

of Uncompleted Residential Properties Bill to provide better protection. However, in the face of opposition from the developers and as a result of the downturn in the economy and property market at the time, the Bill was abandoned in August 2001. Since the property market recovered after 2003, there had been escalating allegations of malpractice by estate agents and developers in their marketing and selling practices and the provision of information. To enhance the accuracy, uniformity and transparency of information provided in sales brochures and advertisements, the Residential Properties (First-hand Sales) Ordinance (Cap 621) was enacted in June 2012 and came into force on 29 April 2013. There is now a statutory regime, as stated in the long title, 'to regulate the provision of sales brochures and price lists and the use of show flats in connection with the sale of residential properties in respect of which neither a preliminary agreement for sale and purchase nor an agreement for sale and purchase has ever been entered into and in respect of which no assignment has ever been made, to regulate the viewing of such properties before sale, to regulate the publication of sale arrangements and the execution of agreements for sale and purchase in connection with such properties, to provide for registers of transactions in connection with such properties, to regulate advertisements promoting the sale of such properties, to provide for offences in connection with misrepresentations and dissemination of false or misleading information, and to provide for incidental and connected matters'.

CHAPTER 2

Sale of Land

2.1 Land may be disposed of inter vivos by sale or as a gift or as part of a family settlement.¹ It may also be passed on to a person by will or, if the owner dies intestate, to those persons entitled under the rules of intestacy. This chapter only deals with the disposition of land by sale, as it is by far the most common and significant form of disposition in practice. It is beyond the scope of this book to examine the details of land transfer, and reference to specialist conveyancing books should be made.² Some basic knowledge of disposition by sale is, however, essential for a better understanding of the remaining chapters, particularly those on the protection of legal estates and fragmented equitable interests under a system of deeds registration.³

2.2 The process of land transfer by sale involves invariably two main transactions: the contract and the completion (ie the conveyance or assignment).⁴ There are however various things a buyer and a seller, or more usually their solicitors, have to do before and after the signing of the contract and before and after the completion. There are therefore five stages in the conveyancing or assignment of land by sale.

1. Stage One: Pre-formal Contract

(a) Subject to contract or preliminary agreement⁵

2.3 At pre-formal contract stage, the buyer and the seller are simply negotiating. They may, however, 'agree' on the sale 'subject to contract', and until a contract is signed and exchanged in the usual way, they are not contractually bound.⁶ However, in Hong Kong if the service of an estate agent is used by the seller to sell his flat, a 'provisional' or 'preliminary' agreement is usually drafted by the estate agent on behalf of both the seller and the buyer.⁷ Such a provisional or preliminary agreement,

1 For settlements, see Goo & Lee, *Land Law in Hong Kong (Practitioners' Edition)* (4th Edn, Hong Kong: LexisNexis 2015).

2 See generally Judith Sihombing and Michael Wilkinson, *Hong Kong Conveyancing: Law and Practice* (Hong Kong: Butterworths Asia (looseleaf)), Vol 1.

3 See Chapter 7.

4 Other forms of transfer, eg as a gift or by will, are not normally preceded by a contract.

5 For a discussion on preliminary agreements, see Helen Yee-Fong Chung, 'Conveyancing: Preliminary Agreements and Escape Clauses' (1993) 23 HKLJ 282.

6 *A-G v Humphreys Estate (Queen's Gardens) Ltd* [1986] HKC 592, [1987] HKLR 427, [1987] AC 114, [1987] 2 WLR 343 (PC); *Spottiswoode, Ballantyne & Co Ltd v Doreen Appliances Ltd* [1942] 2 KB 32 at 35; *Keppel v Wheeler* [1927] 1 KB 577 at 584. For commentary on the effectiveness or otherwise of the phrase 'subject to contract' in England, see [2001] Conv 86 and 499.

7 Estate agents are regulated by the Estate Agents Ordinance (Cap 511).

when signed by the seller and the buyer,⁸ is usually binding on the parties because it indicates the parties' intention to be bound.⁹ The practice of using the words 'subject to contract' subsequently by the buyer's solicitor in his letter to the seller's solicitor does not change the binding effect of the provisional agreement.¹⁰ If the intention was that the provisional agreement should not be binding, clear terms to that effect must be used in the provisional agreement itself, as in *Grand Subject Investment Ltd v Mable Road Co Ltd & Anor*,¹¹ where an 'offer letter' was headed 'without prejudice and subject to contract' and clearly provided that neither the offer nor the acceptance of it by the recipient was to constitute a binding obligation on the part of the sender. In coming to the conclusion that there was not yet any binding contract between the parties, Godfrey J, as he then was, referred to what Sir Garfield Barwick said in *Daiman Development Sdn Bhd v Mathew Lui Chin Teck*:

The question whether parties have entered into contractual relationships with each other essentially depends upon the proper understanding of the expressions they have employed in communicating with each other, considered against the background of the circumstances in which they have been negotiating, including in those circumstances the provisions of any applicable law. *Where they have expressed themselves in writing, the proper construction of the writing against that background will answer the question.* The purpose of the construction is to determine whether the parties intend presently to be bound to each other or whether, no matter how complete their arrangements might appear to be, they do not so intend until the occurrence of some further event, including the signature of some further document or the making of some further arrangement. The question is one as to expressed intention and is not to be answered by the presence or absence of any particular form of words.¹²

8 The estate agent will also sign the agreement as a party to it to ensure that he will receive his commission from both the seller and the buyer.

9 See *Man Sun Finance (International) Corp v Lee Ming Ching Stephen* [1993] 1 HKC 113 at 124C-E, where Godfrey J said 'the signing of the form brings into existence an immediately binding agreement, it does so on the terms on which it expressly contains ... From the moment the ink is dry on the parties' signatures, all references to the formal sale and purchase agreement are illusory'. This was cited with approval in *Luxebond Investment Ltd v Super Asian Investment Ltd* [1998] 2 HKC 308. Cf *Yeung Siu Hong v Chan Siu Mee Sandie* [1992] 2 HKC 559, [1992-93] CPR 317 (an agreement to agree and what was to happen if no such agreement was concluded); *Yu Tai Hing Land Agency Ltd v Leung Wing Yin* [1986] 1 HKC 574, [1986-88] CPR 255. However, if the provisional agreement does not contain all the material terms, or is itself 'subject to contract', it may not be binding: *Winn v Bull* (1877) 7 Ch D 29.

10 See *Au Wing Cheung v Roseric Ltd* [1992] 1 HKC 149, [1992-93] CPR 368; *Lam Tam Yi & Anor v Chak Wai Man* [1993] 1 HKC 537, [1992-93] CPR 377; *Hong Kong Housing Authority v Hung Pui & Anor* [1987] 3 HKC 495, [1986-88] CPR 221. 'That a provisional agreement calls for a formal agreement that will supersede it, is not inconsistent with the former being a binding agreement': *Fong Yee Lan v Yiu Yau Ling* [1992] 2 HKLR 167 at 174, per Nazareth JA.

11 [1993] 1 HKC 499, [1992-93] CPR 382.

12 [1981] 1 MLJ 56 at 58 (emphasis added by Godfrey J).

2.4 It is plain that whether the parties intended to enter into a concluded contract is a matter to be looked at objectively.¹³ In *World Food Fair Ltd & Anor v Hong Kong Island Development Ltd*, the owner of a shopping mall (the defendant) and potential tenants (the plaintiffs) orally agreed on certain terms such as the monthly rent, management fees and air-conditioning charges. Upon receipt of a cheque for \$200,000 as 'initial deposit', the defendant sent the second plaintiff a draft letter of intent (dated 1 February 1997), which proposed, inter alia, that the tenancy should be for a term of three years 'commencing 8 March 1997 tentatively (subject to issuance of occupation permit) and a prior 7 days written notice will be served by the Lessor to the Intended Lessee for the actual date of commencement of Lease'. The draft letter of intent also provided that all the terms contained therein were 'subject to the formal Lease Agreement'. After that, the defendant gave the plaintiffs access to the premises to enable their contractors to commence fitting out works. Substantial expenses were incurred by the plaintiffs, but no formal agreement was signed. The plaintiffs' claim for the return of the deposit and damages was dismissed by the judge, who held that the parties had not proceeded beyond the stage of negotiation.¹⁴ The judge's decision was reversed by the Court of Appeal,¹⁵ which was in turn reversed by the Court of Final Appeal. As Ribeiro PJ put it, 'the Court of Appeal may have given undue weight to what [the witnesses] said were their *subjective* intentions as telling against the defendant's case'.¹⁶ The correct approach should be to assess the evidence of the witnesses against the contemporaneous documents to decide whether objectively the parties had unconditionally reached final agreement on all the intended terms of the contract.¹⁷ The standard preliminary agreement used by the estate agent usually includes the description of the property, the price and the parties, etc. On signing the provisional agreement, the buyer is usually required to pay a deposit of 1% of the purchase price. The provisional agreement usually contains terms which allow the seller to resile from the agreement by paying minimal damages only, which is often the loss of the initial deposit of 1% of the purchase price plus the same as liquidated damages.¹⁸ It often also requires the buyer to pay the deposit on the day the preliminary contract is signed and the balance of the purchase price

13 *World Food Fair Ltd & Anor v Hong Kong Island Development Ltd* [2007] 1 HKC 387, [2007] 1 HKLRD 498, (2006) 9 HKCFAR 735 (CFA) at para 35, citing *Kwan Siu Man v Yaacov Ozer* (1997-98) 1 HKCFAR 343 at 354 (CFA).

14 *World Food Fair Ltd & Anor v Hong Kong Island Development Ltd*, [2003] HKCU 1249 (HCA 4602/2000, 11 November 2003, unreported), Deputy Judge Carlson.

15 *World Food Fair Ltd & Anor v Hong Kong Island Development Ltd* [2005] 1 HKC 594 (CA).

