THE HONG KONG CONVEYANCING & PROPERTY LAW ASSOCIATION LIMITED

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Ref: AS/CPLA/ckw

Date: 27 March 2009

The Land Registry
28/F, Queensway Government Offices
66 Queensway
Hong Kong

Dear Sirs,

Re: Consultation on Amendments to Land Titles Ordinance -
[1] Conversion of Existing Land and Property to Land Title Registration System
[2] Rectification and Indemnity Provisions

We refer to the above Consultation papers and hereby enclose our submissions on the respective papers for your consideration. Thank you for your attention.

Yours sincerely,

Anthony Shin
PRESIDENT

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Submissions on Consultation on Amendments to Land Titles Ordinance Conversion of Existing Land and Property to Land Title Registration System

Well said about the Background and features and benefits of the LTO as enacted

1. The **Land Titles Ordinance ('LTO')** as enacted in 2004 was the fruit of two decades of efforts in the conversion of the Hong Kong land registration system from the existing deeds registration system to title registration system.
2. The Consultation paper by the Development Bureau of December 2008 on proposal for amendment of the conversion mechanism ('the Paper') well explained the background and salient features of the scheme in the LTO, namely an interim period of 12 years before conversion, caveats and cautions against conversion to allow for registration of notice of claims otherwise not allowed under the **Land Registration Ordinance ("LRO")**, automatic conversion at the end of the interim period, and preservation of unwritten /unregistered interests before the property is sold to a purchaser for value.
3. The central feature of LTO is the automatic conversion at the end of the interim period, around which interim period, caveats and cautions and others revolve.
4. The Paper also put it very succinctly that the features were intended to address the following concerns:
   a. Notice and opportunity for the public to act during the interim period by way of caveats and cautions against conversion – Paragraph 4(a) of the Paper says:

      *'The **12-year interim period gives substantial time** within which to ensure that all reasonable measures to inform the public of the change can be given. **The amendments to the LRO give interested parties simple and effective means to prevent loss of an interest that might otherwise happen** if an owner were to sell a property immediately after conversion before a claimant had opportunity to enter a caution on the land titles register. **The caveat provides a simple means** to give notice of a claim before conversion. **The caution against conversion allows interested parties to prevent conversion while a claim is determined** so that land*

titles register will give a proper reflection of the state of title.' (emphasis added)

b. Certainty by automatic conversation – no indefinite period of parallel operation of the LRO and LTO - Paragraph 4(b) of the Paper says: *'there should not be an indefinite period of parallel operation of the LRO and LTO with an uncertain timetable for conversion.'*

c. No new liabilities imposed on conveyancing solicitors - Paragraph 4(c) of the Paper says: *'...The automatic conversion process would not create any new liabilities for solicitors.'*

5. The LTO as enacted therefore present a near-perfect if not the perfect model for conversion to title registration system in Hong Kong.

6. We are not aware if it is appropriate that the automatic conversion mechanism, being the central feature of the conversion to title registration system and passed into law in the LTO, can itself be an area for the post-enactment review.

7. In any event, the issue so fundamental as the possible modification of the automatic conversion mechanism as proposed in the Paper must only be considered on very strong and convincing grounds.

Alleged problems of automatic conversion exaggerated

8. For reasons to follow, we take the view that the issues that allegedly presented practical difficulties for the conversion exercise have been exaggerated.

9. With a view to resolving the alleged difficulties, the Paper offered an alternative scheme which in essence is a modified gradual conversion by a process of upgrading of title over an indefinite period. However, we consider that such alternative scheme cannot resolve the alleged difficulties.

Indeterminate ownership

10. Paragraph 5(a) of the Paper claims that cases have been found where it is not clear who the true owner is, either because of multiple registers for the same property, or single registers appear to contain more than one chain of title. We are informed that less than 500 such cases had been identified. However, we have not been provided the facts of these alleged cases. In the absence of such facts, it would appear that the problem arose from the keeping of the registers. The Paper also says that unlike the LRO, under the LTO, the Registrar would be compelled to make a judgment as to who the owner in such cases should be. We are not certain as to the source of this obligation in the LTO.

11. We consider that the alleged difficulty is not as difficult as it appeared and/or can

be resolved by automatic conversion under the LTO as follows.

12. LRO land shall become registered land as provided in Schedule 1 (LTO Section 24).

13. **The source of automatic conversion is in Section 2(1) of Schedule 1 of the LTO (When LRO land becomes registered land)** which provides:

> *'Subject to the provisions of this section, **on the commencement of the 12th anniversary of the appointed day, all LRO land shall be deemed to be registered land**, and all the provisions of this Ordinance shall apply to the land accordingly.' (emphasis added)*

14. **Section 8 of Schedule 1 of the LTO (Registers kept under Land Registration Ordinance)** provides:

> *'On the date of first registration of LRO land for which a **register** has been kept **under the Land Registration Ordinance (Cap 128)**, the register **shall**, subject to the regulations, **be deemed to form part of the Title Register**, and all the provisions of this Ordinance shall apply to the register accordingly.' (emphasis added)*

15. **Accordingly, whilst the LTO already applies to new land on commencement, all LRO land are converted in one go 12 years from commencement. What do registered owners under LTO hold? LTO Section 25 (1) provides:** *'Subject to sections 27 and 82, the **registration of a person as the owner** upon a transfer of land **shall vest** in the person who is registered as the owner of the land the **legal estate or equitable interest and rights** described in subsection (2), **free from all other interests** and claims **except as specified in subsection (3).**' (emphasis added)*

16. **LTO Section 25 (3) provides:** *'The person who is registered as the owner shall hold his legal estate or equitable interest and rights **subject to**—*

> *(a) any covenants, exceptions, reservations, stipulations, provisos or declarations contained in the Government lease or the agreement for a Government lease of the land;*
>
> *(b) **any registered matter affecting the land;** and*
>
> *(c) any overriding interest affecting the land.' (emphasis added)*

17. Thus, the alleged indeterminate ownership situations described by the Paper, namely multiple registers for the same property, or single registers appearing to contain more than one chain of title, are already matters on the LRO register and will be ***deemed to form part of the Title Register***. The fact that there is /are other owners is arguably one such registered matter affecting the land and the owners' respective interest and rights will be subject to each others rights. This is a matter which the relevant owners have to live with as they have always done

under the current system. The owners will have to resolve their respective rights and claims through the courts if they have not done so. There is no need to withhold conversion unless a caution is registered.

18. Furthermore, if the present register is not clear as to who the true owner is, that is a matter which the Registrar can form the opinion to be contained in the Title Register (LTO Section 4(2)(g)) and enter some additional remark about this in the Title Register.
19. The alleged problem of indeterminate ownership is therefore misconceived. The interim period and cautions against conversion would appear to us a reasonably good design to address the same.
20. On the other hand, the modified gradual conversion in the alternative scheme cannot in our view resolve the alleged indeterminate ownership cases, nor assist the Registrar to make a judgment as to who the owner in such cases should be. Even when one of the indeterminate ownership applies for upgrading his title say 20 years later, the Registrar should still have the same difficulty of determining who the rightful owner is.
21. As there are less than 500 such cases identified to date, it is not in the public interest or justified in any manner whatsoever for all the rest of the 2.8 million properties to suddenly suffer a modification to a gradual conversion.

Unknown liabilities – immunity under LTO Section 11

22. Paragraph 5(b) of the Paper claims that the **Land Registry ('LR')** is liable for any errors in the land titles register that are due to the mistake or omission of public officers. With due respect, LTO Section 11(1) and (3) already provides for immunity to the Registrar and his public officers.
23. **LTO Section 11(1) provides:** *'**No person to whom this subsection applies, acting in good faith, shall be personally liable in damages** for any act done or default made in the performance or purported performance of any function, or the exercise or purported exercise of any power, under this Ordinance.'*
24. **Section 11(3)** expressly covers the Registrar and his public officers as persons to whom subsection (1) applies.
25. If the Administration is concerned with the Government's liability, immunity is provided in **Section 11(2):** *'**The Government shall not be liable in damages** even for act or default by a person not acting in good faith **unless** that act or default gives rise to an **indemnity under Part 12** and, in any such case, the liability shall not exceed the amount of the indemnity provided under that Part in respect of that act or default.'*
26. The Paper further says: *"Since there is no requirement to register instruments*

affecting land under the LRO, nor any requirement for the LR to investigate the validity of deeds before they are registered, ***there is a risk*** *that upon conversion the land titles register will not be accurate* ***due to mistakes or omissions of other parties. There is no practical means of assessing the extent of such inaccuracies.***"

27. No actual case of mistakes or omissions of **other parties** has been identified or disclosed. There is no assessment of the **extent of such alleged inaccuracies** and the alleged risk involved. It is therefore difficult to see how the Administration could arrive at the conclusion that *'the* ***LR may owe a duty of care and be held liable*** *to any party who suffers loss* ***due to inaccuracy in the land titles register,*** *whether or not the* ***mistake or omission was that of*** *a public officer or* ***a private party.***'

28. Given that the Administration claims that *'there is no practical means of assessing the extent of such inaccuracies'*, we consider that the alleged unknown liabilities are based simply on an unsubstantiated fear of *'inaccuracy in the land titles register'* and the alleged unknown liabilities problem is also misconceived.

29. We note that in view of the long history and the manner in which the existing register has been kept, some parts of the current register, which will be converted to Title Register, may have mistakes and/or omissions. However, we believe from the practice of the LR in stopping unregistrable instruments and those instruments with errors or discrepancies that it must be extremely remote for such mistakes and/or omissions to be so material as to displace the ownership of an actual true owner of land leading to substantial claim for damages. If there had been such remote cases of errors, the claims should have surfaced.

30. On the other hand, we do not see how the alternative scheme can help focus on curing any such remote cases of errors. Furthermore, if the LR takes up upgrading of title under the alternative scheme, it unavoidably and unnecessarily assumes the heavy duty to approve title in each and every case in Hong Kong and takes up a duty of care not otherwise covered by the present indemnity provisions.

Impracticality of pre-conversion screening

31. We accept that a basic screening, being not an in-depth investigation of title for each of the 2.8 million registers, is all that is required to match the requirements of the LTO.

32. We also accept that it would be impractical to carry out detailed title investigation for all LRO properties in Hong Kong with a view to address the alleged issues in Paragraphs 5(a) and (b) of the Paper, which we consider are

misconceived as explained above, and the LTO as enacted already sufficiently deals with them.

33. As the Paper Paragraph 5(c) acknowledges, the process of such detailed title investigation would be *'seriously complicated by the registration of new documents during the interim period. Based on past records, around 8 million new documents can be expected to be registered over the 12-year period.'*

34. The longer the current system is allowed to continue by a delay in the commencement of the LTO, we can expect more and more deeds to be registered under the LRO at this rate.

35. It is submitted that there is no need for detailed title investigation before conversion and such pre-conversion screening is not a real difficulty.

Mismatch between costs, possible liabilities and financing

36. New land granted after commencement of the LTO will be registered under the LTO from the start, and income will be generated from transactions under the LTO immediately. Accordingly, we do not know the basis for the claim that during the 12-year interim period, income from transactions under the LTO will be 'very low'. No estimates have been provided.

37. Paragraph 5(d) of the Paper says the LTO revenue will increase after conversion as all transactions will be registered under the LTO. If so, automatic conversion seems the best way to ensure that all revenue of converted land goes under LTO.

38. The alternative scheme introduces 'automatic conversion' after 3 years from commencement, and we believe this is to starting drawing LTO revenue as all transactions will be registered under the LTO. However this is not 'automatic conversion' in the true sense of the words as Paragraph 9(c) clarifies that *'title would have to be deduced as required under the **Conveyancing and Property Ordinance ('CPO)** until title is upgraded'*. For that reason, it is difficult to understand why the Administration proposes the alternative scheme to slow down true automatic conversion.

