squatters. As regards article 6, the decision of the European Court of Justice in *JA Pye (Oxford) Ltd v United Kingdom*[415] applied to land which was subject to a system of registered title, whereas in Hong Kong there was no system of registered title but merely a deeds registration system. There was a fundamental difference between the two systems. In the latter case title depended ultimately upon possession. The learned judge concluded that the limitation provisions did not offend the constitutional guarantees laid down in the Basic Law. The judge further noted that, since he had written his judgment, the Grand Chamber of the European Court of Human Rights in the *Pye* case had held that the English law on adverse possession did not violate landowners' constitutional rights. The majority had said:

> It is a characteristic of property that different countries regulate its use and transfer in a variety of ways. The relevant rules reflect social policies against

414 [2007] 5 HKC 122.
415 [2005] 3 EGLR 1.

> the background of the local conception of the importance and role of property. Even where title to real property is registered, it must be open to the legislature to attach more weight to lengthy, unchallenged possession than to the formal fact of registration. The Court accepts that to extinguish title where the former owner is prevented, as a consequence of the application of the law, from recovering possession of land cannot be said to be manifestly without reasonable foundation. There existed therefore a general interest in both the limitation period itself and the extinguishment of title at the end of the period.

[5-279] This decision fortified the judge's conclusion in the instant case that the limitation provisions were not unconstitutional.

11.3 Relevant limitation period

[5-280] The relevant limitation periods are to be found in section 7 of the Limitation Ordinance (Cap 347) and are 60 years in respect of actions by the Government, and, in respect of other actions, 20 years, where the right of action accrued before 1 July 1991, and 12 years, where the right accrued after 1 July 1991. The right of action accrues from the time of the dispossession or the discontinuance of possession.[416] Where, however, there has been fraud or concealment on the part of the possessor, then the period of limitation does not begin to run until the rightful owner discovers the fraud or concealment or could have done so with reasonable diligence.[417]

[5-281] Because of the peculiar characteristics of a t'so and t'ong with new equitable interests stemming from each new member being admitted upon birth by reason of his hereditary link with the focal ancestor, a person who is in adverse possession cannot extinguish the title of the t'so or t'ong under the Limitation Ordinance unless he can establish the requisite limitation period against all the living members of the t'so or t'ong.[418]

11.4 Elements of adverse possession

11.4.1 Introduction

[5-282] There are three essential elements to acquiring title by adverse possession. First, there must be exclusive physical control of the land; secondly, there must be an intention to possess the land; finally, the possession must be adverse to the rightful owner in the sense that he has not consented to the possession. The claimant has the burden of persuading the court as to all three elements. Further, the adverse possession must be continuous, in the sense of not being interrupted.

416 Section 8(1) of the Limitation Ordinance (Cap 347).
417 Section 26 of the Limitation Ordinance (Cap 347).
418 See *Leung Kuen Fai v Tang Kwong Yu T'ong* [2002] 2 HKLRD 705, [2002] HKCU 745; *Tsang Kwong Kuen v Hau Wai Keung Gaius* [2014] 5 HKLRD 622, [2014] HKCU 2277 (CA).

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11.4.2 Exclusive continuous and physical possession

[5-283] The first element is that the squatter must enjoy exclusive physical possession or control of the land (factual possession) and this possession or control must be exercised continuously for the required period of limitation. The paper owner of land may cease to be in possession of it by reason either of his dispossession or discontinuance of possession. Dispossession occurs where a person (often referred to as a 'trespasser') comes in and puts the owner/lessee out of possession; discontinuance of possession occurs where the person in possession goes out of possession voluntarily and a person (often called a 'squatter') takes possession.[419] To constitute dispossession, acts must have been done which are inconsistent with the enjoyment of the land by the person entitled for the purposes for which he had a right to use it.[420]

[5-284] As to the meaning of factual possession Slade J said in *Powell v McFarlane*:[421]

> Factual possession signifies an appropriate degree of physical control. It must be a single and conclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances … acts of possession done on parts of land to which a possessory title is sought may be evidence of possession of the whole. Whether or not acts of possession done on parts of an area establish title to the whole area must, however, be a matter of degree.

[5-285] This test was approved by the House of Lords in *JA Pye (Oxford) Ltd v Graham*[422] and adopted by the Court of Final Appeal in *Wong Tak Yue v Kung Kwok Wai*.[423] It was also applied by the Court of Final Appeal in *Shine Empire Ltd v Incorporated Owners of San Po Kong Mansion*.[424] In this case the issue was whether the incorporated owners of San Po Kong Mansion (the appellant) had dispossessed the developer of the very large roof (16,800 square feet) of the building. The developer, in whose favour the roof had been reserved by the deed of mutual covenant executed in 1968, had never prevented access to the roof, although it did make regular inspections of the roof. The appellant, acting under the deed of mutual covenant, assumed responsibility for management and maintenance of the building and for a significant period of time sold licences to telecommunications companies to install equipment on the roof. From these sales it received substantial contributions by way of licence fees which it did not disclose to the developer. The roof was also used by other tenants in common in the building for hanging out washing and installing television aerials and the tenants used the roof for celebrating festivals. In 1996 the incorporated owners had constructed a building management office on the roof. In 2001 the developer commenced an action against the appellant for these licence fees and the appellant counterclaimed that it had acquired a possessory title to the roof. The counterclaim was dismissed at first instance and on appeal where Yuen JA concluded that the incorporated owners had failed to establish that the acts had been done with the intention of dispossessing the developer. The Court of Final Appeal agreed holding that the acts of possession relied upon plainly did not constitute or demonstrate the necessary factual possession or requisite intention to possess. The appeal was accordingly dismissed.

[5-286] A person may exercise physical possession and control even when he is absent from the land for significant periods of time. For example in *Chan Chi Ming v Brilliant Rise Container Depot Ltd*[425] Chu J held that the plaintiff continued to be in possession of land (and could therefore maintain an action for trespass) although he had ceased to live on the land in 2001. The learned judge pointed out that the mere absence of activities on the land could not be equated with abandonment and what would constitute possession would vary with the character and type of the land being possessed. Thus Lord Guest had said in *Wuta-Ofei v Mabel Danquah*:[426]

> The type of conduct which indicates possession must vary with the type of land. In the case of vacant and unenclosed land which is not being cultivated there

419 See *Rains v Buxton* (1880) 14 Ch D 537 at 540, per Fry J; *Williams Bros Direct Supply Ltd v Raftery* [1958] 1 QB 159, [1957] 3 All ER 593; *Tecbild Ltd v Chamberlain* (1969) 20 P & CR 633.