16 *World Food Fair Ltd & Anor v Hong Kong Island Development Ltd* [2007] 1 HKC 387, [2007] 1 HKLRD 498, (2006) 9 HKCFAR 735 (CFA), at para 35 (emphasis original).

17 *Ibid* at para 38.

18 The validity of this practice was recognised in *Kentex Investment Ltd v Hui Lap Ping Sam* (1992) MPNo 3447/91 at 7, per Godfrey J. His Lordship, however, did not discuss the relationship between such practice and the principle of bare trusteeship under the rule in *Lake v Bayliss* [1974] 2 All ER 1114, nor did he explain whether the stipulated damages (double the deposit of 1% of the purchase price) might be void as a penalty. In *Workers Trust & Merchant Bank Ltd v Dajop Investments Ltd* [1993] 2 All ER 370, the Privy Council held that a deposit of 25% can only be a genuine deposit if special circumstances justified it.

the day after.¹⁹ Such an absurdity, caused by the mindless use of a standard form of contract has caused concern among the profession and consumers, and the Consumer Council and the Law Society of Hong Kong are investigating ways of regulating the industry. Of course, whether to incorporate these clauses is a matter for the parties in each individual case.

See To Keung v Sunny Way Ltd

[2009] 5 HKLRD 300

Yuen JA: As I understand it, the law relating to provisional sale and purchase agreements (as they are generally drafted) may be summarised as follows:

- (a) A provisional agreement is immediately binding on the parties. Although it provides for a formal sale and purchase agreement to be signed, such formal agreement would only be to incorporate the *express* terms of the provisional agreement, to express any *implied* terms, and to add any *new* terms that may subsequently be agreed (*Chu Wing Ning v Ngan Hing Cheung* [1992] HKCU 283 (HCA 9409/1991, 6 November 1992, unreported)).
- (b) Accordingly it is perfectly possible for the parties to proceed to completion without a formal agreement being signed. However if no formal agreement is signed because one party has insisted on the inclusion of a clause that is unreasonable, that insistence *may* be regarded, depending on the individual circumstances, as conduct evincing an intention no longer to be bound by the terms of the provisional agreement (*DH Shuttlecocks Ltd v Keung Shiu Tang* [1994] 1 HKC 286).
- (c) In most provisional agreements there is an 'escape clause', ie a clause allowing a party who wishes to resile from the transaction within a short period of time after the provisional agreement to 'buy his way out':
 - In the case of a vendor, he agrees to return the initial deposit to the purchaser, doubled by a sum of equal amount which he must pay the purchaser (double deposit).
 - In the case of a purchaser, he forgoes the initial deposit.
 This has also been referred to as 'alternative performance' an alternative to specific performance of the sale and purchase. Where the vendor seeks to rely on the escape clause by paying double deposit, he must do so in strict compliance within the time allowed by the provisional agreement (*Lee Ming Ching Stephen v Man Sun Finance (International) Corp Ltd* [1993] 1 HKC 113).
- (d) If the provisional agreement provides that 'upon signing the formal sale and purchase agreement, a further deposit of \$X shall be paid', the purchaser is not obliged to pay the further deposit if the formal agreement is not signed (*Link Brain Ltd v Fujian Finance Co Ltd* [1990] 2 HKLR 353; *Yiu Yau Ping v Fong Yee Lan* [1992] 2 HKLR 167; *Health Link Investment Ltd v Pacific Hawk Investment Ltd* [1995] 1 HKC 249). These are all Court of Appeal judgments binding on this Court. It may be thought that in such a situation, the vendor is in an unfavourable position compared with the purchaser. The purchaser would have the property 'reserved' under an agreement binding on the vendor and he can wait until close to completion date before he decides (after considering the state of the market) whether to complete or not. If the purchaser is a 'two-dollar' company and decides not to complete after all, all that it loses would be the initial deposit. The disadvantage to the vendor is obvious. Of course, that is a good reason for vendors to insist on a larger initial deposit, but it

¹⁹ This practice has been criticised as absurd by Godfrey J in *Tsing Lung Investment Co Ltd v Yu Sai Kin* [1989] 1 HKC 513 at 515, [1989-91] CPR 377.

is in the nature of 'initial' deposits that they are relatively small sums, especially if there is an escape clause involving the payment of double deposit or forfeiture of the initial deposit.

- (e) However, this is all subject to the true construction of the agreement made between the parties in the individual case. Where the buyer buys the property from the developer, whether completed units or units in an unfinished development, the buyer is usually required to sign a binding memorandum for sale with the developer and to pay a deposit of 5% of the purchase price. The buyer and the developer are often jointly represented by the developer's solicitor, although the buyer is entitled to appoint his own solicitor. The sale and purchase agreement will usually be signed by the buyer in the presence of the solicitor within three working days of the signing of the memorandum for sale and the agreement is usually in the standard form contract containing standard terms under the Consent Scheme or mandatory terms under the Non-Consent Scheme.²⁰

(b) Searches, enquiries and inspections

2.6 As in many other contracts, the basic rule in a contract for the sale of land is *caveat emptor* (let the buyer beware). It is therefore important for the buyer (or his solicitor) if he instructs a solicitor before he enters into any agreement to buy the land, to carry out searches, enquiries and inspections to find out more about the condition of the property to be transferred before he signs any agreement. Where an estate agent is engaged by the buyer, such searches are usually done by the agent as he is required to provide the buyer with certain prescribed information including particulars of current ownership and subsisting encumbrances in respect of the property, the total or entire area comprised in the property, the year in which construction of the property was completed, any restrictions on the user of the property, the unexpired term of the Government leases, etc.²¹ The buyer should still make enquiries and inspections of the property and should seek legal advice on how to conduct enquiries and inspections. This, however, does not appear to be the case in practice in Hong Kong. All too often eager buyers who are unfamiliar with the legal minefield of conveyancing matters will go to an estate agent whose staff will bring them to view the property. If the buyers like the property they will sign the provisional agreement prepared by the estate agent or the memorandum for sale prepared by the developer which, as mentioned earlier, is often binding. In some cases, a buyer will even sign a preliminary agreement without viewing the property as it is let out to a tenant. The buyers do not have the opportunity, and indeed some of them do not see the need, to make such enquiries and inspections. In the case of a first-hand purchase from a developer, often a buyer does not even get to inspect the actual unit he is buying before the memorandum for sale is signed. The buyer will usually have to rely on the floor plan, the sales brochure, the architectural model of the development displayed at the developer's sales office, the show flats and his imagination. Furthermore, the buyer is often required to sign the formal sale and purchase agreement within three days of the signing of the memorandum for sale. There is therefore little time for any searches and enquiries to be made.

²⁰ For details on Consent and Non-Consent Schemes, see Judith Sihombing and Michael Wilkinson, *Hong Kong Conveyancing: Law and Practice*, Vol 1, Ch IV, paras 33-75.

²¹ See Estate Agents Ordinance (Cap 511) s 36(1) and (2).

2.7 While it is true that where the seller guarantees good title²² and the buyer can withdraw if the seller cannot give good title later, it may be wise to do these searches before any agreement is signed in order to avoid potential legal problems.

2.8 The *caveat emptor* rule does not apply to latent defects, so the seller is under a duty to disclose any latent defects in his title; it is the seller's duty to provide a good title unless the provisional agreement, if any, or the formal sale and purchase agreement if no provisional agreement is signed, contains express provisions to limit the title to be given.

2.9 Latent defects are encumbrances and any other adverse interests which a prospective buyer cannot discover for himself by a reasonable inspection of the property and cover estate contracts, unwritten equities,²³ notices served by the Building Authority or Highways Department, restrictive covenants, certain easements such as underground pipelines, leases where the tenant is not in possession, etc. Patent defects need not be disclosed by the seller, although it is not entirely clear what amounts to patent defects as there is very little Hong Kong authority on this subject. Matters such as any visible breach of covenants in the Deed of Mutual Covenant where the property is a unit in a multi-storey building, any rights of way, ownership and maintenance of the driveway, planning matters and possibly any illegal structures,²⁴ any breach of the covenants in the Government lease, etc may well be patent defects.

2.10 Apart from disclosing any latent defects where the seller agrees to give good title, the seller does not have to volunteer any information. Even where matters may well be patent defects, the prudent buyer should make standard enquiries of them. This exercise can be the biggest hazard for prospective buyers who have to incur considerable time and effort to gather information which may already be possessed by the seller.²⁵ When questions are asked about the property, the answers the seller gives must be accurate to the best of his knowledge. If the buyer enters into the

22 A defective or defeasible title is not a good title. A defective title is either a title which the seller does not have or a title which is subject to existing encumbrances. A defeasible title is a title which can be avoided either because of the circumstances of the transfer (eg fraudulent conveyance or preference) or because of breach of the conditions in the Government lease or the Buildings Ordinance (Cap 123) or the Building Regulations.

23 For example, *Hillier Development Ltd v Tread East Ltd* [1993] 1 HKC 285, [1992-93] CPR 416; *Financial and Investment Services for Asia Ltd v Baik Wha International Trading Co Ltd* [1985] HKLR 103.

24 But see *Giant River Ltd v Asie Marketing Ltd* [1990] 1 HKLR 297; [1986-88] CPR 543.

25 In England, an attempt to solve this problem was made by the Law Society in 1990 by introducing a 'National Protocol' as a result of the recommendations by the Law Commission's Conveyancing Standing Committee in 1989: 'Let the buyer be well informed' (Reports of Conveyancing Standing Committee, December 1989) at para 33. The National Protocol is intended to be used in all domestic conveyancing transactions. Under the National Protocol, a seller is required to provide certain standard information including a series of questionnaires contained in the 'Property Information Form' and a 'Fixtures, Fittings and Contents Form' and to provide local searches. For an examination of the National Protocol, see [1990] Conv 137 (HW Wilkinson). It should be noted that the Protocol is only a time-saving device and does not change the *caveat emptor*

contract as a result of certain misrepresentations on the part of the seller, he may rescind the contract and/or sue for damages.²⁶

(i) Land Registry searches

2.11 As will be seen, all deeds, conveyances and other instruments in writing must be registered at the Land Registry in order to obtain priority against any subsequently registered deeds, conveyances or instruments in writing.²⁷ A search at the Land Registry will therefore reveal any registered encumbrances on the property. The buyer can then make an informed decision as to whether to buy the property. An estate agent is required to provide his client with this information before a preliminary agreement is signed.