39. We consider that in any event the costs for operating the system should be funded by the Government if initial revenues are not sufficient.

40. For reasons explained above, the alleged possible liabilities of the LR or the Government are misconceived.

41. Given the volume /value /consideration of the sale and purchase of building units in Hong Kong, we believe it is possible to build up the Land Titles Indemnity Fund with an appropriate diversion of the revenue on all land transactions in Hong Kong under the LRO from commencement of the LTO without disturbing

the true automatic conversion.

Conversion of Caveats

42. Registration of unregistered interests, caveats and cautions are made under the LRO and LTO, which should, or can if necessary be amended to, adequately address the question of priority amongst competing interests.
43. Even if complex transitional provisions are required, we do not consider that this would justify a wholesale abandonment of the automatic conversion. In any event, the alternative scheme, one feature of which is to remove the need for caveats or cautions, still cannot resolve the question of priority amongst competing interests if they are not registered.
44. If there are potential for disputes and litigations, it is always open to the parties to resolve their respective claims through the courts.

What is the alternative scheme?

45. Paragraph 8 of the Paper suggests reverting to a gradual conversion approach *'on a case by case basis upon the first transaction in each property after commencement of the LTO'*, well acknowledging that this gradual approach was rejected in 2003.

The Administration seeks to re-open the issue by way of an alternative scheme.

The information on the alternative scheme under Paragraph 9 of the Paper is scanty.

46. New land will be registered as Registered Land under the LTO. This is no change from the LTO as enacted (Paper Paragraph 9(a)).
47. Land other than new land will be automatically converted from the present LRO register to the Land Titles Register in 3 years from commencement of LTO. However, transactions in converted land would remain subject to any *'subsisting interests'* and title would have to be deduced as required under the CPO until title is upgraded (Paper Paragraph 9(b), (c)).
48. After the designated date (tentatively 12 years after conversion, that is 15 years from commencement of LTO), an application will be allowed for application to the Land Registrar to upgrade the title (Paper Paragraph 9(d)).
49. No amendment to LRO would be required because the early conversion of land would *'remove the need for caveats or cautions against conversion. Converted land would remain subject to subsisting interests until upgrading. ... a party having a claim under an unwritten equity would not be faced with an immediate risk of losing their interest if the property were sold directly after conversion.*

They would have time to put a ***warning notice*** *on the land title register to give notice of their claim before upgrading took place.'* (Paper Paragraph 9(e))

We have a number of queries -

50. It is not clear if the 'subsisting interests' are registrable if there is no provisions for caveats or cautions against conversion.
51. Is the 'warning notice' registrable on commencement of LTO or only when the land is converted in 3 years?
52. What if an owner sells the property before or immediately after conversion without making an application for upgrade? And/or if he does so before the party having a claim under an unwritten equity has time to put a warning notice on the land title register?
53. What is the period of time allowed for a party having a claim under an unwritten equity to put a warning notice on the land title register?
54. What is the safeguard to protect the interest of such unwritten equities?

The proposed application to upgrade will be 'on a case by case basis upon the first transaction in each property after commencement of the LTO' (Paper Paragraph 8), and no certificate of good title would be required from a solicitor in private practice (Paper Paragraph 9(d)).

Again, we have queries:

55. Does it mean that no early application would be allowed without a transaction?
56. Does it mean that an owner can only apply when he has signed preliminary agreement or accepted initial deposit for a sale?
57. On such an application, will the LR peruse all title deeds and documents to carry out an in-depth investigation of title on each case? If so, how much would it cost to an average property owner for such application? Alternatively what would be the LR's charge basis?
58. Can LR approve the upgrade application within an average of 4 weeks before completion of a normal transaction?
59. As it is a first transaction pending upgrade, does the purchaser deduce title in the usual manner as required under the CPO? And how can the purchaser or his solicitors do this and/or procure finance for the purchase without the title deeds for perusal by the lender's solicitors if the same are held by the LR pending approval of the upgrade application?
60. If an upgrade application is not approved for the purpose of the relevant transaction, would the transaction be aborted or proceed on a lower price/ consideration? If so, would the LR /Government want to be liable to the owner

for loss and damages for the aborted sale or suddenly decreased property value? If not, would the owner feel aggrieved if he cannot recover his loss and be entitled to make a claim against the LR /Government? On the other hand, if the purchaser has to proceed on the same consideration, would he feel aggrieved and be entitled to make a claim against the LR /Government? In any event, can we safely say that because no certificate of good title would be required from a solicitor in private practice, neither solicitor for the seller nor that for the purchaser should be liable? Would they be subject to claims as well though the decision on an upgrade application is not under their control?

61. If early application is allowed before or without a transaction, does the LR have the necessary qualified manpower to handle a sudden surge of applications for upgrading of title, possibly from the 2.8 million property owners on register (On the Administration's case, Impracticability of pre-conversion screening, Paper Paragraph 5(c))?
62. Why should the LR voluntarily take up approval of title when there is no need to do so under the LTO as enacted?
63. If LR does not expect to peruse all title deeds and documents to carry out an in-depth investigation of title on each case, what is the 'upgrade'? What would be the criteria for approval of the upgrade application?
64. After all, is application for upgrading of title mandatory, on first transaction or otherwise? Or would owners be free not to apply for upgrade?
65. As upgrading of title of a property, if approved, would complete the conversion to registered land under the LTO, will its value be higher than a neighbouring property not yet so approved?
66. How can the alternative scheme avoid discrimination against or an inferior market for properties not applied for or approved for upgrade?
67. Would property owners not having obtained upgrade in their title justifiably feel aggrieved and lay claims against the Government if they find that their properties have a discounted value on the market because they had not yet carried out the upgrade application or simply because they had no intention yet to have a first transaction because the properties are their homes for self-use?
68. Regrettably, the Paper does not provide any answer to any of the above queries. We consider that if we properly address our minds to the above queries on what the alternative scheme involves, we will see that the alleged benefits are questionable, to which we now turn.

Alleged benefits of the alternative scheme questionable

69. By reason of the misconception of the alleged difficulties of the LTO as enacted

and the lack of details in the proposed alternative scheme, the alleged benefits under Paragraph 10 of the Paper are extremely questionable.

70. Limited initial liability – as the alleged uncertain liabilities is misconceived, this is of doubtful benefit.

71. Controlled cost of screening – there are no indication whatsoever as to the estimated costs for screening of titles upon applications for upgrading. Paper Paragraph 10(b) seems to suggest that the extent of examination of title when there are transactions depends on the circumstances of each particular application, which we consider to mean the complexity of each case. If so, such costs for screening of titles upon applications for upgrading may be quite a substantial expense to property owners. If such costs are to be payable by the owners rather than by the Government, the public should know what would such costs be, or how they are to be calculated in order to consider whether or not the alternative scheme is indeed beneficial to them and can be supported. On the other hand, if such costs are to be payable by the Government, it would be a serious issue as to whether or not the registration fee revenue from LTO transaction on a particular property can cover such title approval for that property. The claim about controlled cost of screening is therefore of doubtful benefit.

72. More balance between revenue and risk – As the Administration had not carried out any assessment of risks (Paper Paragraph 5(b) and the possible revenue ('very low' income during interim period, Paper Paragraph 5(d)) or the possible expenses for processing upgrade applications, we cannot agree that under the alternative scheme, the LR will start to receive 'substantial revenue' upon conversion, and can therefore achieve a balance as alleged.

73. Avoiding new provisions to exclude indeterminate titles from conversion – as explained above, the LTO as enacted can already address possible indeterminate titles, whereas the alternative scheme does not really do so. Paragraph 10(d) in fact suggests that the LRO requires amendment to provide that the Registrar has power to reject an application for upgrading, to provide for review of such decision, appeal and settlement of claims. As such, it is not avoiding new provisions as alleged.

74. Avoiding new transitional provisions – we cannot see why we should avoid transitional provisions for the LRO if the existing provisions are not sufficient and further provisions are required to determine priority of registration of unwritten interests. Again the alternative scheme does not really resolve the problem.

75. Early benefit from indemnity provisions – The Administration has not explained clearly why converted land, not enjoying the full benefit of title registration until

title is upgraded, can enjoy benefit from indemnity provisions. If that were so, the public should be entitled to know what in fact is the difference between converted land and one which title has been upgraded, that is, what is it that is upgraded, and what further benefits there are in upgrading one's title.

Disadvantages of gradual conversion should not be underestimated

These are well said in the Paper Paragraph 11 and their repercussions should not be underestimated:

76. Indefinite time table for upgrading – The LTO has been enacted since 2004 and the proposed alternative scheme attempts to postpone true conversion by upgrading of title, itself of uncertain value, for an indefinite period of time.
77. Dual system prior to upgrading – Transactions for converted (but not yet upgraded) land will remain under the CPO. The Paper accepts that *'The difference in treatment may affect perceptions of converted land prior to upgrading and affect the market for such properties.'* The entire society will have to pay an astronomical price for the resulting uncertainty and confusion in our property system and market. There will be uncertainty in the sense that owners do not know if their properties can be approved for upgrade until they apply for it. There will be disparity in property values between those on which title have been upgraded and those that have not. Market information about property values will be confusing and this may even lead to monetary loss by both owners and purchasers alike.
78. Separate fee for application to upgrade title – It is only at Paper Paragraph 11(c) that the Administration mentions that *'owners will have to pay separately for applications for upgrading'*. As mentioned above, the Administration owes the public the details of the charge scale for such applications if these are payable by owners.
79. In addition to the above disadvantages admitted by the Administration, the proposal treats all LRO land as if they are some inferior title (despite the so called 'automatic conversion' after 3 years from commencement) and requires all of them to apply for upgrade after a period of 12 years from 'conversion'. Furthermore, the proposal requires the LR to unnecessarily take up approval of title of all properties in Hong Kong and unnecessarily put the Government at risk of claims when such upgrade applications are rejected. Paragraph 10(d) of the Paper alerted that the LRO requires amendment to provide that the Registrar has power to reject an application for upgrading, to provide for review of such decision, appeal and settlement of claims. Last but not the least, the alternative scheme arguably infringes upon private property rights guaranteed under the

Basic law.

80. All these disadvantages go against a simple and easily administered land title registration system and are detrimental to Hong Kong.

Case studies of daily problems faced by property owners and practitioners

81. Before closing, we would just mention a few cases of ordinary sale and purchase of properties which turned contentious and ended up in the High Court. This would illustrate that the public, conveyancing solicitors and the courts are still troubled by the current land /deeds registration system on a daily basis. The case decision /judgment were delivered in December 2008, when the Administration is planning to re-open the issue of automatic conversion to make it an indefinite one. The identities of the parties and their legal representatives are not identified here. We will just refer to them as the seller /vendor and purchaser. However, copies of their full case decision /judgment are annexed hereto for easy reference.

82. Case 1 (HCA 2550/2007)

a. Sale and purchase agreement was dated 10 October 2007.
b. The purchaser raised requisitions in relation to a Power of Attorney of 1993 and an Assignment of 1996 (signed relying on the said Power).
c. There was intensive correspondence in relation to the said requisitions between seller's and purchaser's solicitors from 24 October 2007 to 15 November 2007.
d. On 15 November 2007 the seller gave a notice of annulment of the sale.
e. There was further correspondence from purchaser's solicitors attempting to settle and complete the purchase on 21 November 2007.
f. Seller's solicitors returned purchase monies and maintained they had annulled the sale.
g. Protracted correspondence continued leading to the application before the Court.
h. After hearing the parties, represented by Counsel, the Court decided that the seller was not entitled to give the notice of annulment on the day it did, and the purchaser was entitled to order for specific performance (although the purchaser was in breach of the agreement for not delivering draft Assignment to the seller for approval at least 1 working day prior to the completion date), and damages in addition to specific performance and interest and costs.
i. Date of decision: 5 December 2008. The case took over one year to conclude.