420 *Leigh v Jack* (1879) 5 Ex D 264 at 274, per Cotton LJ, and at 273 per Bramwell LJ, followed in *Williams Bros Direct Supply Ltd v Raftery* [1958] 1 QB 159 at 168, 169; [1957] 3 All ER 593 at 596, 597; and see *Re Duffy's Estate* [1897] 1 IR 307; *Re Vernon's Estate* [1901] 1 IR 1. Yet see *Buckinghamshire County Council v Moran* [1989] 2 All ER 225, [1989] 3 WLR 152 (there is no special rule that, where land has been acquired for a particular purpose, the owner cannot be dispossessed by acts of trespass which are not inconsistent with that purpose, not following *Leigh v Jack* (above)). For examples of what acts do and do not amount to dispossession, see *Lord Advocate v Lord Blantyre* (1879) 4 App Cas 770 at 791 (HL); *Van Diemens Land Co v Table Cape Marine Board* [1906] AC 92 (PC) (foreshore); *Foster v Warblington Urban Council* [1906] 1 KB 648 at 671 (oyster beds); *Convey v Regan* [1952] IR 56 (bog); *Thomas W Ward Ltd v Alexander Bruce (Grays) Ltd* [1959] 2 Lloyd's Rep 472 (dock); *Williams Bros Direct Supply Ltd v Raftery*, above (building land awaiting development); *Bligh v Martin* [1968] 1 All ER 1157, [1968] 1 WLR 804 (field); *Redrouse Farms (Thorndon) Ltd v Catchpole* (1976) 121 Sol Jo 136 (marshy land only suitable for shooting); *Tecbild Ltd v Chamberlain* (1969) 20 P & CR 633 (minor and harmless acts of trespass); *Man Kam-tong v Man Lin-tai* [1984] HKLR 181, [1985] 2 HKC 299 (use inconsistent with future intended user by owner); *Boosey v Davis* (1987) 55 P & CR 83 (land used for grazing goats; this was minimal in terms of quality and quantity of user; clearing of scrub not significant since it merely facilitated grazing use; erection of fence was merely act of repairing existing fence erected by owner; no sufficient acts to constitute adverse possession); *Common Luck Investment Ltd v Cheung Siu Ming* (unreported, HCMP 1065/1994, 3 December 1997) (residence built upon lot which was used as family home).

421 (1977) 38 P & CR 452.

422 [2003] 1 AC 419 (HL).

423 (1997-98) 1 HKCFAR 55, [1998] 1 HKC 1.

424 (2007) 10 HKCFAR 588, [2007] HKCU 910.

425 [2008] 1 HKC 487.

426 [1961] 1 WLR 1238 (HL) at 1243.

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> is little which can be done on the land to indicate possession … Moreover, the possession which the respondent seeks to maintain is against the appellant who never had any title to the land. In these circumstances the slightest amount of possession would be sufficient.

[5-287] The plaintiff had paid regular visits to the land, picking fruit growing there. He had also acted promptly when discovering that the defendant had pulled down the structures built by the plaintiff on the land. These acts were indicative of an intention to exercise control over the land. The plaintiff had, therefore, continued to be in possession of the land.

[5-288] A landowner will not, therefore, be dispossessed of his land where he continues to enjoy some use of that land. This proposition is clearly illustrated in *Hong Kong Kam Lan Koon Ltd v Realray Investment Ltd*.[427] The plaintiff was the occupier of land in the New Territories who claimed that he had secured a possessory title over that land having dispossessed the paper title holder (the defendant) more than 20 years previously. At first instance Lam J dismissed the plaintiff's claim on the ground that the plaintiff had not dispossessed the defendant since members of the then paper title owners had enjoyed free access to the land up to 1991. The Court of Appeal agreed. The Court of Appeal first pointed out that Slade J had said in *Powell v McFarlane*:[428]

> Dispossession refers to a person coming in and putting another out of possession, while discontinuance refers to the case where the person in possession abandons possession and another takes it. The authorities, however, show that merely very slight acts by an owner in relation to the land are sufficient to negative discontinuance.

[5-289] In the instant case, the trial judge had found that between 1974 and 1990 the owner had paid weekly visits to the land with his children. He also held keys to two gates giving access to the land. Members of the then owner's family were, therefore, able to use the land as they wished and they did so occasionally. There had, therefore, been no dispossession by the plaintiff of the defendant's land. The Court of Appeal concluded that this finding of fact would require strong grounds to be overturned and had not been disturbed. The use made of the land by the then owner and his family had not been transitory or ephemeral and had been consistent with the possession of the land by its then owner. Discontinuance of possession for the required period had not been established and the appeal would, accordingly, be dismissed.

[5-290] Fencing of the land is often the best evidence of exclusive possession,[429] but cultivation of the land without fencing it off has, on occasions, been held

427 [2009] HKCU 302 (unreported, CACV 79/2008, 18 February 2009).

428 [1979] 38 P & CR 452 at 468.

429 See *Kam To Pui v Incorporated Owners of Lux Theatre Building* [2000] HKCU 702 (unreported, HCA 646/1996, 20 September 2000).

sufficient to establish exclusive possession.[430] In order for acts to have the effect of dispossessing an owner, the acts of dispossession must be unequivocal.[431]

[5-291] The limitation period will, therefore, only begin to run where the rightful owner has been dispossessed or has discontinued his possession and the squatter has entered into exclusive physical control or possession of the land.[432]

[5-292] The fact that the land has been occupied by illegal means or has been used for illegal purposes may affect the squatter's title.[433]

11.4.3 Intention to possess

[5-293] The second element is that the squatter must establish an intention to possess the land (*animus possidendi*). This is usually a matter of inference.[434] Of the intention to possess Slade J said in *Powell v McFarlane*:[435]

430 *Seddon v Smith* (1877) 36 LT 168. Yet cf *Dragon Sky Property Ltd v Yeung Mei Hoi* (unreported, DCMP 70/2012, 8 July 2014) where Dty Judge Anthony Chow concluded in that a squatter had not secured title by adverse possession over farmland by planting and picking fruit from trees on the land. As to sporadic farming over part only of a tract of land, see *Kenneth McKinney Higgs (substituted for Clotilda Eugenie Higgs) v Nassauvian Ltd* [1975] AC 464, [1975] 1 All ER 95 (PC). As to use of land for grazing by cattle, see *Boosey v Davis* (1987) 55 P & CR 83.

431 See *Powell v McFarlane* (1977) 38 P & CR 452 ('It is in cases where the acts in relation to the land of a person claiming title by adverse possession are equivocal and are open to more than one interpretation that those acts will be insufficient to establish the intention to possess' … 'If [the squatter's] acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having the requisite *animus possidendi* and consequently as not having dispossessed the owner', per Slade J at 472).

432 *Tenant v Adamczyk* [2006] 1 P & CR 28.

433 See the thorough analysis of these issues by Dty Judge Leung in *Choy Kuen Chi v Tat Fung Enterprises Co Ltd* (unreported, HCA 915/2011, 20 July 2015).

434 Intention to possess has to be inferred from the acts themselves: *Tecbild Ltd v Chamberlain* (1969) 20 P & CR 633, per Sachs LJ. As to the evidentiary weight to be accorded to statements made by the claimant, see *Wong Tak Yue v Kung Kwok Wai David* [1998] 1 HKC 1 (plaintiff sought possession against occupier/ defendant; defendant has stated on affirmation that she was willing to pay rent to the owners if they had requested such payment; held defendant had no requisite intention to possess; 'the question of intention to possess is one of fact … where the occupier had made self-serving statements as to what was his intention, whether during the period of occupation or when challenged in legal proceedings, the courts should approach them with some scepticism. The courts would scrutinise the circumstances in which they were made and would give them such weight, if any, as they may deserve. Conversely, where the occupier has made statements as to what was his intention and such statements are against his interest, the courts would usually accord them considerable weight … the defendant's intention to pay rent if the owners had requested payment demonstrated that he was not intending to exclude the owner with the paper title, but showed that he was treating himself as enjoying possession under a lawful title from the owners', per Li CJ).

435 [1989] 3 WLR 152.

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> The intention to possess requisite for adverse possession involves 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 process of the law will allow. The question of intention to possess, as with any other question of intention, is one of fact. Whether it can be established depends on an assessment of all the circumstances in a particular case.

[5-294] In a similar vein Slade LJ said in *Buckinghamshire County Council v Moran*:[436]

> What is required for this purpose is not an intention to own or even an intention to acquire ownership but an intention to possess - that is an intention for the time being to possess the land to the exclusion of other persons, including the owner with the paper title.