(ii) Companies Registry searches

2.12 If the seller is a company registered under the Companies Ordinance (Cap 622), it is necessary to undertake a search at the Companies Registry. This is to discover any fixed charge or floating charge over the land owned by the company and the company's capacity for execution. These charges will normally be registered at the Land Registry.

(iii) Inspection of property

2.13 The buyer should also inspect the property carefully to find out if anyone other than the seller is in occupation and if so whether they have an interest in the property. Enquiry must be made of the persons in occupation themselves and not just the seller.²⁸ If the buyer fails to make enquiry of any occupier other than the seller who has an unwritten equity or who has an oral lease for less than three years, he will be bound by the occupier's interest. While unwritten equity is a latent defect, and the seller will be in breach of his duty for not disclosing it to the buyer, if the buyer discovers the undisclosed equity at this stage, he can avoid a law suit. The buyer should also look out for any patent defects in the title which are unregistrable, such as a neighbour's right to walk across the garden, etc. (It seems that illegal structures in breach of the Government lease may be treated as latent defects,²⁹ particularly if a building order has been made by the Building Authority for its removal).³⁰ The seller

rule: it is still the buyer's responsibility to find out any other information not covered by the Protocol. Furthermore the Protocol is only voluntary rather than compulsory.

26 Misrepresentation Ordinance (Cap 284) s 3(1).

27 See Land Registration Ordinance (Cap 128) ss 2-5.

28 *Wong Chim Ying v Cheng Kam Wing* [1991] 2 HKLR 253 (CA); *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487, [1980] 2 All ER 408; *Hodgson v Marks* [1971] Ch 892 at 932 per Russell LJ applied; *Kingsnorth Finance Co Ltd v Tizard* [1986] 1 WLR 783 at 794.

29 See *Giant River Ltd v Asie Marketing Ltd* [1990] 1 HKLR 297, [1986-88] CPR 543.

30 But see *But Chung Yin v Billion Extension Development Ltd & Anor* [1997] 1 HKC 531. Knowledge of an illegal structure does not ipso facto constitute waiver or give rise to estoppel: *Giant River Ltd v Asie Marketing Ltd* [1990] 1 HKLR 297, [1986-88] CPR 543.

is not obliged to disclose these patent defects to the buyer. Inspections of property are normally carried out by the buyer himself with perhaps some advice from his solicitor, if he has instructed one, on the matters to look out for.

(c) Survey

2.14 It is also advisable for the buyer to commission a structural survey of the property to be bought to check for physical defects or illegal structures or any differences from the Government lease. In practice, many house purchases are financed by lending institutions which will instruct a surveyor to assess whether the security offered is sound. This will have to be paid for by the buyer and the buyer will usually be reluctant to commission his own additional survey. If the surveyor is negligent in his assessment and report made to the lending institution which helps finance the purchase, and the buyer subsequently suffers loss, the surveyor can be liable to the buyer.³¹

(d) Drafting and approving of contract and checking evidence of title

2.15 Having made all the relevant searches, enquiries and inspections, if the buyer is happy with the property on offer and agrees to purchase it, the estate agent will draft the preliminary or provisional contract. (If the buyer has signed a provisional agreement before any searches etc, which is often the case, then such searches, etc mentioned above and any requisitions are normally carried out after a formal sale and purchase agreement is signed).³² The estate agent usually acts on behalf of both the seller and the buyer, especially in the sale of first-hand property where the seller is the developer. The estate agent normally drafts a provisional or preliminary agreement in his own standard form. A prudent buyer should not sign the agreement before seeking advice from his own solicitors. However, in Hong Kong, the buyer often signs the provisional agreement before instructing a solicitor to handle the formal sale and purchase agreement and assignment. As mentioned earlier, such a provisional agreement tends to be binding as it contains terms which indicate a clear intention to be bound.³³ If the buyer signs the provisional agreement, the seller's solicitors will draft the sale and purchase agreement along the lines of the provisional agreement. The buyer's solicitors will request from the seller's solicitors the draft formal sale and purchase agreement together with the title deeds³⁴ or a certified true copy of them.³⁵ The sale and purchase agreement must reflect the terms of the provisional

- 31 *Yianni v Edwin Evans & Sons* [1982] QB 438, *Smith v Eric Bush* [1990] 1 AC 831.
- 32 The buyer's solicitors may do a simple search at the Land Registry just to confirm that the seller is indeed the legal owner.
- 33 This is so even if the provisional agreement calls for a formal agreement to supersede it: *Yiu Yau Ping v Fong Yee Lan* [1992] 2 HKLR 167 at 174 (CA); *Chan Yock Kwong v Wong Hee Mao* [1962] HKLR 480 at 487-492; *Branca v Cobarro* [1947] 1 KB 854 followed.
- 34 *Lee Kenny & Anor v Wong Kwok Yan* [1994] 2 HKC 309.
- 35 Unless the contrary intention is expressed, a buyer of land shall be entitled to require the seller to deliver to him, for the purpose of giving title to that land, the original of (a) the Government lease that relates exclusively to the land, if there is one; and (b)

agreement and it is obviously important for the buyer's solicitors to ensure that this is the case. But if the sale and purchase agreement is inconsistent with the provisional agreement, the usual contractual principles on variation and waiver would apply.³⁶

2.16 If the buyer does not sign the provisional agreement, the seller's solicitors may draft the sale and purchase agreement in their standard form contract, or in a formal contract containing the requisite terms under the Consent or Non-Consent Scheme, or in the form of Form 2 in the Third Schedule to the Conveyancing and Property Ordinance (Cap 219) containing the conditions in Part A of the Second Schedule to the Conveyancing and Property Ordinance (see the end of this chapter), or a combination of these, or in an open contract.³⁷ As will be seen, the contract, whether provisional or the formal sale and purchase agreement, must comply with certain formalities. The buyer's solicitors should check the draft contract and make further enquiries concerning the draft contract or suggestions for any amendment. The seller's solicitors will then reply to the enquiries and submit two copies of the amended draft contract. If the buyer is now happy with the seller's replies and the amended draft contract, and the pre-contract searches, enquiries and inspections, his solicitors will return a copy of the draft contract to the seller's solicitors. The parties may then fix a date for the exchange of contracts which will create a legally binding relationship. Where the buyer uses the developer's solicitors, the solicitors will prepare the sale and purchase agreement which will be signed separately by the buyer and the developer.

2. Stage Two: Contract

2.17 On the exchange of contracts, the buyer is normally required to pay 9% deposit of the purchase price if he has paid 1% deposit on signing a provisional agreement, or 10% if he has not.³⁸ Once the contracts are exchanged, the parties are bound irrevocably (if not already bound by a provisional agreement) and must be ready to proceed to the completion of contract whereby the legal estate will be conveyed or assigned. A buyer who buys from the developer does not have to pay a further deposit when he signs the sale and purchase agreement. He will, however, have to pay stamp duty for the purchase. The agreement will specify the date of

any document that relates exclusively to the land and is required to be produced by the seller as proof of title to that land under s 13(1)(a) and (c): Conveyancing and Property Ordinance (Cap 219) s 13A (added in 2008)

- 36 See eg *Keung Shiu Tang v DH Shuttlecocks Ltd* [1994] 1 HKC 286, [1994-1995] CPR 335. For more details on variation and waiver, see GH Treitel, *The Law of Contract* (10th Edn, London: Sweet & Maxwell 1999) at pp 97-113.
- 37 In England, it is a common practice for the parties to adopt the Standard Conditions of Sale (5th Edn, 2011) with perhaps some modifications.
- 38 If the total deposit paid exceeds 10% and is unreasonable, it can be void as penalty: *Sung Wai Kiu & Anor v Wong Mei Yin* [1997] 1 HKC 288. But if there are exceptional circumstances to justify a higher amount of deposit, it would be considered reasonable: *China Pride Investment Ltd v Silverpole Ltd* [1994] 2 HKC 341 (CA). Here a deposit of 20% on a sub-sale was held to be reasonable. For a succinct review of the authorities, see *Polyset Ltd v Panhandat Ltd* [2002] 3 HKLRD 319, (2002) 5 HKCFAR 234 (CFA) where a deposit of 35% was held to be unjustifiable.

completion³⁹ and time is often made the essence of the contract by an express term of the agreement.⁴⁰ If the seller later changes his mind, the buyer may seek an order of specific performance compelling the seller to carry out the sale.⁴¹ An order of specific performance is often made almost as a matter of course⁴² (because, land being unique, monetary compensation will not be an adequate remedy) provided the buyer can establish that there is an enforceable contract for the sale of land and he has given consideration⁴³ (because equity will not assist a volunteer). Alternatively he may choose to simply sue for damages or, if time of completion is of the essence, rescind the contract on or after the due completion date. Likewise, if the buyer later refuses to proceed with the sale, the seller may keep the deposit and sue him for breach of contract.⁴⁴ In respect of any question arising out of or in connection with any contract for the sale or exchange of land, the seller or the buyer may apply to the court, by petition or by originating summons, for an order as appears just to the court.⁴⁵ For example, the court may order the refund of deposit if the contract was induced by the seller's representation.⁴⁶

2.18 For a contract for the sale of land to be enforceable by legal action, certain formalities must be complied with under section 3(1) of the Conveyancing and Property Ordinance.⁴⁷

39 Under the Standard Conditions of Sale in England (5th Edn, 2011) Condition 6.1.1, completion will normally take place within 20 working days of the exchange of contracts.