83. Case 2 (HCMP 742/2008)

a. Sale and purchase agreement was dated 30 January 2008.

b. The purchaser raised requisitions in relation to a Memorandum of Direction of 1988.

c. After hearing the parties, represented by Counsel, the Court decided that Memorandum of Direction was in the nature of a nomination and the seller had failed to prove from its wordings that the person who signed it had fully relinguished his interest in the property.

d. In short the purchaser won and could recover his deposits of $710,000 amongst others, but only after a legal action lasting the whole year.

e. Date of decision: 12 December 2008.

84. Case 3 (HCMP 1066/2007)

a. Sale and purchase agreement was in 2007 (date unknown) in respect of a Yuen Long property for $525,000.

b. Completion was to take place on 30 April 2007.

c. The purchaser raised requisitions for copy of Certificate of Exemption, Certificate of Compliance, Occupation Permit or 'No Objection to Occupy' letter.

d. The seller failed to produce any of these.

e. After hearing the parties, represented by Counsel, the Court decided that the seller had failed to show good title by failure to produce the required documents and order him to return the deposit of $52,500.

f. Date of decision: 16 December 2008. The case took over one year to conclude.

Conclusion:

85. The above cases are only a sample illustration of what the public and practitioners face in their daily transactions. We believe that if title registration were in operation, and the properties in the above cases had been fully converted to LTO, the arguments on title deeds and documents upon a sale and purchase transaction and the resulting court actions would have been avoided.

86. It is our submission that the alternative scheme creates an unnecessary hurdle to all property owners to have to apply at their own costs for upgrading of title from the Land Registry, and makes full conversion of all land in Hong Kong indefinite. At the same time, the Registry unnecessarily assumes the duty to decide whether there is a good title for all properties in Hong Kong and the Government unnecessarily takes the risk of claims from owners and purchasers affected by the proposal and by rejection of applications for upgrading. These disadvantages far outweigh the alleged difficulties raised in Paragraph 5 of the Paper. In the circumstances, our views to Paragraph 12 of the Paper are all

answered in the negative and we respectfully submit that automatic conversion in the true sense under the LTO as enacted should not be further delayed in the public interest.

The Hong Kong Conveyancing & Property Law Association Limited
27 March 2009

HCA2550/2007

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO. 2550 OF 2007

BETWEEN

ETERNAL CROWN DEVELOPMENT LIMITED Plaintiff

and

GREAT WIDE INVESTMENT LIMITED Defendant

Before : Deputy High Court Judge H. Wong, SC in Chambers
Date of Hearing : 3 November 2008
Date of Decision : 5 December 2008

DECISION

BACKGROUND

1. By a sale and purchase agreement dated 10 October 2007 ("**the Agreement**") made between the defendant as the Vendor and the plaintiff as the Purchaser, the defendant agreed to sell to the plaintiff the property known as G/F and Cockloft including portion of flat roof adjacent to the Cockloft of Lee Wai Building, No. 41 Pok Fu Lam Road, Hong Kong ("**the Property**").

2. The Agreement provides, *inter alia*, as follows :

(a) the purchase price for the Property ("**the Price**") is $4,550,000, of which $150,000 had been paid prior to the Agreement as initial deposit and $305,000 to be paid upon the signing of the Agreement as further deposit (collectively as "**the Deposits**"). The balance of the Price shall be paid on completion [Clauses 2.1, 3.1 and Part III of the Schedule];

(b) completion shall take place at the offices of Messrs Donald Yap, Cheng & Kong (the Vendor's solicitors) on or before 21 November 2007 ("**the Completion Date**") [Clause 5.1 and Part IV of the Schedule];

(c) completion shall take place by way of undertaking (subject to the usual Law Society Qualifications) unless either party shall serve on the other party or the other party's solicitors three days before the Completion Date a notice in writing requesting formal completion in which case formal completion shall take place [Clause 5.1];

(d) time shall in every respect be of the essence of the Agreement [Clause 7.1];

(e) the Vendor shall give good title to the Property. The title shall commence with the Government Lease and the Vendor shall show good title to the Property in accordance with section 13 of the Conveyancing and Property Ordinance; and

(f) on the payment of the residue of the Price in the manner provided in the Agreement, the Vendor and all other necessary parties (if any) will execute a proper assignment or other assurance of the Property sold to the Purchaser and deliver the same to the Purchaser. The said assignment or other assurances of the Property shall be delivered by the

Purchaser's solicitors to the Vendor's solicitors for approval at least one (1) working day prior to the Completion Date [Clause 13.1].

3. Clause 10.1 of the Agreement is important for the purpose of the present case. I shall set out the provisions in full :

> "Any requisitions or objections in respect of the title or otherwise arising out of this Agreement shall be delivered in writing to the Vendor's Solicitors within seven (7) working days after the day of receipt of the title deeds by the Purchaser's Solicitors or within seven (7) working days after the reply to requisitions raised is received otherwise the same shall be considered as waived (in which respect time shall be of the essence of the Agreement) and if the Purchaser shall make and insist on any objection or requisition in respect of the title or otherwise which the Vendor shall be unable or (on the grounds of difficulty, delay or expense or on any other reasonable ground) unwilling to remove or comply with the Vendor shall notwithstanding any previous negotiation or litigation be at liberty on giving to the Purchaser or his Solicitors not less than three (3) working days notice in writing to annul the sale in which case, unless the objection or requisition shall have been in the meantime withdrawn, the sale shall at the expiration of the notice be annulled the Purchaser being in that event entitled to a return of the Deposit forthwith but without interest, (if return within 7 days) costs or compensation and the Purchaser shall return to the Vendor all title deeds, documents and any other parties furnished to the Purchaser or his solicitors by or on behalf of the Vendor in connection with the sale and purchase hereunder."

4. After the signing of the Agreement, the title deeds were delivered by the Vendor's solicitors, Messrs Donald Yap, Cheng & Kong ("**DYCK**") to the Purchaser's solicitors, Messrs Raymond Chan, Kenneth Yuen & Co. ("**RCKY**").

5. Amongst the title deeds delivered by DYCK was an assignment dated 15 August 1996 ("**the 1996 Assignment**") by which the Property was assigned by one Au Wai Ming, Au Wai Sang and Au Wai Hung (as tenants-in-common) to the defendant in the present case. Au Wai Ming, Au Wai Sang and Au Wai Hung (collectively as "**the TIC**") were thus the immediate predecessors-in-title of the present Vendor.

6. One of the TIC, namely Au Wai Sang, did not execute the 1996 Assignment personally. Instead he executed the same by his "lawful attorney" Au Wai Hung who, it may be noted, was also one of the TIC.

7. To prove that Au Wai Hung was indeed the lawful attorney of Au Wai Sang, a Power of Attorney dated 26 May 1993 ("**the P.A.**") was produced by DYCK. By the P.A., Au Wai Sang appointed Au Wai Hung as his attorney to "do perform transact and effectuate all or any of the ... acts, deeds, matters and things ... more particularly described in the Second Schedule" of the P.A. Under the Second Schedule of the P.A., Au Wai Hung was expressly authorised to dispose of (whether by way of sale surrender exchange mortgage lease or otherwise) or deal with the Property or any part thereof.

8. It appears from the execution page of the P.A. that Au Wai Sang originally executed the same in the presence of a solicitor in Brisbane. It is not known when that execution was made. However, the P.A. was subsequently "Resigned, Resealed and Redelivered" by Au Wai Sang in the presence of a notary public in Brisbane, and the notary public had, by a certificate dated 5 May 1993 ("**the Certificate**"), certified

that Au Wai Sang had duly signed and delivered the P.A. in his presence on 5 May 1993, and that Au Wai Sang was personally known to him and of full age.

9. So it appears that although the P.A. bears the date of 26 May 1993, it was in fact re-executed by Au Wai Sang on 5 May 1993. The original execution by Au Wai Sang (in the presence of a solicitor in Brisbane) would have been even earlier, although the exact date of that execution is not known.

10. By a letter dated 24 October 2007, RCKY raised certain requisitions with DYCK. Requisitions Nos. 3 and 4 were respectively as follows :

> "3. Power of Attorney of Au Wai Sang (26.5.1993)
>
> The P.A. was dated 26.5.1993, while the Certificate given by the Notary Public was dated 5.5.1993, a date earlier than the date of the P.A. Since the P.A. will be invalid if the Donor is deceased after 5.5.1993, please clarify (copy enclosed).
>
> 4. Assignment Memorial no. UB6738203
>
> The Power of Attorney of Au Wai Sang dated 26.5.1993 was older than 1 year when the Assignment was executed on 15.8.1996 (copy enclosed). Please provide a Statutory Declaration made by the authorized person of the Purchaser, Great Wide Investment Limited, pursuant to s.5 (4)(b) of the Powers of Attorney Ordinance."

The reference to "Assignment Memorial No. UB6738203" in Requisition No. 4 was a reference to the 1996 Assignment.

11. I would point out, for completeness' sake, that in fact the letter of 24 October 2007 also mentioned other requisitions. In particular,

Requisition No. 1(c) featured in some of the subsequent correspondence. However, counsel for both parties have told me at the hearing that I can ignore all the other requisitions except Requisitions Nos. 3 and 4 mentioned above. Both counsel have confirmed to me that nothing turns on these other requisitions and they are entirely irrelevant to any of the issues before me. In these circumstances I will say nothing more about these other requisitions.

12. By a letter dated 6 November 2007, DYCK replied to the requisitions, *inter alia*, as follows :

> "3. Power of Attorney Au Wai Sang (26.05.1993)
>
> We do agree to your views and have requested our client to clarify it.
>
> 4. Assignment Memorial No. UB6738203
>
> Our client instructed us that they have already paid a lot of money in obtaining certified copies title deeds and will only consider entertaining your client's request at your client's expenses."

13. Given the fact that the defendant had the duty to show good title, it is difficult to see the basis of the defendant's answer that it would only entertain the plaintiff's request for a statutory declaration under section 5(4)(b) of the Power of Attorney Ordinance ("**PAO**") at the plaintiff's expenses. Merely because the defendant had already "paid a lot of money in obtaining certified copies title deeds" is certainly not a good reason.

14. By its letter of 8 November 2007, RCKY informed DYCK that it awaited its reply in respect of Requisition No. 3. As to Requisition

No. 4, RCKY pointed out that the answer of DYCK was not acceptable as it was the duty of the Vendor to prove title at its costs. RCKY further pointed out that "it was within the power and ability of the 2 directors of [the defendant], namely Au Wai Hung and Lo Choi Sum, to make a declaration pursuant to s.5(4)(b) of the P.A.O.".

15. DYCK replied by a letter dated 12 November 2007. In respect of Requisition No. 3, they alleged that the defendant had instructed them that the whereabouts of Au Wai Sang could not be traced to clarify the matter. In respect of Requisition No. 4, DYCK's answer was as follows :

> "We do not agree to your views as expressed. Our client has indeed performed and observed its duties to prove title to the Property at its own costs. However, our client is not obliged to comply with your requisitions which Clause 10 of the Agreement for Sale and Purchase dated 10th October 2007 has clearly provided."

16. By letter dated 14 November 2007, RCKY wrote to DYCK in reply to DYCK's letter of 12 November. Referring to both Requisitions Nos. 3 and 4 together, RCKY informed DYCK that they were prepared to accept a statutory declaration made by the other two vendors (i.e. the other two tenants-in-common) of the 1996 Assignment (in the letter the memorial No. of the 1996 Assignment was mis-stated as UB1146841, but nothing turns on this). RCKY expressed the view that the title of the Property would be "defective without any secondary evidence of the validity of the P.A. of Au Wai Sang".