[5-295] That the intention required is only an intention to possess, not an intention to own the land, was confirmed in *Ocean Estates Ltd v Pinder*[437] and *JA Pye (Oxford) Ltd v Graham*.[438] It therefore follows that even a person who believes that he is the rightful owner can acquire title by adverse possession.[439] The same principle will apply where the squatter mistakenly believes that he is the lawful tenant of the true owner. Such was made clear in *Cheung Kwong Yuen v Sun Hui Fang*.[440]

[5-296] As regards the evidence required to establish the intention to possess Slade J said in *Powell v McFarlane*:[441]

> The question of *animus possidendi* is, in my judgment, one of crucial importance in the present case. An owner or other person with the right to possession of land will be readily assumed to have the requisite intention to possess, unless the contrary is clearly proved. This, in my judgment, is why the slightest acts done by or on behalf of an owner in possession will be found to negative discontinuance of possession. The position is, however, quite different from a case where the question is whether a trespasser has acquired possession. In such a situation the courts will, in my judgment, require clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess, but made such intention clear to the

436 [1990] 1 Ch 623.

437 [1969] 2 AC 19 (PC) at p 24.

438 [2003] 1 AC 419 (HL).

439 *Wong Luen Chun v Secretary for Justice* [1998] 4 HKC 122, per Barnett J, applying *Hughes v Cork* [1994] EGCS 25 (CA, Eng). See also *Roberts v Swangrove Estates Ltd* [2008] 2 WLR 1111 (CA, Eng), where Mummery LJ said:

> As explained in *Hughes v Cork* [1994] EGCS 25 (CA, Eng), it is obvious that it is possible for a person who (albeit mistakenly) believes himself to be the true owner to have the requisite intention to exclude others and to acquire title by adverse possession. Adverse possession is not confined only to those who think or know that they are trespassing on someone else's land. All that matters for limitation purposes is that the person claiming adverse possession is in factual possession together with the intention to exclude everyone else.

440 [2016] 1 HKLRD 464, [2017] 2 HKC 171 (CA).

441 [1989] 3 WLR 152.

> world. If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will not treat him as having the necessary *animus possidendi* and consequently as not having dispossessed the owner.'

11.4.4 Possession must be adverse to that of rightful owner in the sense that no permission or licence has been granted

[5-297] Finally, a claimant to a possessory title must persuade the court that his possession is adverse to the interest of the rightful owner. Possession will never be, or will subsequently cease to be, adverse if the rightful owner gives permission, expressly or impliedly, to the claimant to use the land. As Harman LJ observed in *Hughes v Griffin*:[442] 'time cannot run in favour of a licensee and therefore he has no adverse possession'. This principle was applied in *Ho Hang Wan v Ma Ting Cheung*.[443] Further, the English Court of Appeal made it clear in *BP Properties Ltd v Buckler*[444] that even subsequent permission granted to the person in possession will prevent title being acquired by adverse possession.

[5-298] Similarly, the effective grant of a licence by a third party to the squatter will prevent the squattter's possession being adverse. Such was the holding in *Tsang Foo Keung v Chu Jim Mi Jimmy*,[445] where Yuen JA concluded that the fact of the squatter having been granted a hawker licence by Government demonstrated that he had no unequivocal intention to possess the land as his own.

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[5-299] It would therefore appear that the grant of an implied permission or licence will prevent a claim to title by adverse possession, but such permission or licence will only be implied where the evidence provides a necessary and obvious inference that the party claiming to be in adverse possession has been in occupation with the permission or licence of the paper title owner. Such was the conclusion of Dty Judge Marlene Ng in *Civic Ltd v Yu Yee Miu*.[446] At issue in this case, inter alia, was whether the party claiming to have obtained title by adverse possession had been in possession as a result of a permission or licence granted by the paper title owner. The learned judge first observed that a permission or licence had to be established as a matter of fact. In *London Borough of Lambeth v Rumbelow*[447] Etherton J had said:

> ... in order to establish permission in the circumstances of any case two matters must be established. Firstly, there must be some overt act by the landowner or some demonstrable circumstances from which the inference can be drawn that permission was in fact given ... Secondly, a reasonable person would have appreciated that the user was with the permission of the landowner.

442 [1969] 1 All ER 460, 463.

443 [1990] 1 HKLR 649, [1990] HKCU 336.

444 [1988] 55 P & CR 337.

445 [2017] 3 HKC 527 (CA).

446 (unreported, HCA 225/2011, 28 March 2014).

447 (unreported, 25 January 2001).

[5-300] Further evolution of this test made it clear that, if permission were to be implied, it had to be a necessary implication which arose necessarily on the particular facts of the case. In *Hicks Development Ltd v Chaplain*[448] Briggs J explained that:

> ... as with other cases where the question is whether something should be implied, it is not enough that the overt acts or demonstrable circumstances are consistent with there having been permission. They must be probative of it.

[5-301] Silent passive inactivity on the part of the paper title owner amounting merely to acquiescence was not enough to stop the limitation period running and would not amount to the grant of a licence: *J Alston & Sons Ltd v BOCM Pauls Ltd*.[449] In the instant case the facts provided a necessary and obvious inference that the party claiming to be in adverse possession had been in occupation with the permission of the paper title owner and the claim to title by adverse possession failed.

[5-302] Clearly, a person who enters into possession under a sale and purchase agreement (unless that agreement is later cancelled or breached by the vendor) where there is no subsequent assignment will not be a squatter, since he is in possession with the consent of the owner. Such was the decision of Cheung J in *Country Rich Development Ltd v Ma Chan Fuk Kiu*,[450] following *Hyde v Pearce*.[451] Where, however, the vendor purports to sell the flat to a third person, the first purchaser might thereby be rendered a squatter and might, accordingly acquire title by adverse possession.[452]

[5-303] Where an owner has no present use for the land but intends some future specific use, there is authority to the effect that possession will only be adverse if it contravenes that intended future use.[453] More recently, however, Lord Browne-Wilkinson explained the position in *JA Pye (Oxford) Ltd v Graham*[454] as follows:

448 [2007] 1 EGLR 1 at pp 4-5.

449 [2009] 1 EGLR 93. See also *Hong Kong Kam Lan Koon Ltd v Realray Investment Ltd* (unreported, HCA 15824/1999, 11 October 2007) where Lam J said: 'Passive acquiescence is not enough to establish implied licence. There must be some overt acts on the part of the licensor referable to a licence having been granted to give rise to an implication by conduct: see *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 (HL), in particular paras 76 to 83'. See also *Raingate Ltd v Bee Cheng Hiang (Hong Kong) Ltd* (unreported, CACV 121/2016, 2 September 2016) where the scope of the doctrine of implied licence was considered in the context of an action for trespass.

450 [1995] HKCU 356 (unreported, HCA 5503/1993, 30 November 1994) (HC).

451 [1982] 1 All ER 1029.

452 See *Yu Fung Co Ltd v Olympic City Properties Ltd* [2015] 5 HKC 133 where the court concluded that the plaintiff purchaser under an uncompleted sale and purchase agreement had obtained title by adverse possession where the flat had been sold to a third party.

453 See *Williams Bros Direct Supply Ltd v Raftery* [1958] 1 QB 159, [1957] 3 All ER 593 (land held unused for future development since present development frustrated by the war; held that trespasser's erection of sheds and rearing of greyhounds did not amount to adverse possession); *Wallis v Cayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd* [1975] QB 94, [1974] 3 All ER 575 (land owned by petrol company could not be used for such purpose until road constructed; claimant farmed land; held that no adverse possession since acts of farming not inconsistent with the future intended use by owner).

454 [2003] 1 AC 419 (HL).

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> The highest it can be put is that, if the squatter is aware of a special purpose for which the paper title owner uses or intends to use the land and the use made by the squatter does not conflict with that use, that may provide some support for a finding as a question of fact that the squatter had no intention to possess the land in the ordinary sense but only an intention to occupy it until needed by the paper title owner. For myself, I think there will be few occasions in which such inference could be properly drawn in cases where the true owner has been physically excluded from the land.