40 Under the Standard Conditions of Sale in England (5th Edn, 2011), time is not the essence of the contract. But a party may, on or after the completion date, give notice to complete making time of completion of the essence of the contract (Condition 6.8).

41 In *Sincere Union Development Ltd & Anor v Hansun Investment Ltd* [2008] 4 HKC 351, sub nom *Hansun Investment Ltd v Sincere Union Development Ltd* [2008] 4 HKLRD 442, the remedy was denied to a buyer who failed to take any steps to pursue specific performance for more than 30 months after the completion date. The fact that the buyer persistently called for the return of the deposit was held to be 'the antithesis of keeping the contract to purchase alive' (at para 49).

42 *Patel v Ali* [1984] Ch 283 at 286G; *Graham v Pitkin* [1992] 1 WLR 403 at 406D (PC).

43 *Hall v Warren* (1804) 9 Ves 605, 32 ER 738.

44 See eg *Union Eagle v Golden Achievement* [1997] 2 WLR 341 (PC).

45 Conveyancing and Property Ordinance (Cap 219) s 12. 'The legislature intended to give the Court a very wide power to order any relief as it thinks fit after considering all the circumstances of the case': *Lai Ke Bin v Capital Project Development Ltd* [2009] 1 HKC 93, [2009] 2 HKLRD 49, at para 44.

46 *Wide Link Ltd v Tam Sing Cheong & Ors* [1999] 3 HKC 405.

47 This section is almost identical to the repealed s 40 of the English Law of Property Act 1925 which applied to contracts made before 27 September 1989. Section 40 was repealed as a result of the English Law Commission's recommendations: see Law Commission, *Transfer of Land: Formalities for Contracts for Sale etc of Land* (Law Com No 164, 29 June 1987) at paras 4.10-4.11. Contracts made on or after 27 September 1989 are governed by s 2 of the Law of Property (Miscellaneous Provisions) Act 1989, which provides that a contract for the sale or other disposition of an interest in land must be in writing incorporating all the terms of the agreement signed by both parties. The terms may be incorporated in a document either by being set out in it or by reference to some other document. This section, however, does not apply to a contract to grant

(a) Formality

2.19 A contract for the sale of land can be made orally. It can be made in the same way as any other contract. However, under section 3 of the Conveyancing and Property Ordinance, a contract for the sale of land has to be in writing or evidenced by a memorandum in writing or supported by a sufficient act of part performance, otherwise it is unenforceable by action.⁴⁸ Thus, although a purely oral contract is as valid as a written one, it will be unenforceable.

Conveyancing and Property Ordinance

3. Land Contracts to be in writing

- (1) Subject to section 6(2), no action shall be brought upon any contract for the sale or other disposition of land unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged or by some other person lawfully authorised by him for that purpose.
- (2) This section applies to contracts or other dispositions whenever made and does not affect the law relating to part performance or sales by the court.

2.20 Section 3(2) provides that the section does not affect the law relating to part performance. Thus, part performance, which will be discussed below, can be viewed as an alternative to section 3(1). Section 3(1), which contains the requirements for writing and signature, is expressed to be subject to section 6(2).⁴⁹ Under section 6(2), nothing in section 3 shall affect the creation by parol of leases taking effect in possession for a term not exceeding three years (whether or not the lessee is given power to extend the term) at the best rent which can be reasonably obtained without a premium. In *World Food Fair Ltd & Anor v Hong Kong Island Development Ltd*,⁵⁰ the Court of Appeal held that there were sufficient acts of part performance and thus it was not necessary to consider whether the alleged three-year lease was 'taking effect in possession'. Nevertheless, Cheung JA referred to defence counsel's submissions on section 6(2) as follows:⁵¹

... counsel for the defendant argued that the plaintiffs cannot avail themselves of s 6(2) because the plaintiffs were not 'in possession' of the lease and the case of *Long v Tower Hamlets London Borough Council* [1996] 3 WLR 317 was relied upon. ... One of the issues is whether the lease in question was within s 54(2) of the Law of Property Act 1925 which is the equivalent of our s 6(2). In that case the landlord on 4 September 1975 informed the tenant that he was 'prepared to grant' the tenant a tenancy to commence on 29 September 1975. The tenant agreed to abide by the terms imposed by the landlord and moved into the premises on 29 September 1975.

a lease taking effect in possession for a term not exceeding three years at the best rent reasonably obtainable without a fine. For an analysis of s 2 of the 1989 Act, see *Goo* at pp 78-90; [1989] Conv 431 (PH Pettit); (1989) 105 LQR 553 (RE Annand).

48 The origin of this statutory requirement as to written evidence is the English Statute of Frauds 1677 s 4. The purpose was to prevent fraud and perjury by false allegations of contracts.

49 'The restriction in s 3(1) is subject to s 6(2)': *World Food Fair Ltd & Anor v Hong Kong Island Development Ltd* [2005] 1 HKC 594 (CA) at para 102.

50 [2005] 1 HKC 594 (CA) (reversed by the Court of Final Appeal on other grounds).

51 *Ibid* at para 104.

held on trust, but also to the study of land law in relation to conveyancing; after all conveyancing is land law in practice. The conveyancers are often interested in the question of how the beneficial interests behind a trust are enjoyed and how they can be protected when the trust property is subsequently assigned to a purchaser, and likewise whether the purchaser is able to take free of the beneficial interests. Thus all the various trusts we have seen hitherto can be classified, in England, from the point of view of a conveyancer, into strict settlements, trusts for sale and bare trusts. A strict settlement, a trust of successive interests, is governed specifically by the Settled Land Act 1925 (UK) which gives the tenant for life the legal estate and wide powers of management. A trust for sale, which can be employed either for successive or concurrent interests, gives the trustees the legal estate and imposes a duty on the trustees to sell. A bare trust is residual and does not require the trustee to do anything. It covers only cases where the legal estate is held by a trustee for a beneficiary. Since 1 January 1997, all trusts are to be treated in the same way. The Trusts of Land and Appointment of Trustees Act 1996 (UK) prohibits the creation of new strict settlements, and all trusts for sale and bare trusts are converted into a new form of 'trust of land'. In other words, where a trust is newly created either for successive interests or concurrent interests, the Settled Land Act 1925 or the provisions in the Law of Property Act 1925 (UK) relating to trusts for sale cease to apply. Instead, the trust will be governed by the new provisions in the 1996 Act. Thus, in England, except existing strict settlements which are still governed by the Settled Land Act, there is only one type of trust which is known as 'trust of land'.

4.149 In Hong Kong, there are no equivalents to the Settled Land Act or the provisions relating to trusts for sale in the Law of Property Act, except the definition of 'trust for sale' in the Trustee Ordinance (Cap 29). But successive interests or concurrent interests, as in England, must exist behind a trust. Such a trust may, but often does not, expressly impose a duty on the trustee to sell the land and is governed by the Trustee Ordinance.³⁵⁰

350 For an example of a vesting order under s 45 of the Trustee Ordinance (Cap 29) where the trustee under a resulting trust cannot be located, see *Lam Tat Choi v Chan Suk Yee* [2000] HKCU 866 (HCA 4101/2000, 3 November 2000, unreported).

CHAPTER 5

Co-Ownership

1. Trusts and Co-ownership

5.1 Ownership in an estate or interest in land, for example, a lease, a mortgage, an easement and a covenant, can be held by two or more persons concurrently. Where there are two or more legal owners, there is a co-ownership at law.¹ Where there are two or more beneficial owners, there is a co-ownership in equity. In the case of co-ownership, ie where the land is held concurrently either at law or in equity, there is often a difference in the legal and equitable ownership, so the legal estate is often held on trust. The legal owners are the trustees and the beneficial owners are the beneficiaries. The trust is often expressly created by the assignment or a trust instrument, or may sometimes arise by way of a resulting or constructive trust.² The trust, however it arises, upon which the land is held is either a bare trust or a trust for sale. As a trust is a bare trust if it is not a trust for sale, it is easier to start with what a trust for sale is. It is important to identify whether a trust is a trust for sale or bare trust because there are some differences in the way in which the land is to be dealt with.

(a) Trust for sale

5.2 Under section 2 of the Trustee Ordinance (Cap 29), a trust for sale 'in relation to land, means an immediate binding trust for sale, whether or not exercisable at the request or with the consent of any person, and with or without power at discretion to postpone the sale'. This is identical to section 205(1)(xxix) of the Law of Property Act 1925 (UK). 'Immediate binding trust for sale' means that the trust under which the trustees are given a duty to sell must take effect immediately and not in the future.³ A trust to sell the property at some future date, eg 'to A in fee simple but when X attains the age of 25 to sell and to hold the proceeds upon trust for the residuary estate', is not an immediate trust for sale. What is required is that the trust for sale must take effect immediately, even if the sale does not take place immediately.

¹ Note, however, that where there are more than four legal owners holding the legal estate on trust, no new legal owners can be added: Trustee Ordinance (Cap 29) s 36(1). If the land is held on trust for sale by more than four legal owners as trustees, the first four named shall alone be trustees: s 36(2).

² See Chapter 4.

³ *Re Hanson* [1928] Ch 96.

Indeed, trustees for sale are frequently expressly given a power to postpone sale. Such a power will not prevent the trust from being a trust for sale.

5.3 The trustees must, of course, be given a duty to sell⁴ and not a mere power of sale. The trustees may be given a power to postpone sale, or they may be asked to obtain the consent of X before they sell.⁵ If X refuses to consent, the trustees or any person beneficially interested may apply under section 56 of the Trustee Ordinance to the court for an order for sale.