17. On 15 November 2007, DYCK gave notice to RCKY that the defendant would annul the sale and purchase ("**Notice of Annulment**")

purportedly under Clause 10 of the Agreement, unless the requisitions raised by RCKY were withdrawn. In the said letter, DYCK informed RCKY that the defendant would not be able to prove good title to the Property, in that :

(a) the defendant could not trace the whereabouts of Au Wai Sang to clarify the matter; and

(b) the defendant could not trace the whereabouts of the other two vendors as tenants-in-common in the 1996 Assignment to make a statutory declaration.

18. By the same letter DYCK gave three working days' notice to RCKY that "pursuant to Clause 10 of [the Agreement], [the defendant] shall be unable or (on the grounds of difficulty, delay or expense or on any other reasonable ground) unwilling to remove or comply with [the plaintiff's] requisitions in respect of the title to the Property and unless the said requisitions shall have been withdrawn by [RCKY], the sale and purchase herein shall at the expiration of the said notice be annulled."

19. By its letter dated 19 November 2007, RCKY wrote to DYCK and, referring to Requisitions Nos. 3 and 4 together, informed DYCK that they were "instructed to enquire how much [would] be the costs of preparing the Statutory Declaration concerned".

20. The next day DYCK replied to RCKY and curtly stated as follows :

> "We would like to advise you that it is not merely a matter of costs, but the difficulty that counts."

The alleged "difficulty that counts" was not explained. This letter was received by RCKY at 3:19 p.m. on 20 November 2007.

21. 21 November 2007 was the Completion Date scheduled under the Agreement. Under cover of a letter dated 21 November 2007 (which arrived at RCKY's office at 10:56 a.m.), DYCK sent to RCKY a cheque in the sum of $455,000.00, described as the "return of the Deposits paid by [the plaintiff] on annulment of the sale and purchase herein upon the expiration of the notice given".

22. As noted above, Clause 13.1 of the Agreement provides that the (draft) Assignment shall be delivered by the Purchaser's solicitors to the Vendor's solicitors for approval at least one working day prior to the Completion Date. At 11:41 a.m. on 21 November 2007, RCKY faxed to DYCK the draft Assignment together with the draft Undertaking for its approval, but made it clear that the sending of the same was to be without prejudice to any outstanding requisitions. This was followed by the physical delivery of the draft Assignment and draft Undertaking to DYCK's offices at 1:14 p.m. It will be noted that the faxing and the physical delivery of the draft Assignment and draft Undertaking all took place on 21 November 2007. The draft Assignment was therefore not delivered to the Vendor's solicitors at least one working day prior to the Completion Date, as defined under the Agreement.

23. In the meantime, RCKY refused to accept the return of the Deposits by DYCK. By another letter dated 21 November 2007 (faxed to DYCK at 12:19 p.m. and delivered to their office at 1:14 p.m., together with the cover letter that enclosed the draft Assignment and draft

Undertaking mentioned above), RCKY informed DYCK that the plaintiff would "insist of *[sic]* completing the sale and purchase today", and returned the cheque of $455,000 to DYCK. DYCK was further informed that the balance of the Price would be sent to them before 5:00 p.m. for completion of the sale and purchase.

24. By its second letter of 21 November 2007 sent to RCKY (and received by them at 2:57 p.m.), DYCK :

(a) "put on record" that if, which DYCK denied, the Agreement "should still be valid", the plaintiff had acted in breach of Clause 13 of the Agreement by failing to deliver the draft Assignment to DYCK for their approval at least one working day prior to the Completion Date;

(b) maintained that the defendant was entitled to annul the sale and purchase under Clause 10 of the Agreement, as the defendant had not withdrawn its requisitions despite the defendant's Notice of Annulment;

(c) drew attention to Clause 7 of the Agreement which provided that time was of the essence of the Agreement;

(d) maintained that the sale and purchase of the Property had been annulled; and

(e) returned the cheque of $455,000 to RCKY again as the return of the Deposits.

25. In response to DYCK's second letter, RCKY sent a further letter to DYCK dated 21 November 2007, alleging, *inter alia*, that :

> "The fact is we were awaiting for your quotation on the costs of preparing the Statutory Declaration which we only received your

> reply on 20th November 2007. In the circumstances, we need reasonable time to consider your reply and prepare the draft undertaking and assignment which we have faxed the same to you this morning. Even if we are late in sending the draft documents for your approval, which we deny, your client is not entitled to rescind the S&P simply on this basis. We cannot see how, as Vendor, your client's position is prejudiced and suffered from damages (which we will put you on strict proof) in receiving the draft documents late."

26. RCKY's attempt to complete the sale and purchase in the afternoon of 21 November 2007 was unsuccessful. The balance of the Price was sent to DYCK, who refused to accept the same. DYCK alleged that the staff of RCKY had left a "sealed envelop with letters and cheques" in the corridor of their office and demanded RCKY to "get back" the same. There was in fact rather protracted correspondence on that matter, which I do not need to deal with. Suffice to say that they are quite irrelevant to the issues now before the court and I have found the contents of some of these correspondences (with allegations of false statutory declaration and counter-allegations of defamation) rather unseemly.

THE APPLICATION BEFORE THE COURT

27. By its Amended Summons issued under Order 14A of the Rules of High Court ("**Amended Summons**"), the defendant applied for the following order or relief :

> "(1) that the following questions of law may be determined, namely :
>
> (a) whether the Defendant [was] entitled to give the Notice of Annulment on 15th November 2007;
>
> (b) if the answer to (a) is in the affirmative, whether the Defendant's Notice of Annulment dated 15th November 2007 remained valid on 20th November 2007;

(c) whether the Defendant has validly rescinded the Agreement;

(d) whether time is of the essence;

(e) if the answer to 1(d) is in the affirmative, whether the Plaintiff breached Clause 13 of the Agreement in failing to deliver to the Defendant's Solicitors the draft assignment as well as other assurance of the Property for approval at least one (1) working day prior to the day of completion and thus the Defendant is entitled to rescind the Agreement.

(2) that if the said question to question 1(a) to 1(c) and/or 1(d) to 1(e) hereinabove be answered in the affirmative, then the Plaintiff's claim be dismissed and that judgment be entered for the Defendant against the Plaintiff for final judgment in this action against the Plaintiff and the Plaintiff shall forthwith vacate the *lis pendens* registered in the Land Registry of HKSAR or if the question be answered in the negative, then judgment be entered for the Plaintiff."

28. No objection is taken by the plaintiff (represented by Mr Timothy Ling) regarding the appropriateness of the Order 14A procedure. It is also agreed by counsel that all the facts relevant to the determination of the questions set out in paragraph 26(1) above are undisputed.

Question 1(a) : Was the defendant entitled to give the Notice of Annulment on 15 November 2007?

29. In my judgment, the answer must be "no".

30. Clause 10.1 is clear in its provision. On the plain reading of the clause, the Vendor's "liberty" to give notice to annul under Clause 10.1 is conditional upon a big "if", namely, "*if* the Purchaser shall *make and insist* on any objection or requisition in respect of the title or otherwise which the Vendor shall be unable or (on the grounds of difficulty, delay or

expense or on any other reasonable ground) unwilling to remove or comply with..." Unless the contingency spelled out has occurred, the Vendor is not at liberty to give notice to annul.

31. It seems to me plain that before the Purchaser can "insist" on an objection or requisition of title under Clause 10.1, it has to be made aware of the Vendor's inability or unwillingness (on grounds of difficulty, delay, etc.) to remove or comply with the objection or requisition. Hence before the Vendor could avail itself of the right to give a notice of annulment under Clause 10.1, it must first have informed the Purchaser of its inability or unwillingness to remove or comply with the objection or requisition raised by the Purchaser. If the Purchaser should insist on the objection or requisition despite having been informed of the Vendor's inability or unwillingness, the Vendor may then give notice of annulment—in effect forcing the Purchaser either to withdraw the objection or requisition before the notice expires or else suffer the annulment of the Agreement.

32. This construction of the Agreement is fortified by the decision of the Court of Appeal in *Sun Wealthy Limited v. Galant Motors Limited*, CACV184/2005, 22 February 2006, a decision which is binding on me. In that case, the Court of Appeal was concerned with a clause (Clause 11) in a sale and purchase agreement which, insofar as it is relevant to the present consideration, was in terms similar to Clause 10.1 of the Agreement in the present case. In paragraph 6 of her judgment, Le Pichon JA held as follows :

> "It is clear from the way Clause 11 is drafted that the vendor's right to give a notice under that clause is conditional upon certain events happening : not only has there to be a requisition or

> objection made by the purchaser, there has to be an inability or unwillingness on the part of the vendor to answer the requisition or objection and an insistence on the part of the purchaser that the requisition be answered. Before one can 'insist' on something being done, one has to be made aware that the other party, i.e. the vendor is unable or unwilling to do what was requested. Implicit in the word 'insist' is the notion that the person 'insisting' is aware of the inability or unwillingness on the part of the vendor. That is no different from the inability or unwillingness having to be communicated to the other party who then has the option of taking no further action or 'insisting' that the requisition or objection be answered or complied with. I do not therefore accept Mr Jat SC's submission that Clause 11 contains no requirement that the purchaser be informed of the vendor's ability or unwillingness to answer the requisition. The conditions precedent to the service of a valid Clause 11 notice are thus no different from those under Condition 7(2)."

33. The Condition 7(2) referred to by Le Pichon JA in the passage cited above is contained in Part A of the Second Schedule to the Conveyancing and Property Ordinance. Condition 7(2) is similar to Clause 11 in the sale and purchase agreement considered by the Court of Appeal in the *Sun Wealthy* case, but there are differences. Despite the differences, the Court of Appeal held that on the construction of Clause 11, the conditions precedent to the service of a notice under that clause are the same as those under Condition 7(2). These conditions precedent are set out in paragraph 5 of the judgment of Le Pichon JA as follows :

> "... for the right to annul the sale to arise, there must be (1) an objection to the title; (2) an inability or unwillingness on the part of the vendor to remove that objection; (3) a communication to the purchaser of the existence of this inability or unwillingness; and (4) an insisting by the purchaser on his objection, notwithstanding this communication. See *per* Sir H M Cairns LJ in ***Duddell v. Simpson*** (1886) 2 Ch App 102 at 109."

34. In the present case, prior to the giving of the Notice of Annulment on 15 November 2007, the defendant had not communicated to

the plaintiff of its inability or unwillingness to remove or comply with the plaintiff's requisitions. It is true that the plaintiff had informed the defendant (by DYCK's letter of 12 November 2007) that it had not been able to "trace the whereabouts of Au Wai Sang to clarify the matter", but that in itself was not an intimation of inability or unwillingness to remove or comply with the plaintiff's requisitions. The possibility that the P.A. might be rendered invalid by the death of Au Wai Sang could be satisfactorily addressed by other means even though Au Wai Sang could not be traced. In particular, that concern could be effectively addressed by the defendant providing the plaintiff with a statutory declaration that conformed with section 5(4)(b) of PAO. The plaintiff had asked for such a statutory declaration and the defendant's position, as indicated by DYCK in their correspondence prior to 15 November 2007, was merely that the defendant would only provide the same at the cost of the plaintiff. There was never any intimation by the defendant that, question of costs aside, it was unable or unwilling to provide the statutory declaration requested. The plaintiff had also indicated that it was prepared to accept a statutory declaration made by the other two tenants-in-common. Prior to the giving of the Notice of Annulment on 15 November 2007, the defendant had not indicated any difficulty or unwillingness to provide such a statutory declaration. It was only in the letter of 15 November 2007, and not at any time prior thereto, that the defendant claimed that it was not able to "trace the whereabouts of the other 2 vendors as tenants-in-common".

35. In my judgment, prior to the giving of the Notice of Annulment on 15 November 2007, the defendant had plainly not communicated to the plaintiff of any inability or unwillingness on its part

to remove or comply with the plaintiff's requisitions. On that ground alone, the Notice of Annulment was invalid as being premature.