[5-304] The Court of Final Appeal has also held in *Wong Tak Yue v Kung Kwok Wai (No 2)*[455] that, if a squatter in possession of land makes it clear that he is willing to pay rent to the owners if such is demanded, this will prevent the squatter from securing a possessory title.[456]

11.5 Period of adverse possession must be continuous

[5-305] For a squatter to acquire title by adverse possession the period of adverse possession must be continuous. This brings us to two issues which have exercised the attention of the courts at the highest levels. First, where more than one person is in adverse possession for consecutive periods of time, can such periods of time be aggregated for the purpose of the final squatter securing a good holding title? Secondly, does the period of continuous adverse possession cease where the squatter leases the property to another? Both these issues are dealt with below.

11.5.1 Continuous period of adverse possession by different squatters in succession

[5-306] The effect of a continuous period of adverse possession by different squatters in succession constituted the last issue to be adjudicated upon by the Privy Council in its appellate capacity from Hong Kong. In *Sze To Chun Keung v Kung Kwok Wai David*[457] the defendant entered into adverse possession of the plaintiff's land in 1955, built a hut on the land and erected a boundary fence. He remained in possession up to 1990 when the plaintiff commenced an action for possession. In 1961, the defendant had been 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

455 (1997–98) 1 HKCFAR 55 at 69, [1998] 1 HKC 1.

456 Yet authorities in England have reached a different conclusion. In *Ocean Estates Ltd v Pinder* [1969] 2 AC 19 (PC) the Privy Council held that the willingness of a squatter to pay for his occupation, if asked, did not in law indicate an absence of an intention to possess the land. This decision was upheld by the House of Lords in *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 (HL) at 46 and 71. See also the comments of Recorder McCoy, SC, in *Lau Wing Hong v Wong Wor Hung* [2006] 4 HKC 221.

457 [1997] HKLRD 885, [1997] 2 HKC 231 (PC).

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 (Cap 347) 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.

[5-307] The proposition 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 is clearly supported in *Ng Lai Sim v Lam Yip Shing*.[458] In 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.

11.5.2 Receipt or interception by squatter of rent payable by tenant to owner/landlord

[5-308] Adverse possession may also be taken by a person who wrongfully receives or intercepts rent from a tenant of the paper title owner. Thus s 12(3) of the Limitation Ordinance ('the Ordinance') provides:

> Where any person is in possession of land by virtue of a lease in writing by which a rent of not less than $20 is reserved, and the rent is received by some person wrongfully claiming to be entitled to the land in reversion immediately expectant on the determination of the lease, and no rent is subsequently received by the person rightfully so entitled, the right of action of the last-named person

458 [2001] HKCU 31 (unreported, CACV 57/2000, 19 January 2001).

> to recover the land shall be deemed to have accrued at the date when the rent was first received by the person wrongfully claiming as aforesaid and not at the date of the determination of the lease.

[5-309] Further s 13(3) of the Ordinance provides:

> For the purposes of this section:
>
> (a) possession of any land subject to a rentcharge by a person (other than the person entitled to the rentcharge) who does not pay the rent shall be deemed to be adverse possession of the rentcharge; and
>
> (b) receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3), the land in reversion shall be deemed to be adverse possession of the land.

[5-310] When called upon to construe the effect of these provisions Cheung JA in *Tang Kwan Tai v Tang Koon Lam, alias Tang Kun Lam*[459] ruled that ss 12(3) and 13(3) of the Ordinance applied to the situation where the squatter wrongly received, or intercepted, rent from a tenant who had been granted a lease by the owner of the land and these provisions did not apply to the situation where the lease was granted by the squatter himself. This view was subsequently confirmed by Bokhary PJ in *Cheung Yat Fuk v Tang Tak Hong*.[460]

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11.5.3 Squatter granting tenancy to another during his period of adverse possession

[5-311] 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*[461] and has now been confirmed by the Court of Final Appeal in *Cheung Yat Fuk v Tang Tak Hong*.[462] 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.[463] There were several compelling authorities for the proposition that a squatter could remain in adverse possession through a tenant.[464] The same had been held in the decision of the Court

459 [2002] 3 HKLRD 762, [2002] 4 HKC 482 (CA).

460 (2004) 7 HKCFAR 70, [2004] 2 HKLRD 86 (CFA). The effect of these provisions was considered more recently by Dty Judge Gary Lam in *Fang Moon Wan v Yu Chi Foon* (unreported, DCMP 2331/2015, 23 June 2016). Applying these decisions, the learned judge concluded that ss 12(3) and 13(3) of the Ordinance applied to the situation where the squatter wrongly received, or intercepted, rent from a tenant who had been granted a lease by the owner of the land and not by the squatter.

461 [1998] 4 HKC 122.

462 [2004] 2 HKLRD 86, [2004] HKCU 356.

463 *Bruton v London & Quadrant Housing Trust* [2000] 1 AC 406, 415 (HL).

464 See *AG Securities v Vaughan* [1990] 1 AC 417 (HL), *Nesbitt v Mablethorpe Urban District Council* [1918] 2 KB 1, *Bligh v Martin* [1968] 1 WLR 804.

[7-142] It seemed that in Hong Kong, decisions such as *Union Eagle Ltd v Golden Achievement Ltd*,[200] there was no room in Hong Kong conveyancing for this new relief, especially because 'there is no elasticity in punctuality', and Hong Kong conveyancing had no room for such indulgences. This was the view of the Court of Appeal also in *Howarth Cheung v Tsang Hong Kwang OK & Anor*.[201] The Hong Kong approach looks to the contract and its terms, and appropriate decisions on the forfeiture of the deposit on the purchaser's breach; such as *Polyset v Panhandat*[202] where the relevant question is one of penalties rather than relief in equity against forfeiture of a proprietary interest. Unless the quantum of the deposit is exceptionally large, *Polyset* allows 10% to be the norm, and further allows a greater percentage of the purchase price as deposit in appropriate circumstances.

[7-143] However, in *Pacific South (Asia) Holdings Ltd v Million Unity International Ltd*,[203] the Court of Appeal [2:1] reversed the setback to the new equity from the Privy Council's decision. Although the decision rested on estoppel, it relied on the presence of unconscionability as the trigger to relief resulting in the enhancement of estoppel and unconscionability and often resulting in the form of relief as restitution.

[7-144] In Australian courts, this re-interpretation of 'promissory estoppel' is generally rationalised as being a re-emergence of inherent equitable principles which requires the court to act to prevent equitable fraud (*Earl of Chesterfield*).[204] One such illustration of this is where the court acts to prevent 'unconscionable conduct': *Commercial Bank of Australia v Amadio*;[205] see also Hong Kong decisions, such as *Chu Wing Yip v Leung Siu Yuk*;[206] *World Ford Development v Ip Ming Wai*;[207] *Wellfit Investments Ltd v Poly Commence Ltd*.[208]

[7-145] The new equity has not confined itself to contracts and matters more usually considered to be within the province of equity. It has extended into administrative law by reference to the principle of 'legitimate expectation': *Hang Wah Chong Investment Co Ltd v AG*;[209] *Polorace Investments Ltd v Director of Lands*.[210] It is used extensively in commercial law thereby rendering otiose the two basic principles of that field of law: first, that because the parties to a commercial transaction were of equal bargaining power, equity had no role in company activities such as assisting in the avoidance of contracts, and, secondly, that the parties were thus free to contract on whatever terms they wished. The

200 [1997] 1 HKC 173 (PC).
201 [2015] 1 HKC 330.
202 [2000] 4 HKC 440 (CA).
203 [1997] 3 HKC 440.
204 (1751) 28 ER 82.
205 (1981) 151 CLR 442.
206 (1996) CA No 118/96.
207 [1993] 1 HKC 98.
208 [1995] 3 HKC 56.
209 [1981] HKLR 336.
210 [1997] 3 HKC 373.

court would intervene only at the level of remedy where one party had failed to perform his obligations.