5.4 If the trustees are asked 'to retain or sell the land', then it depends on how the court construes it having regard to the general intention of the settlement. If the intention is that the land should be sold it will be regarded as a trust for sale.⁶ If the land should be retained then the settlement will be a bare trust.⁷

5.5 Note that for a trust for sale to be created, the trustee must be given a duty to sell with or without a power to postpone sale. A duty to sell can only be imposed expressly; there is no implied duty to sell.⁸ (One exception is where a person dies intestate (ie without a will) on or after 7 October 1971⁹ where his estate is to be held by the personal representatives on trust for sale under section 62 of the Probate and Administration Ordinance (Cap 10), ie the personal representatives are given a statutory duty to sell).¹⁰ So a trust for sale must be expressly created, and in Hong Kong this is rather rare in practice.¹¹ Likewise, a power to postpone sale can only be given expressly. There is no implied power to postpone sale.

(b) Co-ownership under a trust

5.6 Before we look at the substantive law of co-ownership, it is important to understand the conveyancing aspects of co-ownership under a trust for sale or bare trust because in practice cases of co-ownership also often involve the transfer of ownership and third party's rights.

4 This means that in Hong Kong only an express trust can be a trust for sale. An implied trust or constructive trust must be a bare trust. This is one reason why trust for sale is not common in Hong Kong.

5 *Re Wagstaff's Settled Estates* [1909] 2 Ch 201.

6 See eg *Re Johnson* [1915] 1 Ch 435.

7 Cf *Re White's Settlement* [1930] 1 Ch 179.

8 Under the English Law of Property Act 1925, in certain circumstances, a duty to sell was implied on the trustees for sale. Since 1 January 1997, all existing and new trusts for sale are governed by the Trusts of Land and Appointment of Trustees Act 1996 (UK) which gives the trustees a power to sell or to postpone sale. For details, see *Goo*, Chapter 13.

9 Where a person died before 7 October 1971, there was no statutory trust for sale, but the administrator had the power to dispose of the deceased's estate at common law. *Lo Fook Cheung v Law Yun Yau* [1981] 1 HKC 429.

10 Another exception in equity is that partnership property, on death or dissolution, is held on trust for sale: *Re Land Registration Ordinance (Cap 128)* sub nom *Re an Application by Lo Ling Leung-chai* [1980] HKLR 910 at 916-918; *A-G v Hubbuck* (1884) 13 QBD 275 applied.

11 A rare example is *Lo Fook Cheung v Law Yun Yau* [1981] 1 HKC 429.

5.7 It is common today for a couple to buy a flat in their joint names. Usually there is no express duty to sell so that the property is often held on a bare trust. But if the land is held on trust for sale, the trustees for sale must sell the land immediately. This means normally within one year of the creation of the trust,¹² unless there is a power to postpone sale. If there is a power to postpone sale, and there is more than one trustee, the power can only be exercised unanimously. Because the legal estate is vested in all the trustees as co-owners, the assignment must be executed by all in order to sell the entire legal estate. If they cannot reach a unanimous decision as to whether to sell the property or to retain it, the property must be sold unless they all agree to postpone the sale. This important principle was laid down in *Re Mayo*.¹³ The duty to sell overrides the power to postpone sale. In the case of a bare trust, the trustees do not have a duty to sell. They may sell the property if they are given a power of sale expressly by the trust instrument. If they do not have a power of sale, and if they wish to sell, they will have to apply to the court under section 56 of the Trustee Ordinance for an order to approve the sale.¹⁴ But if all beneficiaries of full age join in the conveyance, such an application to the court would be unnecessary.

5.8 In deciding whether to sell, the trustees for sale do not have to consult the beneficiaries or obtain their consent unless they are expressly required by the trust instrument to do so.¹⁵ It is common for a testator or settlor who has left his property to, say, his children on trust for his wife who lives in the property, to stipulate expressly that the property cannot be sold without the consent of his wife since she may wish to continue to reside there. The beneficiaries who are of full age and are all together absolutely entitled to the property, may act together to direct the trustees for sale to deal with the trust property in a particular way. The position is the same in the case of a bare trust.

5.9 The trustees for sale, or a bare trustee who has a power to sell, may sell the property either by public auction or by private contract.¹⁶

5.10 If the trustees for sale decide not to sell the property, the beneficiary may be allowed either by the trust instrument or by the trustees to be in possession of the property as he only has an interest in the proceeds under the doctrine of conversion (see below).¹⁷ In the case of a bare trust the beneficiary has an interest in land and so a right to possession. If he is not in possession, any income from the property may

12 See *Re Petrie* [1962] Ch 355.

13 [1943] Ch 302.

14 For example, *Kwong Suk Chun v Wong Fung Ming* [1989] 2 HKLR 114.

15 In England, there was a duty of consultation under the Law of Property Act 1925 in an express trust for sale. Now under the Trusts of Land and Appointment of Trustees Act 1996 (UK), such a duty applies to both express and implied trusts of land. For details see *Goo*, Chapter 13.

16 Trustee Ordinance (Cap 29) s 13.

17 *Re Bagot's Settlement* (1894) 1 Ch 177 at 180f; *Re Earl of Stamford and Warrington* [1925] Ch 162 at 171; (1955) 19 Conv (NS) 146 at 147 (F R Crane). See also *Gray* (3rd Edn) at pp 661-663. But see also *Bull v Bull* [1955] 1 QB 234; *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487 at 507B-D, 510G, 511H; *City of London Building Society v Flegg* [1988] AC 54, [1987] 3 All ER 435 at 453.

be invested and the income from the investment can be enjoyed by the beneficiary or accumulated. Likewise, if the property is sold, the proceeds from the sale may be invested. If the beneficiary is entitled to the distribution of the proceeds, he may call for its distribution.¹⁸

5.11 If the property is not sold because the trustees for sale (or the bare trustee) want to lease the property or mortgage it to raise money for its maintenance or improvement, they must apply to the court for approval under section 56 of the Trustee Ordinance unless the powers are expressly given by the trust instrument.

5.12 In the case of a trust for sale, as the trustees for sale have a duty to sell, equity treats as done that which ought to be done. Thus, from the date of the trust for sale, the property is notionally regarded as being sold, and the beneficiaries' interests converted into the proceeds of sale. This is known as the doctrine of conversion. Thus, the interests of the beneficiaries under a trust for sale are in the proceeds of sale, not in the land itself even before the land is sold. Whereas in the case of a bare trust, as the trustee does not have a duty to sell, the beneficiaries' interests are always in the land. This is important because in some cases certain statutory provisions only apply to land or interest in land but not proceeds of sale. For example, section 3 of the Conveyancing and Property Ordinance (Cap 219) provides that no action shall be brought upon any contract for the sale or other disposition of 'land' unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged or by his lawfully authorised agent. Land, as defined in section 2 of the Conveyancing and Property Ordinance, does not include proceeds of sale. So prima facie, an agreement by the beneficiaries of land held on trust for sale to sell their beneficial interests is not caught by section 3 of the Conveyancing and Property Ordinance since they do not have an interest in land but merely an interest in the proceeds of sale. On the other hand, where a beneficiary under a bare trust agrees to sell or dispose of his beneficial interest, such an agreement will be caught by section 3. Why should the agreement by a beneficiary under a bare trust comply with section 3 when the agreement by the beneficiaries under a trust for sale does not have to? This is illogical. Thus, in England, the court, when faced with a similar problem under the repealed section 40 of the Law of Property Act 1925 (which is identical to section 3 of the Conveyancing and Property Ordinance) ignored the doctrine of conversion, and held in *Cooper v Critchley*¹⁹ that for the purposes of section 40, the beneficiaries under a trust for sale had an interest in land.

5.13 In *Irani Finance v Singh*,²⁰ the English Court of Appeal reverted to the doctrine of conversion and held that a co-ownership in a trust for sale could not be subject

18 This is the area of trust law on trustees' powers and duties. For details, see HG Hanbury and JE Martin, *Modern Equity* (16th Edn, London: Sweet & Maxwell 2001), Chapter 18.
19 [1955] Ch 431.
20 [1971] Ch 59. In *Kung Wong Sau Hin v Kung Kwok Sun & Ors* [1985] 2 HKC 547, Deputy Judge O'Dea held that a joint tenancy under a bare trust is clearly an interest chargeable by a charging order under s 20 of the High Court Ordinance (Cap 4), and so the charging order can be properly registered under the Land Registration Ordinance (Cap 128).

to a charging order which could only be imposed on land or interest in land. This line of thinking was disapproved by the House of Lords in *Williams & Glyn's Bank Ltd v Boland*.²¹ However, in *City of London Building Society v Flegg*,²² the House of Lords returned to the direction pursued in *Irani Finance*.

5.14 With conflicting dicta, the precise status of the doctrine is uncertain. It seems likely that the court will in general apply the doctrine unless it will give rise to absurdity, particularly where the issue concerns whether a purchaser from the trustees for sale can take free of the beneficiaries' interests or not. Under the doctrine, as the beneficiaries' interests are in the proceeds, the purchaser does not have to worry about their interests. So the purchaser does not have to require the beneficiary to join in the conveyance even if he is aware of the beneficial interest.²³ As long as he pays the proceeds of sale to all the trustees for sale, he can overreach the beneficial interest. In the case of a bare trust, if the trustee has the power of sale, when he exercises the power, the purchaser will also be able to overreach. But if the trustee does not have a power of sale, it will be a breach of trust for the trustee to sell. Further, the beneficiary has an interest in land which can bind the purchaser unless the purchaser is equity's darling. So the purchaser who has actual or constructive notice of the beneficial interest must require the beneficiary to consent to or join in the sale.²⁴

5.15 If the property is sold by the trustees for sale, or the bare trustee, as long as the purchaser pays to all the trustees for sale or the bare trustee he does not have to see that the proceeds are applied properly.²⁵

5.16 In the case of a trust for sale, the purchaser must, however, make sure that the trust has not come to an end; ie the trustees are still under a duty to sell. If the trust for sale has come to an end, for example, the beneficiaries, *sui juris*, have instructed the trustees not to sell, the trustees would not be able to sell. The purchaser may not know whether the trust has been brought to an end. One way of getting round the problem is to require at least one of the beneficiaries to consent to the sale to show that the trust for sale has not been unanimously terminated by all beneficiaries of full age.²⁶

2. Types of Co-ownership

5.17 Where property is held on trust concurrently either at law or in equity, the concurrent ownership may be enjoyed by the co-owners as either joint tenants or

21 [1981] AC 487 at 507E.