36. There is, in my view, another reason why the Notice of Annulment was invalid.

37. It is settled law that a vendor is not entitled to act unreasonably or recklessly in giving notice of annulment on grounds of inability or unwillingness to comply with the requisitions of the purchaser. The inability or unwillingness relied upon by the vendor for giving the notice must be based on reasonable grounds. In *Selkirk v. Romar Investments* [1963] 1 WLR 1415, Lord Radcliffe giving the judgment of the Privy Council held at pp.1422–1423 :

> "It does not appear to their Lordships, any more than it did to the judge who tried the action, that there is any room for uncertainty as to the nature of the equitable principle that is invoked in these cases. It has frequently been analysed, and frequently applied, by Chancery judges and, although the epithets that describe the vendor's offending action having been shown some variety of expression, they are all related to the same underlying idea, and their variety is only due to the fact that, as each case is decided according to the whole context of its circumstances and the course of conduct of the vendor, one may illustrate more vividly than another some particular aspect of that idea. Thus, it has been said that a vendor, in seeking to rescind, must not act arbitrarily, or capriciously, or unreasonably. Much less can he act in bad faith. He may not use the power of rescission to get out of a sale *brevi manu*, since by doing so he makes a nullity of the whole elaborate and protracted transaction. Above all, perhaps, he must not be guilty of 'recklessness' in entering into his contract, a term frequently resorted to in discussion of the legal principle and which their Lordships understand to connote an unacceptable indifference to the situation of a purchaser who is allowed to enter into a contract with the expectation of obtaining a title which the vendor has no reasonable anticipation of being able to deliver. A vendor who has so acted is not allowed to call off the whole transaction by resorting to the contractual right of rescission; see ***Re Jackson and Haden's***

> ***Contract*** [1906] 1 Ch 412 and ***Baines v. Tweddle*** [1959] Ch 679."

38. In addition to the authorities cited by Lord Radcliffe, one might also mention the case of *In re Des Reaux and Setchfield's Contract* [1926] 1 Ch 178, and the decision of our own Court of Appeal in *Queen's Electronic Manufacturing Co. Ltd v. Dr Ma Chung Ho Kei* [1991] 2 HKC 218.

39. In the present case, the concern raised by the plaintiff (in raising Requisitions Nos. 3 and 4) was the possible invalidity of the P.A. if Au Wai Sang had died after 5 May 1993 but before the 1996 Assignment was executed by his attorney, Au Wai Hung. The concern was raised legitimately, for the P.A. would be automatically revoked by the death of the donor, and the defendant's title to the Property may be in doubt if Au Wai Sang had died before his attorney executed the 1996 Assignment. Section 5(2) of PAO however provides that :

> "where a power of attorney has been revoked and a person, without knowledge of the revocation, deals with the donee of the power, the transaction between them shall, in favour of that person, be as valid as if the power had been in existence."

Section 5(4) further provides :

> "Where the interest of a purchaser depends on whether a transaction between the donee of a power of attorney and another person was valid by virtue of subsection (2), it shall be conclusively presumed in favour of the purchaser that that person did not at the material time know of the revocation of the power if—
>
> (a) ...
>
> (b) that person makes a statutory declaration, before or within three months after the completion of the purchase, that he

> did not at the material time know of the revocation of the power."

40. In the present case, the interest of the plaintiff as a purchaser clearly depends on the validity of the 1996 Assignment, which was a transaction between the donee of the P.A. and another person, namely, the defendant. Hence the making by the defendant of a statutory declaration pursuant to section 5(4)(b) of PAO would be an effective way of addressing the concern raised by the plaintiff, as such statutory declaration would be conclusive in presuming that the defendant did not at the time of the 1996 Assignment have knowledge of any revocation of the P.A. The combined operation of sections 5(2) and 5(4)(b) would remove any doubt on title that may arise from the possibility that Au Wai Sang might have died before the 1996 Assignment.

41. As the defendant itself was the person required to make the statutory declaration, there should not be any difficulty by the defendant to comply with the plaintiff's request for a statutory declaration in conformity with section 5(4)(b). The present case is not a case where the person required to make the statutory declaration is some predecessor-in-title far up in the title chain, unknown and unrelated to the present vendor, and whose whereabouts cannot be traced by the vendor despite reasonable efforts. I can see no reason why the defendant was not able to make the statutory declaration in conformity with section 5(4)(b), and no reason had ever been suggested by the defendant either in the correspondence or by its counsel (Ms Lorinda Lau) at the hearing. Insofar as the defendant purported to insist that it would only make the statutory declaration at the cost of the plaintiff, the position of the defendant was unreasonable. The defendant had the duty to show and give good title, and any costs incurred

or to be incurred by the defendant in the discharge of its duty must, unless the Agreement provides otherwise, be borne by the defendant. There is nothing in the Agreement to provide otherwise.

42. Further, the plaintiff had, by RCKY's letter of 14 November 2007, indicated to the defendant that it was prepared to accept a statutory declaration made by the other two vendors to the 1996 Assignment. The other two vendors were Au Wai Ming and Au Wai Hung. By its letter dated 15 November 2007 (i.e. the letter in which the Notice of Annulment was given), DYCK alleged that the defendant was not able to trace the whereabouts of the other two vendors. Nothing was said as to what efforts had been made to trace the whereabouts of the other two vendors. This allegation of DYCK was somewhat surprising, for according to the company search of the defendant, Au Wai Hung was both a director and shareholder of the defendant, and no reason had been proffered by the defendant as to why it could not even trace its own shareholder or director.

43. In all the circumstances, I am of the view that as at 15 November 2007, the defendant had no reasonable grounds to give the Notice of Annulment and for that reason as well, the Notice of Annulment was invalid.

44. It follows that my determination of Question 1(a) is "no".

Question 1(b) : whether the Notice of Annulment remained valid on 20 November 2007?

45. As I have answered Question 1(a) in the negative, it follows that there was never any valid notice of annulment given and therefore no valid notice of annulment existed on 20 November 2007.

Question 1(c) : whether the defendant has validly rescinded the Agreement?

46. If what is intended to be asked by Question 1(c) is whether the defendant has validly annulled the sale and purchase under the Agreement pursuant to Clause 10.1 thereunder, the answer is "no". There was never any valid notice of annulment given, and the sale and purchase could not be annulled by the defendant without a valid notice of annulment.

47. If what is intended to be asked by Question 1(c) is whether the defendant has validly rescinded the Agreement on other grounds (i.e. grounds other than annulment pursuant to Clause 10.1 of the Agreement), an answer will be given when I consider Question 1(e) below.

Question 1(d) : whether time is of the essence?

48. The Agreement expressly provides in Clause 7.1 that time shall *in every respect* be of the essence of the Agreement.

49. As pointed out by Sir Nicholas Browne-Wilkinson VC in *British Holdings Plc. v. Quadrex Inc.* [1989] QB 842 at 856, the phrase "time is of the essence of the contract" is capable of causing confusion since the question in each case is whether time is of the essence of the

particular contractual term which has been breached. As the Vice-Chancellor said in the *Quadrex* case (at p. 856) :

> "[The question of time of the essence] normally arises in the context of the failure to complete a contract on the date specified (i.e. is time of the essence of completion) and that is what is normally meant by time being of the essence of a contract, e.g. the giving of notices under rent review clause (*United Scientific Holdings Ltd. v. Burnley Borough Council* [1978] A.C. 904) and the making of a declaration of ship under a commercial contract : *Societe Italo-Belge pour le Commerce et l'Industrie v. Palm and Vegetable Oils (Malaysia) Sdn. Bhd.* [1982] 1 All E.R. 19. There is therefore no general concept that time is of the essence of a contract as a whole : the question is whether time is of the essence of a particular term in question."

50. In the present case, the question is whether the time stipulation stipulated in Clause 13.1 of the Agreement is of the essence.

51. Time is not normally of the essence of a contractual term. However, in the case where the contract expressly so provides, time is regarded in equity to be of the essence.

52. In the present case, Clause 13.1 provides that the (draft) Assignment or other assurance of the Property ("**draft Assignment**") *shall be* delivered by the Purchaser's solicitors to the Vendor's solicitors for approval *at least* one working day prior to the Completion Date.

53. The Completion Date is defined under Part IV of the Schedule to the Agreement as "on or before 21 November 2007".

54. The parties have expressly agreed to a deadline by which the draft Assignment was to be provided by the Purchaser's solicitors to the

Vendor's solicitors for approval. I have no doubt that, as a matter of construction, the stipulation that time shall in every respect be of the essence applies to the obligation imposed upon the Purchaser's solicitors under Clause 13.1. Not only does such conclusion follow naturally from the language in Clause 7.1 (which makes time of the essence *in every respect* of the Agreement), the fact that Clause 13.1 employs the words "at least" in describing the time for sending the draft Assignment for approval strongly fortifies that conclusion. If compliance with the deadline is not regarded by the parties as material, the use of the expression "at least" in Clause 13.1 would have been out of place.

55. I therefore determine Question 1(d) by answering "yes" to the question.

Question 1(e) : whether the plaintiff was in breach of Clause 13 of the Agreement and whether the defendant is entitled to rescind the Agreement?

56. Mr Ling argued that the plaintiff was not in breach of Clause 13 of the Agreement, alternatively that even if it was in breach the defendant was not entitled to rescind the Agreement, because :

(a) the Completion Date was a mere target date only, and the plaintiff was entitled to postpone the same as the defendant had been late in replying to the requisitions raised by the plaintiff. Hence the plaintiff's solicitors had not been late in providing the draft Assignment to the defendant's solicitors;

(b) relying on the "prevention principle" enunciated by the Court of Final Appeal in the case of *Kensland Realty Ltd v. Whale View Investment Ltd* [2002] 1 HKLRD 87, Mr Ling argued

that the defendant was in the wrong by answering the plaintiff's requisition late and the delay by the plaintiff's solicitors in complying with the obligations under Clause 13.1 was caused by the defendant's wrong. Accordingly, the defendant should not be permitted to take advantage of its own wrong to claim rescission of the Agreement; and

(c) in any event, the defendant had not "relied on" the plaintiff's breach. Further, the defendant had not suffered any prejudice as a result of the plaintiff's breach.

57. Mr Ling's submission that even if the plaintiff was in breach of Clause 13.1, the defendant had not suffered prejudice, may be disposed of immediately. The effect of a breach of a contractual time stipulation, which is of the essence, is that the breach is to be regarded as a breach of condition that would entitle the other party to terminate the contract for repudiatory breach, irrespective of the magnitude of the breach : see, *Okachi (Hong Kong) Co. Ltd v. Nominee (Holdings) Ltd* [2007] 1 HKLRD 55, *per* Yuen JA at 79I–J. Mere absence of prejudice by the defendant would not, *per se*, have disentitled the defendant from terminating the Agreement on ground of repudiatory breach by the plaintiff.

58. Mr Ling argued that under Clause 10.1 the plaintiff was entitled to raise further requisitions or objections within seven working days after receiving the defendant's reply to its initial requisitions (which must be raised within seven working days after the receipt of the title deeds by the Purchaser's solicitors). Accordingly, the plaintiff was entitled to seven working days to consider the defendant's reply to its

initial requisitions. He pointed out that the defendant only replied to the plaintiff on 15 November 2007 by alleging that it could not trace Au Wai Sang "to clarify the matter", and that the other two vendors could not be traced to make a statutory declaration. Mr Ling further pointed out that it was only on 20 November 2007 that DYCK informed RCKY, after the latter had inquired for the amount of costs involved in the preparation of the statutory declaration, that it was "not merely a matter of costs, but the difficulty that counts". As the plaintiff was entitled to have seven working days to consider these replies of the defendant's solicitors, it was entitled to postpone completion of the sale and purchase to a date being seven working days from 20 November 2007, alternatively seven working days from 15 November 2007.