[7-146] The elements of this estoppel are:

(a) it creates an equity in the party who asserts it;
(b) the remedy is whatever is necessary to prevent detriment from the unconscionable conduct of the other party; and
(c) it is a cause of action to prevent unconscionable conduct or to prevent the detriment to be suffered if the assumption or expectation was not honoured.

[7-147] Like the old promissory estoppel it can be a shield, ie a defence, but is now more often seen in its guise as a cause of action.

10.3 Uses of new estoppel

[7-148] There are probably three situations in which this estoppel functions: see comments on proprietary estoppel in *Thorner v Major*:[211] Cf comments in *Yeoman's Row Management Ltd & Anor v Cobbe*.[212] Although there is still some retention of 'promissory' in describing the estoppel, it would seem clear that the courts are really talking about the new amalgamated estoppel.

(a) In the case of pre-existing contractual obligations, the estoppel is equivalent to consideration in the waiver of those obligations. This is the traditional *High Trees* promissory estoppel to be used on 'a shield and not a sword' basis. It required a representation of fact, reliance on that representation and detriment to the promisee. These elements are still needed but perhaps stress on them is different than when considering *High Trees* estoppel. In *Legione v Hatley*,[213] the High Court of Australia held that the relevant statement was not clear enough to act as a representation to establish promissory estoppel. However, the court confirmed that *High Trees* would have applied had it been more forceful and unambiguous.
(b) Where there is no pre-existing contract, estoppel can be used in the formation of the contract, not as a consideration but as something akin to evidence of the 'intention to create legal relations'; thus if there is an offer, acceptance and consideration there will be a binding contract. Although disguised as promissory estoppel, this form is totally antipathetic to *High Trees*. This was the way in which it was used in *Walton's Stores (Interstate) Ltd v Maher*.[214]

An attempt to rely on promissory estoppel in this form was unsuccessful in *AG for HK v Humphrey's Estate*[215] because of a

211 [2009] UKHL 18, [2009] 3 All ER 945.
212 [2008] 4 All ER 713 (HL).
213 (1983) 152 CLR 406.
214 (1988) 62 ALJR 110 (HCA).
215 [1987] ANZ ConvR 212, [1987] 2 WLR 343, [1986] HKC 592 (PC).

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provision in negotiations that any agreement was to be 'subject to contract': cf *Pacific South (Asia) Holdings Ltd v Million Unity International Ltd.*[216]

(c) Where there is a pre-existing contract, a form of estoppel, said to be promissory, arises based not on an express or positive representation but on a negative representation. In *Foran v Wight,*[217] a vendor advised the purchaser that the former would not be in a position to complete the contract for the sale of land on the due date. The purchaser failed to obtain the finance which he needed to complete. The vendor then said he was ready to complete and on the purchaser's failure to do so, the vendor sold the land to a third party, and forfeited the deposit. The purchaser sought a declaration that he had validly terminated the contract on the acceptance of the vendor's anticipatory breach, with the result that he was entitled to a refund of the deposit. By a cross-summons, the vendor claimed entitlement to the deposit on the basis of the purchaser's non-completion. However, despite concern as to whether the purchaser had been able to show that he would have been ready and willing to complete but for the vendor's breach, the majority in the High Court allowed the purchaser to recover the deposit.

Estoppel here was to support a claim for equitable relief – in the form of relief against the forfeiture of the deposit. As such, it was functioning as a remedial device.

[7-149] Brennan J in *Stern v McArthur*[218] did say that 'the concept of unconscionability is not a charter for judicial reformation of contracts', perhaps there hoping this admonition would have slowed down the impact of equity, but that has proved groundless in Australia.[219] However, in Hong Kong, the Privy Council, in *Union Eagle Ltd v Golden Achievement Ltd,*[220] did not approve of the new reliance on unconscionability and preferred to allow equitable relief to be founded on estoppel or restitution. In practice, these two concepts are often the nominate remedy where there has been unconscionable behaviour.[221]

11. Procedure for a Sale and Purchase of Land

[7-150] Ideally, the process of entering into a contract for the sale and purchase of land in Hong Kong should observe the following procedures which is set out in very broad terms (subject to any provisions to the contrary in the contract):

216 [1997] 1 HKLRD 1238, [1997] 3 HKC 440.
217 (1989) 168 CLR 385.
218 (1988) 81 ALR 463 at 472.
219 *FAC v Makucha Developments* (1993) 115 ALR 679.
220 [1997] 1 HKLRD 366, [1997] 1 HKC 173 (PC).
221 *Pacific South (Asia) Holdings Ltd v Million Unity International Ltd* [1997] 1 HKLRD 1238, [1997] 3 HKC 440.

(a) the PA, prepared by the estate agent is signed by the V and P and the P pays the initial deposit (1 to 3% of the purchase price). At this point of time it is assumed the P has inspected the property;

(b) The V should instruct his solicitor to prepare the draft SPA either in the solicitor's own standard form,or in that of Form 2 of the Third Schedule to the CPO incorporating the conditions set out in Part A of Schedule 2 to the CPO, or a combination of these. In so doing, the solicitor should make inquiries and carry out certain searches, for example, at the Land Registry, and at the Companies Registry (where appropriate): *Lau Sik Ching Peggy v Ma Hing Lam & Ors*;[222]

(c) The V's solicitor will send the draft SPA to the P's solicitor, for comment, and ultimate execution by the P. This gives the P's solicitor an opportunity to seek to insert any special conditions for the benefit of the purchaser into the contract. Obviously, such terms will be conditional on the V's consent.

The P's solicitor will have carried out necessary searches such as at the companies' registry and the Land Registry and the High Court to ascertain whether the V is about to be made a bankrupt, or is insolvent. He will also have made appropriate inquiries as to the length of term remaining of the Government lease, whether there are any illegal structures or unauthorised building works, and whether there has been a breach of any covenants in the Government lease. Any requisitions on title will be served on the V's solicitor.

The title deeds, or certifies copies of them, will be sent to the P's solicitor before, or with, the draft SPA;

(d) Where the property is a unit in a MSB, the Pr's solicitor will have inspected the DMC, and sought confirmation that the vendor is not in breach of any of the covenants thereunder: see Law Society Circular No 40 of 1986;

(e) The P's solicitor will send the copy SPA executed by the P together with the deposit to the V's solicitor, who will then forward to the P's solicitor a corresponding copy signed by the V. The P should then register a memorial at the Land Registry to obtain priority against subsequent competing interests;

(f) A memorial of the SPA should then be registered at the Land Office. The P's solicitor will submit requisitions on title, within the time limit set out in the SPA. The V's solicitor will answer those requisitions in a timely manner. Requisitions on title may be made up to the time of completion;

(g) The P's solicitor prepares the draft assignment and memorial, and the completion undertaking (if applicable) and forwards them to the V's solicitor for approval. The assignment should then be executed by the P and forwarded to the V's solicitor for execution by the V pending completion. The P's solicitor should again search the

222 [2010] 4 HKC 215 (CFA).

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Land Registry to ensure that there have been no competing interests registered in the interim;

(h) Settlement can be effected in person or by way of completion by undertaking whereby the purchaser forwards the purchase money remaining due to the V's solicitor who gives an undertaking to forward necessary documents within a specified time to the P's solicitor; and

(i) where there is an occupier of the premises who is not the owner, a tenant or a lessee, obtain a statutory declaration that the occupier will claim no interest in the land which would adversely affect the P.