22 [1987] 3 All ER 435 at 443g, 443j, per Lord Oliver.

23 In England, it is only necessary for the purchaser to pay to two trustees for sale, or trustees of land, in order to overreach.

24 Cf *Kingsnorth Finance Co Ltd v Tizard* [1986] 1 WLR 783. While this is a case of trust for sale, there was no overreaching as the proceeds of sale were not paid to two trustees, and like a case of bare trust without power of sale, was therefore governed by the doctrine of notice.

25 Trustee Ordinance (Cap 29) s 15.

26 See *Re Patten* (1883) 52 LJ Ch 787.

tenants in common.²⁷ It is important to differentiate whether the co-owners hold their interests as joint tenants or as tenants in common because of the right of survivorship in the case of a joint tenancy.²⁸ An example is the case of *Greenfield v Greenfield*.²⁹ A dwelling house was bought by the defendant, D, and A as joint tenants, as a residence for themselves and their mother. Later the mother died. The defendant and his wife then occupied the ground floor and A and his wife, the plaintiff, occupied the first floor. Later A died. A's wife brought an action seeking a declaration that she was entitled to half of the beneficial interest in the house. The defendant counterclaimed for possession. Here, because D and A held as beneficial joint tenants, when A died, his interest went to D. So A's wife was not entitled to anything and D was entitled to possession. It would have been different if D and A were beneficial tenants in common.

(a) Joint tenancy

5.18 This is a co-ownership where all the co-owners own the entire estate,³⁰ but they own nothing individually.³¹ Any reference to ownership in specific shares, for example 'to A as to one-third and to B as to two-thirds', negatives the existence of a joint tenancy.³²

5.19 There are two characteristics of joint tenancy: (a) joint tenants enjoy as between themselves a right of survivorship (or *jus accrescendi*), and (b) there exist the four unities.

(i) Right of survivorship

5.20 If land is held by A, B and C as joint tenants, in the eyes of the law, A, B and C constitute an entity. On the death of A, the ownership of A's interest automatically remains in B and C. The entire interest in the land merely survives to B and C.³³ No new vesting deed is required. The co-owned property is vested automatically in the survivors. As a joint tenant does not individually have a share in the land, his interest cannot be disposed of by will or under the rules of intestacy to Z (see Figure 1).

27 In England, it is no longer possible to co-own legal estate as tenants in common: Law of Property Act 1925 s 1(6).

28 The use of the word 'tenancy' in this context refers to all forms of tenure; it does not refer simply to leaseholds: *Megarry's Manual of The Law of Real Property* (9th edn, 2014, London: Sweet & Maxwell) at para 1-020. For the Chinese translation of 'joint tenancy', see *Chen Tek Yee v Chan Moon Shing* [2015] HKCU 989 (HCA 954/2010, 7 May 2015, unreported) at para 50.

29 (1979) 38 P & CR 570.

30 *Hammersmith and Fulham LBC v Monk* [1992] 1 AC 478 at 492B (HL).

31 *Re Rushton (a bankrupt)* [1972] Ch 197 at 203A; *Challis's Law of Real Property* at p 367.

32 *Cowcher v Cowcher* [1972] 1 WLR 425 at 430H.

33 *Litt* at s 280; *Co Litt* at 181a.

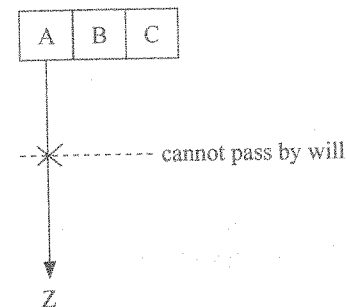


Figure 1

5.21 What if two or more joint tenants died in circumstances that made it uncertain as to which of them died first? Under section 11 of the Conveyancing and Property Ordinance, the deaths are presumed to have occurred in order of seniority and accordingly the younger shall be deemed to have survived the elder.³⁴ This is the same as section 184 of the Law of Property Act 1925 (UK). In *Hickman v Percy*, Viscount Simon LC said that section 184 had no application if the relevant deaths were 'absolutely simultaneous'.³⁵ However it is virtually impossible to be certain if two human beings cease to breathe at exactly the same moment of time. Thus the majority of the House of Lords held that section 184 applies unless it is possible to say for certain who died first.³⁶

5.22 At common law, as a company or corporation can never die, it was impossible for the right of survivorship to operate, therefore a company cannot be a joint tenant.³⁷ This was inconvenient for corporations, such as banking corporations that frequently act as trustees offering trust services. If the corporation cannot hold as joint tenant with other individual trustees, it cannot take advantage of the right of survivorship to avoid the need of having the trust property transferred to it when an individual trustee dies. However, under section 10 of the Conveyancing and Property Ordinance, a corporation is now able to acquire and hold any property in joint tenancy in the same manner as if it were an individual. If the corporation is ever dissolved, the jointly owned property devolves on the other joint tenant or tenants by right of survivorship. A trust company, acting in a fiduciary capacity, is also capable of acquiring and holding any property in joint tenancy.³⁸

5.23 The right of survivorship ceases when the joint tenancy is severed inter vivos and turned into a tenancy in common. In such a case, after the severance, each co-

34 This rule is excluded in the case of husband and wife, where the intestator and his or her spouse die in circumstances rendering it uncertain who died first. This rule of intestacy applies as if the husband or wife had not survived the intestator: Intestates' Estates Ordinance (Cap 73) s 4(11).

35 [1945] AC 304 at 314, 317.

36 See also *Re Bate* [1947] 2 All ER 418.

37 *Law Guarantee & Trust Society v Bank of England* (1890) 24 QBD 406 at 411; *Bl Comm*, Vol II at p 184.

38 Trustee Ordinance (Cap 29) s 86.

owner has a distinct but undivided share and can dispose of it by will or under the rules of intestacy.

(ii) *Four unities*

5.24 Joint tenancy requires four unities.³⁹ These are unities of possession, interest, title and time. As *Blackstone's Commentaries* put it, 'joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at the one and the same time, and held by one and the same undivided possession'.⁴⁰

(A) *Unity of possession*

5.25 This is common to all forms of co-ownership. Unity of possession exists in joint tenancy as well as tenancy in common. It means that each co-owner is as much entitled to possession of any part of the land as the others.⁴¹ He cannot point to any part of the land as his own to the exclusion of the others.⁴² So, as a general rule, 'one joint-tenant cannot have an action against another for trespass, in respect of his land; for each has an equal right to enter on any part of it',⁴³ unless the complainant has actually been ousted.⁴⁴ Nor can one co-owner in sole occupation be made to pay rent to another co-owner,⁴⁵ unless the occupying co-owner has excluded or ousted the other from possession.⁴⁶ This will be further discussed below in the context of a tenancy in common.

39 *AG Securities v Vaughan* [1990] 1 AC 417 at 431H.

40 *Bl Comm*, Vol II at p 180.

41 *Litt* at s 288; *Bl Comm* Vol II at p 182; *Wiseman v Simpson* [1988] 1 WLR 35 at 42E.

42 *Meyer v Riddick* (1990) 60 P & CR 50 at 54.

43 *Bl Comm* Vol II at pp 183, 194. See also *Lo Kau Kun v Cheung Yuk Yun* [2015] HKCU 415 (HCA 152/2013, 24 February 2015, unreported) at para 73: 'At common law, the unity of possession between co-owners meant that if one joint tenant occupied the whole land this by itself was not adverse possession which would start time running. Some further act, such as ouster of the co-owner was needed to start time running.' (per Deputy Judge Sakhrani).

44 *Lai Wai Kuen v Wong Shau Kwong* [2004] 4 HKC 528 was an unusual case where the executrix of a deceased co-owner was granted a declaration that the interest of the other co-owner had been extinguished. Lam J was prepared to assume ouster of the other co-owner who had not occupied, accessed or dealt with the property since the 1950s. Cf *Lo Kau Kun v Cheung Yuk Yun* [2015] HKCU 415 (HCA 152/2013, 24 February 2015, unreported) at para 76, where *Lai Wai Kuen* was distinguished and explained: 'the circumstances under which the defendant ceased to have any dealings with the property in that case were very flimsy. The court was prepared to presume ouster in those circumstances.' (per Deputy Judge Sakhrani) In *Lo Kau Kun*, the circumstances under which the plaintiff left the property were clear. The court was not prepared to presume ouster, and held that the defendant failed to prove actual ouster of the plaintiff from the co-owned property.

45 *M'Mahon v Burchell* (1846) 2 Ph 127; *Jones v Jones* [1977] 1 WLR 438 (this is a case of tenancy in common, but the position is the same as joint tenancy; see *Bl Comm*, Vol II at p 194).

46 *Murray v Hall* (1849) 7 CB 441; *Dennis v McDonald* [1981] 1 WLR 81 (tenancy in common); *Jones v Jones* [1977] 1 WLR 438 at 443B; see (1978) 41 MLR 208 at 209 (Alder). *Gray & Gray* suggests that the proper presumption today is that an occupation

(B) *Unity of interest*⁴⁷

5.26 This means the interest of each joint tenant must be the same in extent, nature and duration.⁴⁸ Because of this the rents and profits must be divided equally between them.