59. Implied in Mr Ling's arguments is that the reference to "at least one (1) working day prior to the Completion Date" in Clause 13.1 should be construed as "at least one (1) working day prior to the Completion Date as may be extended or postponed". If he is right, and if the Completion Date had in fact been postponed or extended to a date being seven working days from 20 November 2007, or alternatively from 15 November 2007, RCKY was not late in delivering the draft Assignment to the DYCK on 21 November 2007.

60. There are substantial difficulties in Mr Ling's arguments. Clause 13.1 is clear in its terms. It provides that the draft Assignment shall be delivered at least one (1) working day prior to the Completion Date. The term "Completion Date" is precisely defined in Part IV of the Schedule as "on or before 21 November 2007", and not any other date after 21 November 2007. Even if I were to accept (without making a

final decision on that matter) Mr Ling's argument that the plaintiff was entitled to seven days' time to consider the replies of the defendant, and to extend the time for completion accordingly, it does not necessarily follow that the time provided under Clause 13.1 for the delivery of the draft Assignment would have to be extended on the same ground. In my judgment, there is simply no causal connection at all between the plaintiff's obligation under Clause 13.1 and the time stipulations under Clause 10.1, which relate to the time for raising requisitions. In particular, the preparation of the draft Assignment and the delivery of the same to the Vendor's solicitors for approval could be performed by the Purchaser's solicitors without waiting for the answer to the requisitions. Indeed in the present case, when RCKY sent the draft Assignment to DYCK for their approval, they expressly stated that the same was sent "without prejudice to any outstanding requisitions and [their] rights to raise requisitions". Hence it is clear that the sending of the draft Assignment to the Vendor's solicitors for approval could be made by the Purchaser's solicitors while the requisitions were still outstanding. There is no reason to hold that because the plaintiff might have been entitled to extend the time for completion, the time for compliance of its obligation (to be carried out by its solicitors) under Clause 13.1 must be extended accordingly.

61. Moreover, even *assuming* (without deciding) that the plaintiff was entitled to extend the time for completion, the fact remains that the plaintiff had never sought to exercise that entitlement. The plaintiff had never sought extension of the time for completion. Indeed on 21 November 2007 the plaintiff made it clear through its solicitors that they insisted on completion on that day as scheduled under the Agreement. It is not the plaintiff's case that the Completion Date had in fact been

postponed or extended. There is a world of difference between merely having an entitlement to extend time and an actual extension of time. The obligation under Clause 13.1 is for the Purchaser's solicitors to deliver the draft Assignment to the Vendor's solicitors for their approval at least one working day *prior to the Completion Date*. It follows that unless the Completion Date was changed, the time for performing the obligation remained the same, i.e. one working day prior to 21 November 2007 at the latest.

62. Mr Ling's reliance on the "prevention principle" is, in my view, misplaced. As pointed out above, the preparation and delivery of the draft Assignment did not depend on the answer to the requisitions. The obligation under Clause 13.1 could be discharged by the plaintiff's solicitors without waiting for the answer to the requisitions. For the prevention principle to apply, there must at least be a causal connection between the alleged wrong of the defendant and the plaintiff's breach : see *Kensland Realty Ltd v. Whale View Investment Ltd (supra)*, at pp.118-119. In the present case, the alleged wrong of the defendant relied upon by Mr Ling was the "Defendant's failure to provide the relevant [statutory declaration] for which it was obliged and able to do", and the refusal by the defendant to pay for costs of preparing the statutory declaration. In other words, Mr Ling was relying upon the defendant's failure to prove good title as the "wrong" which enabled him to invoke the prevention principle.

63. I am unable to accept Mr Ling's argument. Even if the defendant had failed to prove good title, it did not and could not have prevented the plaintiff from complying with its own obligation under

Clause 13.1. As pointed out above, when RCKY did deliver the draft Assignment to DYCK on 21 November 2007, it was made without prejudice to any outstanding requisitions that they had raised. Clearly the alleged failure to prove good title by the defendant had not prevented the plaintiff from delivering the draft Assignment on 21 November 2007, and I cannot see why the plaintiff could not have performed its obligation (which was to be carried out by its solicitors) in accordance with the time stipulations under Clause 13.1 while its requisitions were still outstanding. The alleged failure to prove good title simply cannot satisfy the causal requirement necessary for the invocation of the "prevention principle" as enunciated in the *Kensland* case. If, in the event as happened, the plaintiff decided to accept the defendant's title and proceeded to completion, it is not open to the plaintiff to rely on the defendant's alleged failure to prove good title as a "wrong" for its own failure to comply with its obligation under Clause 13.1.

64. In my judgment, by delivering the draft Assignment only on 21 November 2007, and not at least one working day before 21 November 2007, the plaintiff was in repudiatory breach of Clause 13.1 of the Agreement.

65. That, however, does not mean that the Agreement would have automatically come to an end upon the plaintiff's breach. In my view, on the facts of the present case, the defendant had never accepted the plaintiff's repudiation. As famously observed by Asquith LJ in *Howard v. Pickford Tool Co. Ltd* [1951] 1 KB 417 at 421, an unaccepted repudiation is "a thing writ in water and of no value to anybody". See, also *Fercometal S.A.R.L. v. Mediterranean Shipping Co. S.A.* [1989] 1 AC 789.

An unaccepted repudiation therefore has no legal effect at all, and would not operate to prevent the plaintiff from obtaining specific performance in the present case.

66. After the draft Assignment was received by DYCK, its reaction was to "put on record", in its second letter of 21 November 2007, that the plaintiff was in breach of Clause 13 of the Agreement as the draft Assignment was not delivered to DYCK for their approval at least one working day prior to the Completion Date, and reminded RCKY that Clause 7 of the Agreement stipulated that time was to be in every respect of the essence to the Agreement. However, despite putting this on record, it is clear from the letter dated 21 November 2007 that the defendant never purported to accept the plaintiff's breach as a repudiation of the Agreement. Nothing was mentioned in DYCK's letter to the effect that the defendant was treating the plaintiff's breach as a repudiation, let alone any mention of the defendant accepting the plaintiff's repudiation as bringing the Agreement to an end. Indeed it is abundantly clear that the defendant's solicitors were insisting that the defendant had a *contractual right* to annul the Agreement on strength of the Notice of Annulment purportedly issued under Clause 10.1 of the Agreement. Instead of forfeiting the Deposits (as one would expect the defendant to have done if it was indeed treating the plaintiff's breach as a repudiation, and was accepting the same), the defendant's solicitors sought to return the Deposits to the plaintiff stating expressly that :

> "As the sale and purchase of the Property *has been annulled*, it is entirely up to our client to keep whatever stuff therein."

67. Rescinding an agreement by accepting the other party's repudiation is a very different thing from annulling the agreement on the strength of one's contractual right thereunder. By maintaining that the sale and purchase had been annulled under Clause 10.1 of the Agreement, and by returning the Deposits to the plaintiff, the defendant could not at the same time maintain that the Agreement had been brought to an end by rescission. The defendant's conduct of returning the Deposits to the plaintiff made it clear that it was not rescinding the Agreement on the ground of the plaintiff's repudiation.

68. In these circumstances, I would answer Question 1(e) by holding that although the plaintiff was in breach of Clause 13 of the Agreement, the defendant *is not* entitled to rescind the Agreement as it had never accepted the plaintiff's repudiation. The Agreement remains on foot and is capable of being made the subject of an order for specific performance.

ORDER OF THE COURT

69. Order 14A, rule 1(2) provides that upon determination by the court of the questions raised in an Order 14A application, "the Court may dismiss the cause or matter or make such order or judgment as it thinks fit."

70. It is accepted by both Counsel that if I determine the questions set out in paragraph 1 of the Amended Summons against the defendant, I would have the power to enter judgment for the plaintiff. I have no doubt that under Order 14A, rule 1(2) the court has such power and indeed paragraph 2 of the Amended Summons anticipates this eventuality by

seeking an order from the court that "if the question (referring to the questions set out in paragraph 1 of the Amended Summons) be answered in the negative, then judgment be entered for the plaintiff."

71. Mr Ling informed me that the plaintiff would only seek judgment on the following :

(a) a declaration that the Notice of Annulment was invalid;

(b) specific performance of the Agreement;

(c) damages in addition to specific performance, to be agreed; and

(d) interest.

72. Insofar as the Amended Statement of Claim prays for other relief, Mr Ling has made it clear that the plaintiff is no longer pursuing the same.

73. I have already decided that the Notice of Annulment was invalid. I will make the declaration sought accordingly.

74. Although specific performance is a discretionary remedy, Ms Lau for the defendant has not made any submission, nor has she made any attempt, to persuade me why I should not exercise my discretion to order specific performance in this case. Nor can I see any circumstances in the present case which would make an order for specific performance inappropriate. I will make the order accordingly.

75. I will also make an order in favour of the plaintiff for damages in addition to specific performance, such damages to be assessed. The question of interest to be reserved to the master assessing damages.

76. Judgment shall be entered for the plaintiff in terms of the orders above. I will give liberty to the parties to apply for further directions.

(Horace Wong, SC)
Deputy High Court Judge

Mr Timothy Ling, instructed by Messrs Simon Wong & Co., for the Plaintiff

Ms Lorinda Lau, instructed by Messrs Donald Yap Cheng & Kong, for the Defendant

HCMP742/2008

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO. 742 OF 2008

BETWEEN

MORAL KIND LIMITED

and

ROSE PALACE LIMITED

Before : Deputy High Court Judge Mayo in Chambers
Date of Hearing : 8 December 2008
Date of Judgment : 12 December 2008

JUDGMENT

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1. This is a vendor and purchaser summons.

2. The plaintiff is the purchaser under a Sale and Purchase Agreement dated 30 January 2008 and the defendant was the vendor.

3. The suit premises is Flat A on the 3rd Floor of Yu Fung Building, Wong Nai Chung Road, Hong Kong.

4. It is the plaintiff's case that the defendant failed to satisfactorily answer requisitions on title raised by the plaintiff's solicitors and thus did not prove a good title to the property.

5. The requisitions were first raised in a letter dated 11 February 2008 :

"Howell & Co.
...

Messrs. S.H. Chan & Co.,
Solicitors,
...

Re: Flat A on 3/F. of Yu Fung Building, 27, Wong Nai Chung Road, Hong Kong.

We refer to your letter dated 31st January, 2008.

Upon perusing the title deeds and documents, we have the following requisitions on title to make :-

1. Please provide us with documentary evidence to show that the Government Rates, Rent and Management Fee in respect of the above property have been paid up to date.

2. By an Agreement dated 12/9/1988 registered in the Land Registry by Memorial No. UB3969069, Chui Kai Chuen and Wu Lap Kung contracted to purchase the above property as Tenants in Common in equal shares from the then owner. It then followed by a Memorandum of Direction dated 12/10/1988 registered in the Land Registry by Memorial No. UB3969070 (copy enclosed) given by Chui Kai Chuen and Wu Lap Kung to the said Chui Kai Chuen in which Chui Kai Chuen and Wu Lap Kung directed the vendor to assign the above property to Chui Kai Chuen solely. Chui Kai Chuen subsequently entered into a sub-sale and purchase agreement with Senior Field Limited in which he agreed to sub-sell the above property to Senior Limited. Finally, the above property was assigned to Senior Field Limited under and by virtue of an Assignment dated 30/12/1988 and registered in the Land Registry by Memorial No. UB3969073.

It was noted from the said Memorandum of Directions Memorial No. UB3969070 that Chui Kai Chuen and Wu Lap Kung merely gave directions to direct the vendor to

assign the above property to Chui Kai Chuen. Wu Lap Kung had not relinquished his interest in the above property nor had the Memorandum of Directions conferred any power on Chui Kai Chuen to sub-sell the above property. We take the view that the above scenario constitutes a typical type of resulting trust situation in favour of Wu Lap Kung, Please therefore provide us with documentary evidence to show that Wu Lap Kung has waived and/or relinquished his beneficial interest in the above property.