12. FORM

[7-151] Since the Statute of Frauds (29 Car II c 3) in 1677, a contract for the sale of land or an interest in land must be in writing: s 3(1) of the CPO which provides:

> (1) No action shall be brought upon any contract for the sale or other disposition of land unless the agreement upon which such an action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged or by some other person lawfully authorised by him for that purpose.

[7-152] Failure to comply with s 3(1) does not prevent enforcement of a valid contract of sale because the parties can proceed to execute an Assignment with the result that the informal contract merges into the assignment which transfers the legal estate in the land: s 4. Section 3(1) simply provides that under a contract by which a person is obliged to acquire or to part with some interest in land, the contract is unenforceable at common law.

[7-153] The subsection is procedural in preventing action on the oral contract without denying its existence. It is complemented by the parol evidence rule which applies to exclude oral evidence being given to add to, contradict or subtract from the terms of a written, contractual document. There are several exceptions to the rule, such as where the written document does not contain the complete written contract. Another operates where the written contract has already been amended by an enforceable collateral contract.

[7-154] It is up to the defendant to plead that the agreement has not been complied with. On the other hand, the plaintiff does not have to show the agreement is within s 3(1). If the defendant does not raise the absence of writing, then this factor is no bar to the plaintiff's action.

[7-155] Non-compliance with the subsection will not affect the validity of the contract. Instead, it prevents 'actual prosecution of claims in the law courts which are not supported by written evidence at the trial'. Thus, it procedurally inhibits resort to the agreement.

[7-156] Whilst the common law will not tolerate an unwritten contract for the sale of land or an interest in land, equity will grant relief, usually as specific performance, where the oral or open contract, has been accompanied by 'sufficient

acts of part performance': s 3(2) CPO. Equitable relief is discretionary so the plaintiff will need to show he acted properly, for example he has 'clean hands'.

[7-157] The Assignment of the legal estate required a document under seal, that is it is by deed: s 4(1) of the CPO. Without a deed, the Assignment can take effect only in equity; the result can be to make the V a trustee for the P pending completion of a satisfactory deed.

12.1 Section 3(1) of the CPO

[7-158] Section 3(1) of the CPO clearly applies to contracts for the sale or disposition of an interest in land. Land in this context includes fixtures, unless they are severable from the land. Not only contracts for the sale of land are included within its ambit but also contracts for leases, charges, mortgages and any other land transaction. Obviously, agreements for licences and pre-emptions are not included as these are merely personal interests.

[7-159] Under s 6 of the CPO, a tenancy for a term less than three years, which takes effect in possession at the best rent available without payment of a fine, is not within s 3(1). In addition, the interest receives statutory protection under s 4, and also under s 3 of the LRO.

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[7-160] The courts generously interpret the requirements for the note or memorandum. Thus, a series of pieces of writing or printing may function as the note or memorandum so long as there is something linking the last document to all others. The document(s) relied upon as a note or memorandum does not have to be a contract. In *JN Roland Deneault v Yangtzekiang Garment Manufacturing Co Ltd*,[223] it was held that pleadings in a discontinued action would satisfy the requirements of s 3(1). This was so where those pleadings evidenced the existence of a concluded agreement. In that case, action was taken on an oral agreement concerning land. The action was discontinued. The plaintiff then used the pleadings from the discontinued action, in which the defendant had acknowledged the existence of the agreement, as the basis of his claim. In his judgment, Huggins J (at 346) said that the legislation was not designed to defeat the plaintiff who had entered into an agreement but was merely to protect defendants who had not entered into agreements allegedly made by them.

[7-161] The note or memorandum does not have to be made at the time of concluding the binding contract but it must be in existence before court action is taken. Similarly, the note or memorandum cannot be in existence before the contract is made, unless the terms of the offer reflect the writing and the offeree expressly adopts that writing as evidence of the contract.

[7-162] To function as a note or memorandum for the purposes of the subsection, it is necessary that it contains at least details of the parties, property, and price, and that a concluded agreement has been made. Any special terms must also be included. Where the oral agreement contained special terms which are not present in the note or memorandum, the plaintiff can waive their operation if they are

223 [1977] HKLR 320.

wholly in the plaintiff's favour and severable from the concluded agreement. Similarly, if they favour the defendant but are not incorporated, the plaintiff may offer to perform them to ensure that the written part of the contract is enforced.

[7-163] The parties must be named and described so that their identities are clear. For example, it is sufficient to describe the V as 'owner' rather than by name where his identity can be established with certainty. However, it is not sufficient to describe him as V for this requires use of parol evidence to establish his identity. In such cases, there is no justification for resort to any of the exceptions to the parol evidence rule. However, where it is unclear which party is the V and which is the P, parol evidence can be used on the ground that there is a latent ambiguity in the document which requires external clarification.

[7-164] Where one party makes use of an agent whose identity rather than the principal's is disclosed, the subsection will be satisfied in certain cases. There are two steps in satisfying the requirement of 'parties': first the note or memorandum must contain details of two parties who are named or otherwise identified and, secondly, they must have agreed to be bound. The agent will be liable personally, and where he is authorised his principal may also be liable. Where one of those parties is the agent for an unnamed party but where the other party knows about the agency, then the subsection has been satisfied if the agent had authority to contract on behalf of his principal. Both of these elements were referred to in *Davies v Sweet*,[224] where it was said that agency to enter into and sign a contract on behalf of the principal 'may be conferred upon an estate agent expressly or may be inferred from the circumstances of the case'. Lord Evershed MR also added that the agent would:

> render himself liable upon the contract and nonetheless so though it may be established that he was in fact acting as agent for another who may also be liable under the contract.

[7-165] However, in the absence of one or both of these elements, the note or memorandum would not satisfy the subsection.

12.2 Price

[7-166] The general principle is that the price for the land or the interest in land being disposed of must be stated with certainty, ie the specific amount must be referred to. However, where no specific amount is given, the note or memorandum can still satisfy the subsection where a formula and machinery for using that formula is contained therein. The machinery can be extra-judicial or it can be the court itself. There is no uniformity in decisions. Although it would seem apparent that the courts are more prepared to salvage agreements rather than not, equally clear there would also seem to be one area in which the courts are not prepared to imply terms.

12.3 Signed by party to be charged

[7-167] The defendant must have signed the note or memorandum. Otherwise, it is incomplete and the court will not enforce it. It is unnecessary for the plaintiff

224 [1962] 1 All ER 92.

to sign. The note or memorandum can consist of a series of documents. In such a case, the subsection will be satisfied if, although not referring to each other, the document which is signed expressly or impliedly refers to the others.

[7-168] In *AG v Tong Iu & Anor*,[225] the Government, having sold land, sought payment of an instalment of the premium then due. The Government lessee who was in financial difficulties said the two relevant documents did not constitute evidence of a binding agreement and so he could withdraw from the transaction. The two documents were the Conditions of Sale and a memorandum signed by the defendant. The court held that the defendant, on signing the memorandum, acquired an immediate right of possession prior to the completion of the conditions in the Conditions of Sale. The two documents illustrated a binding agreement which the Government was entitled to enforce.

[7-169] Where the defendant has not signed but an agent has done so for him, the agent must be properly authorised. Such authority will include subsequent ratification by the principal, as well as agency by estoppel where the principal is estopped from denying the agent's authority. As the note or memorandum functions in place of a written contract, there is no need for the authority to be by deed, as with a power of attorney, though it must be in writing. However, if the agent is also to execute the assignment on behalf of his principal, then the principal must execute a valid power and that power must be registered under the Powers of Attorney Ordinance (Cap 31).