5.27 It also means that any legal act such as a conveyance or lease,⁴⁹ or surrender of a lease,⁵⁰ giving of a notice⁵¹ must be done by all joint tenants collectively, except in the case of the termination of periodic tenancies.⁵² It was held in *Hammersmith and Fulham LBC v Monk* that the notice by one joint tenant is effective to terminate a periodic tenancy.⁵³

Hammersmith and Fulham London Borough Council v Monk

[1992] 1 AC 478

Lord Browne-Wilkinson: My Lords, there are two instinctive reactions to this case which lead to diametrically opposite conclusions. The first is that the flat in question was the joint home of the appellant and Mrs Powell: it therefore cannot be right that one of them unilaterally can join the landlords to put an end to the other's rights in the home. The second is that the appellant and Mrs Powell undertook joint liabilities as tenants for the purpose of providing themselves with a joint home and that, once the desire to live together has ended, it is impossible to require that the one who quits the home should continue indefinitely to be liable for the discharge of the obligations to the landlord under the tenancy agreement.

These two instinctive reactions are mirrored in the legal analysis of the position. In certain cases a contract between two persons can, by itself, give rise to rights and duties incapable of being founded in contract alone. The revulsion against Mrs Powell being able unilaterally to terminate the appellant's rights in his home is property based: the appellant's property rights in the home cannot be destroyed without his consent. The other reaction is contract based: Mrs Powell cannot be held to a tenancy contract which is dependent for its continuance on the will of the tenant.

rent should always be payable unless the non-resident co-owner chooses not to occupy voluntarily (at para 7.4.45).

47 See further *Megarry & Wade* at pp 491–493, para 13–006.

48 *Megarry & Wade* at p 491, para 13–006.

49 *Bl Comm* at p 183.

50 *Leek and Moorlands Building Society v Clark* [1952] 2 QB 788.

51 *Newman v Keedwell* (1977) 35 P & CR 393.

52 *Doe d Aslin v Summersett* (1830) 1 B & Ad 135; *Parsons v Parsons* [1983] 1 WLR 1390 (notice by one joint landlord); *Leek and Moorlands Building Society v Clark* [1952] 2 QB 788 at 793; *Greenwich LBC v McGrady* (1982) 46 R & CR 223; *Hammersmith and Fulham LBC v Monk* [1992] 1 AC 478 at 485D, 492G (HL) (notice by one joint tenant).

53 It was suggested that to give such a notice without the others' consent might be a breach of trust: *Parsons v Parsons* [1983] 1 WLR 1390; *Hammersmith and Fulham LBC v Monk* [1992] 1 AC 478 at 493 (noted [1992] Conv 279 at 283 (S Goulding)). But in *Crawley Borough Council v Ure* [1996] 1 All ER 724 (noted [1995] Conv 424 (Kathleen Shorrock)), the English Court of Appeal held that giving such a notice without consulting the others was not a breach of trust under s 26(3) of the Law of Property Act 1925 (UK).

11. Reform

6.106 As seen above, the Hong Kong Law Reform Commission has reviewed the existing rule of adverse possession in Hong Kong and made recommendations for reform in specific areas of concern. The most important recommendation relates to the adaptation of the law on adverse possession to the prospective registered title regime. The Land Titles Ordinance (Cap 585), which was enacted in July 2004 to replace the existing system of deeds registration by a system of title registration, still has not taken effect. Once implemented, the title registration system will make conveyancing easier and more transparent, as registration of interests in land will become mandatory.³⁶⁴ In England, under the Land Registration Act 2002, the adverse possessor's title is registrable. It is the recommendation of the Hong Kong Law Reform Commission that we should follow the English approach and provide for registration of possessory titles.³⁶⁵

We recommend that when a registered title regime is in place in Hong Kong, adverse possession alone should not extinguish the title to a registered estate. The rights of the registered owner should be protected. If, for example, the registered proprietor is unable to make the required decisions because of mental disability, or is unable to communicate such decisions because of mental disability or physical impairment, then a squatter's application will not be allowed. However, such protection would not be absolute. Under the proposed scheme:

- The squatter of registered title land will only have a right to apply for registration after 10 years' uninterrupted adverse possession.
- The registered owner will be notified of the squatter's application and will be able to object to the application.
- If the registered owner fails to file an objection within the stipulated time, then the adverse possessor will be registered.
- If the registered owner objects, the adverse possessor's application will fail unless he can prove either: (a) it would be unconscionable because of an equity by estoppel for the registered owner to seek to dispossess the squatter and the circumstances are such that the squatter ought to be registered as the proprietor; (b) the applicant is for some other reason entitled to be registered as the proprietor of the estate; or (c) the squatter has been in adverse possession of land adjacent to their own under the mistaken but reasonable belief that they are the owner of it.
- If the squatter is not evicted and remains in adverse possession for two more years, then the squatter would be entitled to make a second application, and the matter can be referred to the adjudicator for resolution.

364 See Chapter 7.

365 Hong Kong Law Reform Commission, Report on Adverse Possession (October 2014), Recommendation 3.

CHAPTER 7

Priority¹

1. Introduction

7.1 The distinctions between legal and equitable interests, and how they can be acquired by sale, under the doctrine of proprietary estoppel and adverse possession, have been discussed. It is now essential to examine how these legal and equitable interests are accommodated and protected under the law of property.

7.2 In a property regime which stresses the relativity of title and allows an unlimited number of claims over the same piece of land, it is always necessary to protect one claim against the other and to decide the priority of each claim in relation to others. The question of priority arises not only between two or more encumbrances, but also in deciding whether a substantive ownership is free of any encumbrances. Rules of priority can affect substantive rights by postponing some interests in favour of others. Any purchaser of the substantive ownership or any grantee of an interest (such as a mortgagee) will want to make sure that he will get a title or interest which is valid and free from undisclosed encumbrances. This can normally be achieved through a tedious process of tracing the vendor's good root of title. This is still the case in England with unregistered conveyancing.² To help ease the task of investigating the chain of title, in some jurisdictions, a system of deeds registration has been introduced to allow all documents pertaining to a parcel of land to be recorded and made available for public inspection. The current system in Hong Kong falls into this category.³ In others, a system of title registration has been introduced.⁴

1 Reform of the priority regime in Hong Kong has taken longer than expected. See at the end of this chapter Goo, 'Reforming the Priority Rules in Hong Kong: A Comparative Perspective', in Paul Jackson and David C Wilde (Eds), *The Reform of Property Law* (Aldershot, Hants: Dartmouth 1997) at p 387.

2 Although certain interests are to be registered centrally as land charges which must be inspected separately.

3 Land Registration Ordinance (Cap 128).

4 It has been said that it is misleading to think of registration of deeds and registration of title as two quite separate and distinct systems which are mutually exclusive: see S Rowton Simpson, *Land Law and Registration* (Cambridge: Cambridge University Press, 1976) at p 19. 'Each is not a single system, but rather is composed of different alternatives, and the combined alternatives form a continuum': see Ontario Land Registration Report (1971) at p 19. The major variable in the two systems is the extent of the affirmation made by the sovereign State of the existence and ownership of interests.

7.3 England and many Commonwealth countries such as Australia, New Zealand, Malaysia and Singapore have such a system although the specifics may differ. A title registration system to replace the deeds registration system had been under consideration in Hong Kong for some time before it was finally enacted in 2004.⁵ Further revision of the principal legislation and drafting of the subsidiary legislation still have to be done before the new system can be implemented. It has taken the Government and the profession more than a decade to fine-tune the system since its enactment.⁶

(a) General rules of priority

7.4 As is apparent from the above, rules of priority are not distinct rules which are designed for their own sake. They are a natural outcome of a conveyancing process which seeks to ensure the orderly transfer of interests in land free of undisclosed encumbrances.

7.5 Under the English unregistered land system, priority depends on a combination of statutory provisions in the Law of Property Act 1925 and the Land Charges Act 1972, and in some cases, the doctrine of notice. Where the title is registered, priority is determined in accordance with the provisions in the Land Registration Acts of 1925 and 2002. Notice should become irrelevant, although this is not always the case. Priority under the deeds registration system as administered in Hong Kong is primarily determined according to the Land Registration Ordinance (Cap 128)⁷ and where the interest is not registrable, the doctrine of notice.

7.6 It seems that whatever system of priority one adopts, the system should promote the efficient negotiation of property transactions, facilitate private dealings and reduce the cost of transactions and risk of defective titles. As any Hong Kong conveyancer knows and many students will find out, one of the main reasons why a system of registration is introduced is to replace the 'wearisome and intricate task'⁸ of examining the title deeds, etc held by the vendor. The English unregistered system only achieves this aim partially by enabling a central register of land charges to be inspected by a potential buyer of land. The title registration system, on the other hand, makes it unnecessary to investigate the chain of title. The Hong Kong deeds registration system is in some way similar to the English unregistered system in that registration of deeds, as we will see below, does not guarantee the validity of the owner's title. It simply provides evidence of interests affecting the land and gives notice of those interests to a potential buyer of the land. In other words, it does not

⁵ Land Titles Ordinance (Cap 585), originally Ord No 26 of 2004.

⁶ A Working Party of the Law Society has been formed to consider the fine details of the title registration system. It is quite likely that the final version that is implemented will differ from the enacted version.

⁷ The title of this Ordinance is misleading as it does not provide a system of title registration. 'The system is called land registration, but is in fact a system of deeds registration': *Wu Koon Tai v Wu Yau Loi* [1996] 3 HKC 559 at 562 (PC), per Lord Browne-Wilkinson.

⁸ *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487 at 511, per Lord Scarman.

guarantee the owner's title but simply deals with the issues of priority.⁹ Thus the tedious process of investigating title must go on even though it is helped to some extent by the deeds register. The new title registration system in Hong Kong under the Land Titles Ordinance (Cap 585)¹⁰ is modelled principally on the English Land Registration Acts with some features of the Torrens system. Once implemented, it would make it unnecessary for the investigation of title to be carried out in most cases, and would seemingly promote the efficient transfer of or dealings in land.