3. Occupation Permit No. 108 dated 7/6/1972 (copy enclosed) relates to a development erected on the then Section C of Inland Lot No. 2165 and not the then Remaining Portion of Section C of Inland Lot No. 2169 on which the building in respect of which the above property forms part was built. Please provide us with certified copy of a property Occupation Permit of the above property.

4. Please provide us with the original of the Legal Charge dated 15/8/1996 Memorial No. UB6748643 and its Receipt on Discharge dated 31/3/2001 Memorial No. UB8359464 for proof of title prior to completion as well as to complete the chain of title.

5. We noted that the lot number of the building in respect of which the above property forms part was changed from the Remaining Portion of Section C of Inland Lot No. 2165 to Inland Lot No. 8703 on 1/12/1988. Accordingly, the description of property as set out in Party V of the Schedule to the present Agreement for sale and Purchase dated 30/1/2008 was ambiguous and requires rectification in the manner as per the revised schedule attached hereto. Please confirm that you have no objection to amend the description of property in the said Agreement for Sale and Purchase in the manner as proposed.

Yours faithfully

(Signed)
Howell & Co.

encl.

c.c. client"

6. Requisition No. 2 is the relevant one in this case.

7. The Memorandum of Direction referred to in the requisition was in this form :

" MEMORANDUM OF DIRECTION

WE, CHUI KAI CHUEN (徐繼存) of Flat B on 18th Floor of Chang Pao Ching Building, Hong Kong and WU LAP KUNG (鄔立功) of Room C on 13th Floor, Kar On House, 12 Cheung Hong Street, North Point, Hong Kong 'as Tenants in Common in equal shares' DO hereby direct that the property, being ALL THAT one equal undivided 23rd part or share of and in ALL THAT piece or parcel of ground registered in the Land Office as THE REMAINING PORTION OF SECTION C OF INLAND LOT NO. 2165. And of and in the messuages erections and buildings thereon now known as YU FUNG BUILDING TOGETHER with the sole and exclusive right and privilege to hold use occupy and enjoy ALL THAT FLAT A on the THIRD FLOOR of the said Yu Fung Building agreed to be purchased by us under an Agreement for Sale and Purchase dated 12th day of September 1988 in respect of the above property be assigned to the said CHUI KAI CHUEN solely.

Dated the 12th day of October 1988.

WITNESS to the signatures of the) Signed
)
said Chui Kai Chuen and Wu Lap Kung:-) Signed

(Signed)
ONG TONG SING LAWRENCE
Solicitor, Hong Kong.

INTERPRETED by:-

(Signed)
Lau Kwok Kwong
Clerk to Messrs. Lawrence Ong & Chung,
Solicitors, Hong Kong."

8. The root of title was an agreement for sale and purchase dated 12 September 1988 under which Wu Lap Kung ("Wu") and Chui Kai Chuen ("Chui") agreed to purchase the property as tenants in common in equal shares and their vendor received a deposit and part payment in respect of the purchase.

9. The next document adduced as evidence was the said Memorandum of Direction.

10. Following this was a Sub-Sale and Purchase Agreement dated 18 October 1988.

11. Under this agreement Chui agreed to sell the property in his own name to Senior Field Limited ("Senior Field").

12. This was followed by an assignment to Senior Field which Chui executed as a confirmor in his own name.

13. It was this which was the subject of the requisition in question.

14. It will be noted that the concern which is being expressed by the plaintiff's solicitors is that there is no proof that Wu as a tenant in common in equal shares under the Sale and Purchase Agreement had relinquished his interest in the property.

15. The defendant's solicitors reply to the requisition was as follows :

> "S.H. Chan & Co.
> ...
>
> Messrs. Howell & Co.,
> Solicitors,
> ...
>
> Re: Flat A on the 3rd Floor of Yu Fung Building, No. 27 Wong Nai Chung Road, Hong Kong ("the Property")

We refer to your letter dated 30th January 2008 and hereby reply to your requisitions in the same order adopted by you :-

1. We would drawn your attention the decision in Jasmin Enterprise Ltd, v. Chan Yuk Hon, MP No. 4070 of 1997 that unless there were some reasons to suspect that the government rent had not been paid, the requested documentary evidence to prove due payment thereof is not a proper requisition. The rates and management fees are matters of outgoings which do not qualify themselves as requisitions on title. We shall deal with the same by way of apportionment account on or before completion.

2. We would like to draw your attention to Section 13(4A) of the Conveyancing and Property Ordinance Cap. 219 which stated that where any document is or has been produced by a vendor as proof of title to any land and that document purports to have been executed, not less than 15 years before the contract of sale of that land, under a power of attorney, it shall for the purposes of any question as to the title to that land be conclusively presumed. Your request will not be entertained.

3. We opine that the lot which appear in the Occupation Permit No. H108/72 and dated 7th June 1972 is discernable. However, on an entire without prejudice basis, we now send you herewith another certified copy of the said Occupation Permit together with a copy letter dated 17th March 2008 issued by Buildings Department showing that No. 27 Wong Nai Chung Road was erected on The Remaining Portion of Section C of Inland Lot No. 2165 and covered by the said occupation permit. Your requisition will not be entertained any further.

4. As the documents as requested are not registered against the Property we fail to see any reason for its production.

5. We have no objection to amend the description of the Property in the Agreement for Sale and Purchase dated 30th January 2008 in manner as proposed.

We trust that we have satisfactorily answered all your requisitions and look forward to receiving your draft Assignment and Undertaking Letter for our approval as soon as possible.

Yours faithfully,

(Signed)
S.H. CHAN & CO."

16. I find myself to be in agreement with Mr Kenny Lin who was representing the plaintiff that for all practical purposes all that the reply to the 2nd requisition amounted to was a bald assertion that Wu had ceased to be the legal or beneficial owner of the property.

17. Before me Mr Denis Yu for the defendant attempted to elaborate on the reply to the requisition by adding that when considering presumptions under resulting trusts the important rule to consider was the most likely inference of fact to be drawn from the surrounding circumstances was the one which should be drawn in the absence of any evidence to the contrary.

18. His authority for this proposition was *Halsbury's Laws of Hong Kong*, Vol. 26(2), page 28, paragraph 400.026.

19. I fear that this is an unduly simple approach to this problem.

20. What is clear from the documents of title is that Chui and Wu were described as tenants in common in equal shares.

21. Under the Memorandum of Direction it was stated that the property should be assigned to Chui solely. It was not. It was assigned to Senior Field under the said Sub-Sale Agreement by Chui alone.

22. There is no reference in any of the documents as to how Wu's interest was relinquished.

23. There are a number of cases where the courts have considered the position where one party has nominated another to take an interest in property, see *Fulltrend Co. Ltd v. Longer Year Development Ltd* [1990] 1 HKC 452, *Formking Development Ltd v. Lee Kwok Hung Robert* [1993] 1 HKC 412 and *Lion Will Investment v. Triple Will* [1992] 2 HKC 430.

24. *Lion Will Investment* was upheld by the Court of Appeal.

25. A common feature of these cases is the necessity for the nominator to prove that the nominee has indeed relinquished their interests for the title to the land to be made good.

26. Mr Yu submitted that the present case could be distinguished from these cases as it did not involve a nomination.

27. I disagree. This is simply a matter of what label is attached to the document.

28. If the document is considered as a whole its purport is indistinguishable from the so-called nomination cases.

29. I have no doubt that the law propounded in these cases is correctly stated and that it was incumbent upon the defendant to prove at the requisite level that Wu had divested himself of any interest he may have had in the property.

30. Mr Yu did raise some other issues including consequences which might flow from the operation of the Limitation Ordinance, Cap. 347.

31. I do not think that any of these matters can assist the defendant.

32. The reason for this is that they were not raised in the correspondence when the plaintiff's requisitions were being considered.

33. The authority for this proposition can be found in the judgment of the Court of Appeal in *Kok Chong Ho & Another v. Double Value Developments Ltd* [1993] 2 HKLR 423.

34. For all these reasons I am satisfied that the defendant did not prove an acceptable title to the property to the plaintiff and that accordingly its claim must succeed.

35. The relief it seeks in its summons is :

> "(1) A Declaration that since
>
> (a) under the Agreement for Sale and Purchase date 12 September 1988 and registered in the Land Registry by Memorial No. UB3969069, Wu Lap Kung ('Wu') and Chui Kai Chuen ('Chui') agreed to purchase the Property as tenants in common in equal shares;
>
> (b) by a Memorandum of Direction dated 12 October 1988 and registered in the Land Registry by Memorial No. UB3969070, they as tenants in common in equal shares directed that the Property be assigned to Chui solely;

(c) by an Agreement for Sub-Sale and Purchase dated 18 October 1988 and registered in the Land Registry by Memorial No. UB3969071, Chui agreed to sell the Property in his own name to Senior Field Limited ('Senior Field'); and

(d) by an Assignment dated 30 December 1988 and registered in the Land Registry by Memorial No. UB3969073 which was executed by Chui as confirmor in his own name, the Property was assigned to Senior Field,

the Plaintiff was entitled as against the Defendant to sufficient and satisfactory conveyancing proof that Wu retained no beneficial interest in the Property.

(2) A Declaration that the Defendant has failed to provide any sufficient and satisfactory conveyancing proof that Wu retained no beneficial interest in the Property.

(3) A Declaration that in all the circumstances of the case, the Defendant, as the vendor of the Property under the Agreement has, in breach of the Agreement :-

(a) failed to answer satisfactorily and sufficiently the requisitions and objections numbered 2 (as set out in letters dated 11 February, 29 March, 9, 10, 12 and 14 April, 2008 and issued by the Plaintiff through its Solicitors) raised by the Plaintiff in respect of the title to the Property comprised in the Agreement; and/or

(b) failed to show and prove a good title to the Property in accordance with the Agreement.

(4) A Declaration that the Plaintiff was entitled to rescind the Agreement and has effectively rescinded the Agreement.

(5) A Declaration that the Defendant shall return to the Plaintiff the sum of $710,000.00 being the amount of deposits and part payment paid by the Plaintiff to the Defendant pursuant to the Agreement and is liable to compensate the Plaintiff a sum of money equivalent to any estate agency fee and/or stamp duty (if any) paid or liable to be paid by the Plaintiff in respect of the Agreement and its conveyancing costs incurred (including the costs of investigation of title) together with interest thereon at such rate and for such period as this Honourable Court shall think fit.

(6) Further or alternatively, an Order that the Defendant do pay to the Plaintiff the said sum of $710,000.00 and do pay to

the Plaintiff such sum of money equivalent to any estate agency fee and/or stamp duty (if any) paid or liable to be paid by the Plaintiff in respect of the Agreement and its conveyancing costs incurred (including the costs of investigation of title) together with interest at such rate and for such period as this Honourable Court shall think fit.

(7) Damages for breach of the Agreement to be assessed.