[7-170] A solicitor does not automatically have implied authority to sign a contract on behalf of his client; see however *Wise Think Global Ltd v Finance Worldwide Ltd*.[226] This requires express, written authority. In *Daniels v Trefusis*,[227] the defendant's solicitor was authorised to sign certain letters on behalf of the purchaser. Some letters constituted, when read together, sufficient details to satisfy the subsection. Thus, the purchaser was bound. Although the solicitor had not been authorised to sign a contract, but because he had a general authority to sign letters, his client was bound. This meant that the note or memorandum could comprise a series of documents which referred to each other and which read together contained all of the relevant details. The requirement for the agent to be authorised by deed was a later development in the law.

[7-171] There was no real indication that the parties had intended to be bound by the correspondence. *Daniels* was decided at a time when the note or memorandum did not need to evidence a concluded agreement and so the decision should be looked at as one on the particular facts of that case. However, the implicit warning is that although a solicitor will not be able to bind a client without authority, the absence of authority might be irrelevant where the fact situation matches the *Daniels* and where the court establishes an intention on the part of the client to be bound.

225 [1968] HKLR 903.
226 [2014] 4 HKC 167 (CFA).
227 [1914] 1 Ch 788.

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[7-172] The signature can take any recognised form. Thus, it can be a signature, a chop, a mark, initials and even a printed sign. However, in all cases, it must be clear that the signer intended to sign and to be bound. The signature must also identify the signer adequately. Thus, references to 'your mum' or 'your uncle' may be insufficient for although they might satisfy the element of 'parties', yet such a signature is not a clear, identifying one. Where a printed signature is used, then clear evidence is required that the named party adopted it.

[7-173] Does the mere signing mean the signer is bound or does the subsection require delivery of the signed document as well? The court determines liability on this in the same way as where the signed note or memorandum is handed over. The test is that of intention. If the signed document is handed over but the signer does not intend to be bound, the document does not satisfy the subsection. If the document is not handed over and the signer does intend to be bound, the document does satisfy. This interpretation lays stress on the need to have a concluded agreement, for without this the writing is useless.

13. Part Performance

[7-174] The effect of s 3(1) of the CPO is simply to make the agreement unenforceable at law, due to the absence of writing; but the agreement is not void. Where s 3(1) is not complied with, it is possible for the plaintiff who had performed sufficient acts of part performance, to seek equitable relief on the basis of that performance. Section 3(2) provides that:

> (2) Nothing in subsection (1) shall affect the law relating to part performance or sales by the court.

[7-175] Part performance involves one party performing certain acts which are referable to the contract he claims is in existence and for which he seeks equitable relief in the form of specific performance. Specific performance is the usual remedy for breach of a contract for the sale or disposition of land. Part performance is distinguished from 'partial performance', which is a factor in deciding whether a party to a contract has performed sufficiently to enable him to be discharged therefrom without liability for any minor non-performance.

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[7-176] In *Lam Ngok Ching & Anor v Lam Tse Choi & Ors*,[228] the relevant factors relating to part performance were described by Suffiad J, at paragraphs 36 to 38, as:

> (a) part performance is really evidence to show or prove the existence of the contract;
> (b) the proper view is that without acts of part performance, the court will not even commence to consider the question of specific performance; and
> (c) if sufficient acts of part performance can be shown, the court may consider the question of specific performance; relief will be granted only if the court is satisfied that in all the circumstances that remedy should be granted.

228 [2006] HKCU 932.

[7-177] The defendant had sought to defend his occupation of land, claiming to be entitled to specific performance of two agreements, but at the same time maintaining an alternate claim based on adverse possession. Suffiad J observed the claims were inconsistent and noted that:

> he could only ask for specific performance … if the Agreements are still on foot, but if they are still on foot, and until there is repudiation of the Agreements, the defendant's occupation of the Property could not be adverse.

[7-178] The defendant had not paid the purchase price.

[7-179] The court held that he had gone into possession under a licence granted by the agreements. He had remained in possession for more than 20 years without being asked to leave. At one point he acknowledged the title of the plaintiff. He only sought specific performance, and the possessory title, when he had been asked to leave. The court decided that the plaintiff was entitled to possession and mesne profits. As there was no evidence presented by the plaintiff as to the value of the property, the mesne profits were set at the nominal amount of $1.

[7-180] The consequence of the court accepting that there was part performance is not to enforce defective contract. The result of part performance is that the court in its equitable jurisdiction (subject always to the fact that equitable relief is discretionary) will treat the defendant as the recipient of a *benefit from the performance*, and as such would be acting unconscionably to deny relief to the plaintiff. So, the court in its equitable jurisdiction will **never** circumvent the Statute of Frauds (ie in Hong Kong, s 3(1)) by enforcing the unenforceable contract. Instead it is preventing the actions of the defendant amounting to equitable fraud.

[7-181] The acts required as sufficient acts of part performance were described in the House of Lords in *Steadman v Steadman*,[229] as:

> If a party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn round and assert that the agreement is unenforceable. Using fraud in its older and less precise sense, that would be fraudulent on his part and it has become proverbial that courts of equity will not permit the statute to be made an instrument of fraud.
>
> [U]nless the law is to be divorced from reason and principle, the rule must be that you take the whole circumstances, leaving aside evidence about the oral contract, to see whether it is proved that the acts relied on were done in reliance on a contract: that will be proved if it is shown to be more probable than not.

[7-182] However, there was no clear decision on whether the contract had to be a contract affecting land or whether any type of contract would do.. In Hong Kong, only part of s 4 of the Statute of Frauds survives in Hong Kong; and that as s 3(1). In *Cheang Kwok Sam v Chui Kin Wing & Anor*,[230] it was said that:

> One must not first look at the oral contract to see whether the alleged acts of part performance were consistent with it but that one must first look at the alleged acts of part performance to see whether they proved that there must be a contract. It is only if they do so prove that one can bring in the oral contract.

229 [1976] AC 536.
230 [1995] 1 HKC 637.

[7-183] The plaintiff, seeking to rely on those acts, must have performed them. They should be referable to the contract involving land, they must be unequivocal and the oral agreement must contain sufficient terms for the court to order specific performance. In *Chan Yat v Fung Keong Manufacturing Factory*,[231] both parties had carried out acts of part performance, so that either party could have relied on this equitable relief. However, in the events that occurred there, the lessor was more concerned with obtaining damages for breach and for that he had to rely on s 3(1). Among the acts performed by the lessor were those whereby:

(a) he no longer sought a lessee for the property;
(b) he told all who inquired that the property was let;
(c) he wrote to the neighbouring owner to convey a complaint of the lessee; and
(d) he completed the building and allowed the lessee to install machinery there before the due date for possession by the lessee.

[7-184] Amongst those performed by the lessee company were:

(a) it made complaints about neighbouring owners which the lessor conveyed to them;
(b) it paid part of the cost of the electricity installation; and
(c) it paid a deposit for the rent.

[7-185] Had the common law remedy failed, the lessor would have been able to seek specific performance based on his acts. Alternatively, had the lessor refused to continue, the lessee would have had his choice of remedies also.

14. EXCHANGE

14.1 Where there is provisional agreement

[7-186] All too frequently in Hong Kong, neither V nor P instructs a solicitor until they have signed a binding PA prepared by the V's estate agent. Generally, the formal SPA prepared by the V's solicitor which both parties then sign and exchange at a later date does alter the terms appearing in the pre-existing binding agreement. It is usual for both documents to follow Form 2 of Schedule 3 and insert conditions from Part A of Schedule 2 although in the PA these terms are often unrecognisable.

[7-187] The timing of the exchange, and of the payment of the balance of the purchase money will be set out in the PA. It is to be remembered that time is of the essence for the contract, unless the parties have otherwise agreed.

14.2 Where there is no binding PA

[7-188] Where the parties are not already bound by a PA, the contract in duplicate is prepared by the V's solicitor having received full instructions from the V and after the solicitor has made certain inquiries. The two legal representatives

231 [1967] HKLRD 364.

then negotiate the terms of the SPA. Inquiries made by the P's solicitor relate to the V's title and capacity to sell includes the following:

(a) inquiries in connection with the V being able to deduce good title, dependent always on what his obligations in respect of the title will be under the contract. To ensure that the V will meet his obligations, it will usually be necessary to carry out a search the Land Registry and the Companies Registry (where appropriate), and to inspect the property to see whether there are any illegal structures or unauthorised building works, or to view the car parking facilities and similar factors; and
(b) inquiries from the vas to any representations he may have made to the purchaser which he may be unable to maintain. These representations can take effect as collateral contracts. The purchaser may also have a remedy under s 3(1) of the Misrepresentation Ordinance (Cap 284) under which the measure of damages is that of the tortious action for deceit, including in recent decisions, the right to potential profits. See *East v Maurer*;[232] and *Long Year Development v Tse Fok Man Norman*.[233]

[7-189] At the same time, the Ps solicitor will be making similar searches and inquiries at the Land Registry, the Companies Registry and inspecting the physical of the land.

[7-190] One part or copy of the draft contract is then forwarded to the P's solicitor together with the title documents or certified copies thereof. The title deeds or the copies will be held by the P's solicitor on an undertaking to return them to the V's solicitor when so requested. This step in the transaction is the same where there is a PA, but by that time the P is usually bound by an enforceable contract.

[7-191] The P's solicitor is entitled to seek amendment to the draft. Prior to signing, the P's solicitor will investigate the title and other relevant matters in light of the documents forwarded with the draft contract, and prepare to make requisitions: see however the timing problems in *First Shanghai Enterprises Ltd v Dahlia Properties Pte Ltd*.[234]

[7-192] Once the draft has been accepted, it should be signed by the P whose solicitor will forward it to the V's solicitor together with the deposit, and the V's solicitor will forward a copy signed by the V to the P's solicitor.

[7-193] The process referred to above represents the ideal but there are variations of this in practice. The contract for the sale of land is effected by each party signing one part of a formal sale and purchase agreement and those parts being exchanged. Generally, until the exchange, there is no binding contract although the parties can provide otherwise. Ideally, all terms on which the parties agree to be bound should be settled before the signing and exchange of the parts.

232 [1991] 2 All ER 733.
233 [1991] 2 HKC 393.
234 [2002] HKCU 1521.

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14.3 Exchange in escrow

[7-194] An exchange in escrow is a conditional exchange pending the completion of a condition precedent or some other similar factor; the purpose is to seek to ensure the P is not in breach of his obligations under the PA or some other agreement with the V but that he is not irrevocably bound until the factor in escrow has been settled. Generally, an escrow agency is used in relation to payments under a commercial transaction, and the agency agreement expressly provides that the escrow agent has no right to any interest payable on the escrow money whilst in his care. He has fiduciary duties to the person entitled to the money, and must act in accordance with his agency

[7-195] Where the exchange is expressed to be in escrow, there is doubt as to the date when the deed takes effect. There are two views. One view is that the parties are bound conditionally on the delivery of the deed but that on the successful happening of the named event, the deed takes effect from the date of delivery when it then binds the grantor absolutely: *Alan Estates Ltd v WG Stores Ltd.*[235] From the related back date, the deed then binds the parties *vis-à-vis* third parties. The other view is that the parties are not bound in any way until the event occurs and on that date the deed becomes binding without relation back: *Beesly v Hallwood Estates Ltd*, and *Terrapin International Ltd v Inland Revenue Commissioners*.[236]

[7-196] The *Alan* decision treats the parties, prior to the deed becoming absolute, as bound by the terms of the underlying contract. Lord Denning MR in that case mentioned that pending this, the grantor would not be able to dispose the property contrary to the interests of the grantee. The grantor was bound to give the grantee a reasonable time to perform and only if the condition was unfulfilled could the grantor deal with the land. This seems to make the grantor some sort of trustee for the benefit of the grantee. Once the condition has been performed, the parties to the deed can then bind third parties in respect of the property.

[7-197] It would seem that the *Alan* decision is the preferable one, especially in view of the need to register for priority purposes under the LRO. Whilst registration does not create or effect any interest in land, it does offer protection to those claims to interests in land which are evidenced in writing sufficient to be detailed in a memorial which is then registered under the Ordinance. Thus, where the deed has some effect as between the parties thereto prior to the fulfilment of the condition, the grantee is in a position to claim an interest in land, potential though it be. Under the opposing view, it would be difficult for the grantee to substantiate a claim prior to the fulfilment of the conditions and so would not be in a position to defend an action by the grantor seeking the vacation of any registration under the Ordinance.

235 [1981] 3 WLR 892.
236 [1976] 2 All ER 491.

15. Stakeholder

[7-198] Often, the V's solicitor will act as a stakeholder whereby he holds the deposit or the balance of the purchase money in some type of relationship which sometimes seems akin to a fiduciary capacity: see *Wise Think Global Ltd v Finance Worldwide Ltd*.[237]

[7-199] The role of the stakeholder generally was described by Farquharson LJ in *Rockeagle Ltd v Alsop Wilkinson*,[238] as:

> the duties and authority of a stakeholder lie in contract or quasi-contract and not as trustee. The task of a stakeholder, when paid a deposit by the parties to a contract of sale of a property or as may be, is to hold the stake upon the happening of the events that are specified in the contract. Thus, if in due course the sale of the property is completed or for any reason the deposit is forfeited, it would be his duty to pay over that money to the vendor.
>
> Alternatively, if for any other reason the sale is not proceeded with, he must pay the money to the original depositor, that is to say the purchaser.
>
> The problem arises whether there is a right on the part of the contracting parties to require the surrender of the stake from the stakeholder and to terminate that authority before either of those specified events take place. …
>
> There must be an implied term in the contract made between the original parties and the stakeholder that they can, should they so desire, withdraw that authority and direct him to apply the money in the way both agree.

[7-200] In *Edward Wong Finance Co Ltd v Johnson, Stokes & Master*,[239] the Privy Council added a necessary protection to the purchaser by noting that where the purchaser pays money to the vendor's solicitor under the terms of the contract and that solicitor holds it as stakeholder, then it is received as agent of the vendor. On the vendor's default, the purchaser can seek specific performance on the basis that the money was received by his agent. This applies even though the solicitor may have acted as stakeholder for both parties.

[7-201] In *Fulltrend Co Ltd v Longer Year Development Ltd & Anor*,[240] the V's solicitor acting as stakeholder released the purchase money to the V; the P objected on the ground that the P's objections on title had not been satisfactorily dealt with. Two adjoining pieces of land had been sold to two persons who later incorporated. The two Ps were the directors of the new company (DC) and they nominated the company as the ultimate P As directors, they then conveyed the land to a third party (RDM). Several transactions later, the present owner (JIL) sought to sell to the first defendant, who then entered into a sub-sale with the plaintiff. The plaintiff sought to object to the title on the grounds that DC had purported to assign to RDM as 'beneficial owner' whereas it would seem that the two original Ps were beneficially entitled by way of trust. However, the court held that the objection was not well-founded and was misconceived for the two original purchasers had executed the assignment as directors without any reservations of their personal interests. In the event, the solicitor had properly released the money to the vendor.

237 [2014] 4 HKC 167 (CFA).
238 [1991] 3 WLR 573.
239 [1984] AC 296.
240 [1990] 1 HKC 452.

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