(8) A Declaration that the Plaintiff is entitled to a lien on the Property for the said deposits in the sum of $710,000.00 and interest thereon, the costs and expenses (including but not limited to all the conveyancing costs, stamp duty, and/or estate agent commission, if any) incurred by the Plaintiff in or about the said purchase of the Property and costs to be recovered by the Plaintiff in this action;

(9) Interest on the amounts found to be due to the Plaintiff at such rate and for such period as this Honourable Court shall think fit;"

36. I make an order *nisi* that the plaintiff will have its costs.

(Simon Mayo)
Deputy High Court Judge

Mr Kenny Lin, instructed by Messrs Howell & Co., for the Plaintiff

Mr Denis Yu and Mr Danny Choi, instructed by
Messrs Leung Chan & Pang, for the Defendant

Case 3

HCMP 1066/2007

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO. 1066 OF 2007

IN THE MATTER OF the Front Portion of G/F, Yun Kong Tsun Lot Nos. 139 & 140 in Demarcation District No. 106, Yuen Long, the New Territories ("the Property")

AND IN THE MATTER OF a Sale and Purchase Agreement dated 21st March 2007 between Leung Wing Kit and Lau Ching Wan as the Vendor and Sun Lai Fong Keller as the Purchaser ("the Agreement")

AND IN THE MATTER OF section 12, Conveyancing and Property Ordinance, (Cap. 219)

BETWEEN

SUN LAI FONG KELLER	Plaintiff
and	
LEUNG WING KIT	1st Defendant
LAU CHING WAN	2nd Defendant

Before: Hon Reyes J in Court

Date of Hearing: 16 December 2008

Date of Judgment: 16 December 2008

JUDGMENT

I. INTRODUCTION

1. The Vendors (Leung and Lau) agreed to sell a Yuen Long Property to Sun for $525,000. Sun paid a total deposit of $52,500 for the Property. The Vendors undertook to "give prove and show good title" in accordance with s.13 of the Conveyancing and Property Ordinance (Cap.219).

2. Completion was to have taken place on 30 April 2007. But completion did not take place because, according to Sun, the Vendors failed to show a good title to the Property. The Vendors, on the other hand, say that they have shown good title. The question is who is right.

3. The issue between the parties is narrow.

4. Among other requisitions as to title, Sun's solicitors requested copies of any Certificate of Exemption, Certificate of Compliance, Occupation Permit, or "No Objection to Occupy" Letter issued by the Government in respect of the Building of which the Property forms part.

5. The Vendors' solicitors did not produce any such document. They replied that, the Building having been constructed in about 1981, it was unnecessary to produce a document. They doubted that any such document had ever been issued by the Government. Nonetheless, they pointed out that, in the 26 years since its construction, the Government had never taken any enforcement action against the Building for transgression of any regulation.

II. DISCUSSION

6. The Building (including the Property) is situated in the New Territories.

7. The Buildings (Application to the New Territories) Ordinance (Cap.322) came into effect in 1961. The Buildings Ordinance (Application to the New Territories) Regulations came into effect at the same time. Subject to certain exceptions stipulated in the 1961 Regulations, the 1961 Ordinance extended the application of the Buildings Ordinance (BO) to the New Territories.

8. One exception concerned buildings not exceeding 7.62 metres in height. Under BO s.21, new buildings may only be occupied after the Building Authority has issued an occupation permit. By the 1961 Regulations, buildings of less than 7.62 metres height were exempted from this requirement of an occupation permit.

9. On 16 October 1987 the Buildings Ordinance (Application to the New Territories) Ordinance came into effect. This repealed the 1961 Ordinance and 1961 Regulations subject to transitional provisions. By those latter provisions, the 1961 Ordinance and 1961 Regulations

continued to apply to any building which had been constructed or which was in the course of being constructed when the 1987 Ordinance came into effect.

10. In the normal course of events, the Building (including the Property) might have qualified for the exemption allowed by the 1961 Ordinance and 1961 Regulations.

11. But there is evidence (namely, a letter dated 7 October 1996 from the District Lands Officer (Yuen Long)) that upon completion in 1981 the height of the Building exceeded the permitted limit of 7.62 metres. By how much is unclear. I must assume that the excess was significant.

12. In consequence, the exemption in the 1961 Ordinance and 1961 Regulations could not apply.

13. No action ever having been taken to rectify the situation, no document (whether in the form of a Certificate of Exemption, a Certificate of Compliance, an Occupation Permit, or a "No Objection to Occupy" Letter) was ever issued in respect of the Building (including the Property). It is hardly surprising then that the Vendors could not produce any such document in answer to the requisition from Sun's solicitors.

14. In *Wong On v. Lam Shi Enterprises Ltd.* HCMP No. 2549 of 1995, 20 December 1995, Le Pichon J in a similar situation stated (at p.3):-

> "Where a building is not exempt from s.21 of the Buildings Ordinance which imposes the requirement of an occupation permit, that occupation permit is a relevant and necessary document to prove title because in the absence of such a permit,

> there is the possibility of enforcement action by the Building Authority in respect of the building. See *Lui Kwok Wai v. Chan Yiu Hing* [1995] 1 HKC 197. In the absence of special factors, I am bound to hold that the Vendor's title is defective because of the absence of occupation permits."

15. In *Wong On* the District Lands Officer (DLO) had issued a Letter of Toleration whereby, in consideration of a fee, an excess of 0.65% over the permitted height of a building would be tolerated over the life of that building. There was also a Letter of Compliance whereby the DLO certified that all positive obligations imposed on the grantee had been complied with to the DLO's satisfaction. On this basis, it was argued in *Wong On* that there was no real risk of enforcement action being taken by the Building Authority.

16. Le Pichon J rejected this argument. She held that the Letter of Toleration from the DLO did not amount to a waiver by the Building Authority. There was nothing to show that the Building Authority had delegated its statutory functions to the DLO. At best the DLO could only be said to have been acting for the Government in its capacity as landlord, not as agent of the Building Authority.

17. Le Pichon J concluded (at pp.7-8):-

> "It is in these circumstances that the test in *MEPC Ltd. v. Christian-Edwards* [1981] AC 205 at 220 is to be applied, namely whether it can be said that it is *beyond reasonable doubt* that the Purchaser would not be at risk of enforcement action being taken. I am asked so to conclude, based on the limited extent of this transgression and the fact that a premium had been paid for the contravention. But I do not see how I can be satisfied that it is *beyond reasonable doubt* that the Purchaser would not be at risk in the absence of any evidence that in circumstances such as the present, it is not the practice of the Building Authority to take any enforcement action. Had such evidence been adduced, it would have been a different matter. Here, it is to be noted that enforcement action need not

> necessarily take the form of a demolition order which might appear to be a drastic response. Contravention of s. 21(1) of the Buildings Ordinance is an offence punishable by a fine: see s.40 of the Buildings Ordinance. In the absence of evidence as to when occupation in contravention of s.21 began or when the same came to the notice of the Building Authority, there is no basis for concluding that any prosecution was time-barred as at the date for completion. There is therefore potential liability. If the Building Authority should decide, for whatever reason, to take action, it would be within its rights. The corollary is that the owner could be faced with a potential claim. Whilst it may be true that the chances of this happening are not high, this does not mean that it is in the 'beyond reasonable doubt' category. To fall into that category, something more is required and that is what is lacking in this case. As it does not, the Vendor has failed to show it has good title."

18. There is less in the way of special circumstances relied upon in this case than in *Wong On*.

19. The Vendors merely rely here on the absence of any enforcement action by the Building Authority over 26 years. There is no evidence as to the Building Authority's practice on whether or not (say) to impose a fine where (despite absence of an occupation permit) a building has been occupied for years. Nor is there any evidence as to when (if at all) the Building Authority first became aware of the excess in the Property's height. There is no serious suggestion that the Building Authority is time-barred from now bringing an enforcement action.

20. In that light, upon application of *Wong On*, the answer to the question here is clear. Although the chances of an enforcement action may not be high, that does not mean that the standard of "beyond reasonable doubt" in *MEPC Ltd.* has been met. The Vendors cannot have answered the requisition adequately by maintaining that it was unnecessary to

produce an occupation permit or similar document. The Vendors here thus failed to show good title.

21. Ms. Karen Ma (appearing for the Vendors) draws my attention to *Forever Business Ltd. v. Long Surplus International Investments Ltd.* [2007] 2 HKLRD 700 (CA). In that case there was an absence of an occupation permit. However, the Court held that good title had been shown. Ms. Ma invites me to do the same.

22. But, as Yeung JA stressed in his judgment, there were several special factors in *Forever Business*. Those were the following (at §71):-

> "(1) The building concerned was likely to be erected in or before 1947;
>
> (2) It is likely that the Building Authority had lost the records of the building concerned just as they had lost the records of most properties in Hong Kong completed during the pre-war and immediate post-war period;
>
> (3) The Building Authority had approved structural changes to part of the building as early as 1964 and must therefore be aware of the construction and occupation of the building;
>
> (4) The Government lease in respect of the building concerned was extended in 1988; and
>
> (5) There has never been any action or threat of action for the non-availability of an occupation permit and/or for enforcement action for such non-availability for 43 to 60 years."

23. *Forever Business* is distinguishable from the present situation. In the former, a substantially longer period of at least 40 years had passed without any enforcement action having been taken. More importantly, there were circumstances from which one could infer that the Building Authority had condoned the absence of an occupation permit.

24. I see nothing inconsistent between the approach in *Forever Business* and that stated by Le Pichon J in *Wong On*. I do not think that *Forever Business* assists the Vendors here.

25. I note that in *Forever Business* the Court of Appeal recommended (at §§13 and 95) that, at the time of agreement, a vendor who is aware that his property is not covered by an occupation permit should, if only out of prudence, disclose such fact to a purchaser. This simple measure would obviate a dispute (such as the present one) which might arise when the purchaser discovers that there is no occupation permit.

III. CONCLUSION

26. There will be a Declaration that the Vendors have failed to show good title. The deposit of $52,500 must be returned to Sun. I will now hear the parties on costs and any other consequential orders.

(A. T. Reyes)
Judge of the Court of First Instance
High Court

Mr Lawrence C L Hui, instructed by Messrs Hagon Wai & Partners, for the Plaintiff

Ms Karen Ma, instructed by Messrs Simon Ho & Co, for the Defendants

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Submissions on Consultation on Amendments to Land Titles Ordinance Rectification and Indemnity Provisions

Proposed clarifications to various provisions set out in paragraphs 9 to 18 of the Consultation paper

1. With reference to proposals set out in **paragraphs 9 to 17,** we accept all the proposed clarifications in principle.
2. In respect of **paragraph 18,** we accept the proposal regarding the Registrar's costs of processing applications for indemnity. However with regard to the applicant's costs, it would appear that if an applicant accepts the Registrar's offer in **Land Titles Ordinance ('LTO') section 86(1)(b)(i),** he cannot make an application to the Court under subsection (4). We submit that provision should be made for such cases that his costs should be payable from the indemnity fund automatically without further application either to the Registrar or to the Court.

Proposed modifications to the Mandatory Rectification rule in paragraph 26

3. We accept the proposed modifications in **paragraph 26 except for paragraph 26(b)(i),** which introduces the doctrine of deferred indefeasibility and therefore contravenes the fundamental principle that title of an assignee can be no better than that of his assignor. As such, if the first bona fide party to deal with the property after a fraud cannot enjoy indefeasible title, the second and subsequent ones should not be in a better position.
4. Paragraph 28 explains that a prospective owner have to exercise care in the transaction by which they themselves become owners since, if they have dealt with a fraudster, they are not given security against rectification in favour of the true owner affected by fraud. Using the illustration of owners A to E in the paper, where C is the fraudster, we accept that D, who deals with the immediate fraudster C, should exercise care in dealing with C, although it is not easy for D to detect that C has defrauded true owner B.
5. With deferred indefeasibility, it opens the loophole for fraudster C to procure sales in quick succession through D to E to perfect his fraud against true owner B,

thereby defeating the whole purpose of mandatory rectification.

6. For this reason, we submit that the proposed exception in paragraph 26(b)(i) should not be adopted.

7. As for paragraph 23(d) (deferred indefeasibility to be the rule for new land), which do not seem to be dealt with in paragraph 26, we consider that mandatory rectification should also apply to new land, and no modification is necessary. Even after the LTO takes effect, owners of new land may also be subject of fraud and they should also be entitled to the same mandatory rectification protection.

The Hong Kong Conveyancing & Property Law Association Limited
27 March 2009