(b) Priority under the present Hong Kong deeds registration system

7.7 How does the present Hong Kong system deal with the issues mentioned above? Under Hong Kong's registration of deeds system, which owes its origin to the Irish Registration of Deeds Act 1707 that introduced deeds registration for the whole of Ireland,¹¹ the Register provides a record of registrable land transactions and gives notice to and priority against any later transactions. Registrable transactions include all deeds, conveyances, instruments and judgments by which any parcels of ground, tenements or premises are affected.¹² Unregistrable transactions are governed by the doctrine of notice. This system is deceptively simple for there are some inconsistencies and lacunae in its application.

7.8 As mentioned, the system of conveyancing of land in Hong Kong is essentially one of registration of deeds of conveyance or instruments under the Land Registration Ordinance. It is in some way similar to the unregistered system of conveyance in England in that the title of the land is unregistered. What is registered in Hong Kong is not the title, but rather the deeds or instruments relating to the land. Thus, in Hong Kong, the process of transferring land is still carried out by assignment or conveyance which takes the form of a deed. But the deed in Hong Kong, whether it creates a legal or equitable interest, must be protected by registration in order to gain priority over subsequent competing interests. It is in this respect that it differs from the English unregistered land system where a legal interest binds the whole world without any registration but certain equitable interests have to be registered under the Land Charges Act 1972 and some are overreachable.¹³

7.9 In England, there is also a registered land system of conveyancing. The deeds registration system in Hong Kong is different from the registered land system in

⁹ Validity and priority are different concepts: see *Financial and Investment Services for Asia Ltd v Baik Wha International Trading Co Ltd* [1985] HKLR 103, citing an article by the Registrar General of Hong Kong (1958–1969) WK Thomson, 'The Land Registration Ordinance of Hong Kong: Historical and Legal Aspects' (1974) 4 HKLJ 242. See also *HKSAR v Lau Kam Ying* (2013) 16 HKCFAR 595.

¹⁰ Land Titles Bill 2002, Legal Supplement No 3 to the Hong Kong Government Gazette 6 December 2002, at c 1191. For an earlier version, see Land Titles Bill 1994, Legal Supplement No 3 to the Hong Kong Government Gazette 4 November 1994, at c 1623.

¹¹ WK Thomson, 'The Land Registration Ordinance of Hong Kong: Historical and Legal Aspects', (1974) 4 HKLJ 242 at 244–247. But there are technical differences between the two.

¹² Land Registration Ordinance (Cap 128) s 2(1).

¹³ See *Go*, Chapter 7.

England which is a system of title registration that guarantees title. When it takes effect, the Land Titles Ordinance, enacted in 2004, will bring about a system which is substantially similar to the English registered land system.

7.10 Thus, at present, legal and equitable interests in land are today protected under two distinct regimes: the Land Registration Ordinance and the common law rules.

2. Outline of Approach to Priority

7.11 Issues relating to priority between competing interests in land can first appear confusing and daunting. However, it is not unmanageable if one adopts a sensible and clear approach. In determining the priority of competing interests, it is important to first ascertain whether the prior competing interest is registrable under the Land Registration Ordinance. If it is, the Ordinance will apply unless there is a lacuna in the Ordinance, in which case one would look at the common law rules. If the prior competing interest is unregistrable under the Ordinance, the Ordinance is simply irrelevant and the position is thus governed by the common law rules.

7.12 That is because the Land Registration Ordinance, in setting out the effect of non-registration, provides that a registrable but unregistered instrument shall be postponed to a 'subsequent bona fide purchaser or mortgagee for valuable consideration',¹⁴ without requiring the latter to be registered or registrable. There is authority for the applicability of this subsection to cases where both interests are unregistered.¹⁵

3. Priority at Common Law

7.13 At common law, the distinction between legal and equitable rights is fundamental. The extent to which a right or interest in land is enforceable upon a transfer against a purchaser depends on whether the right or interest in question is legal or equitable.

7.14 The cardinal principles are stated in the maxim: Legal rights are good against all the world; equitable rights are good against all persons except a bona fide purchaser of a legal estate for value without notice, and those claiming under such a purchaser.¹⁶

7.15 That equitable interests bind the whole world except a bona fide purchaser of a legal estate for value without notice has the disadvantage of uncertainty. The purchaser of a legal estate cannot know for certain if he has taken the legal estate free of equitable interests of which he might later be found to have constructive notice. Likewise, the position of the owners of equitable interests is insecure, as a subsequent purchaser of the legal estate who has no notice might destroy their interests. The inherent insecurity of many equitable interests created by instruments is removed

¹⁴ Land Registration Ordinance (Cap 128) s 3(2).

¹⁵ *Kwok Siu Lau v Kan Yang Che* [1913] 8 HKLR 52.

¹⁶ FW Maitland, *Equity* (2nd Edn, Cambridge: Cambridge University Press 1936) at pp 114, 115.

by the Land Registration Ordinance. However, those not created by instruments, sometimes called unwritten equities, remain vulnerable.

(a) Legal rights bind the world

7.16 This means that a legal right in or over land binds whoever subsequently acquires an interest in the land. Thus, if A has a legal lease in the land owned by B, C who later acquires the land from B will be bound by A's legal lease whether or not C was aware of A's lease at the time he acquired the land. This same principle applies to other legal estates or interests. Therefore, if A has a right to walk over B's garden (a legal easement), C who subsequently buys the house from B will be bound by A's right of way because being a legal right, it binds the whole world including C.

(b) Equitable rights bind all persons except 'equity's darling'

7.17 According to the cardinal principles stated above, equitable rights bind all persons other than a bona fide purchaser of a legal estate for value without notice of the equitable rights (sometimes called 'Equity's Darling'). This is also known as the equitable doctrine of notice. Under this doctrine a person who can show that he is a bona fide purchaser of a legal estate for value without notice of the earlier equitable interest can take the legal estate free of the equitable interest. James LJ put it most succinctly, in *Pilcher v Rawlins*:¹⁷

I propose simply to apply myself to the case of a purchaser for valuable consideration, without notice, obtaining, upon the occasion of his purchase, and by means of his purchase deed, some legal estate, some legal right, some legal advantage; and, according to my view of the established law of this Court, such a purchaser's plea of a purchase for valuable consideration without notice is an absolute, unqualified, unanswerable defence, and an unanswerable plea to the jurisdiction of this Court. Such a purchaser, when he has once put in that plea, may be interrogated and tested to any extent as to the valuable consideration which he has given in order to shew the *bona fides* or *mala fides* of his purchase, and also the presence or the absence of notice; but when once he has gone through that ordeal, and has satisfied the terms of the plea of purchase for valuable consideration without notice, then, according to my judgment, this Court has no jurisdiction whatever to do anything more than to let him depart in possession of that legal estate, that legal right, that legal advantage which he has obtained, whatever it may be. In such a case a purchaser is entitled to hold that which, without breach of duty, he has had conveyed to him.

My view of the principle is, that when once you have arrived at the conclusion that the purchaser is a purchaser for valuable consideration without notice, the Court has no right to ask him, and has no right to put him to contest the question, how he is going to defend himself, or what he is going to rely on. He may say, honestly and justly, 'I am not going to tell you. I have got the deeds; I defend them, and you will never be able to make me produce them, and you will never be able to produce secondary evidence of them. I am not obliged to produce them at all; probably before you get half way through your action of ejectment you will find a *jus tertii* which you will not dispose of; the estate is in the hands of a legal tenant to whom I have let it, and no one can determine that tenancy without notice, and no one can give that notice but

¹⁷ (1872) 7 Ch App 259 at 268.

myself; I will not give that notice, and no Court has any power to compel me to give it. I have a right to rely, as every person defending his position has, on the weakness of the title of the person who is seeking to displace me.'

I am therefore of opinion that whatever may be the accident by which a purchaser has obtained a good legal title, and in respect of which he has paid his money and is in possession of the property, he is entitled to the benefit of that accident, just as a purchaser would be entitled to avail himself of the possession so acquired, without any reference to the rights of the persons who may be otherwise interested ...

(i) *Bona fide*

7.18 The requirement of bona fide or good faith is a separate test which may have to be passed even though absence of notice is proved. An enquiry into bona fide raises not only the genuine and honest absence of notice but the whole conscience of the purchaser.¹⁸ This issue was considered by Hunter J in *Cheung Pik Wan v Tong Sau Ping*.¹⁹ Here, the owner of a flat was fraudulently induced by a dishonest woman to part with possession of her title deeds and to execute a power of attorney in favour of the woman. The woman then assigned the flat to two purchasers who were close relatives of hers. The owner brought an action to set aside the assignment. Having decided that the owner had an equity to set aside the power of attorney, the court had to decide whether the purchasers were affected by the equity so that the assignment could be set aside as well. Hunter J found that the purchasers could not be regarded as bona fide because one of them (who also acted on behalf of the other) knew all along that there were suspicious circumstances surrounding the transaction but refused to ask the obvious.²⁰

(ii) *Purchaser*

7.19 'Purchaser' in this context is a term of art; it is not confined to the situation of a sale and purchase.²¹ In its technical sense, a 'purchaser' is a person who takes property by a grant (including a donee of a gift or a buyer) and not by mere operation of law (eg a person entitled under the rules of intestacy or a squatter who derives title from effluxion of time). Thus, while a squatter may never be a purchaser, a donee ranks as one.²²

18 *Cheung Pik Wan v Tong Sau Ping* [1986] HKLR 921 at 927; *Midland Bank Trust Co Ltd v Green* [1981] AC 513, at 528, per Lord Wilberforce.

19 [1986] HKLR 921.

20 See the evidence set out in *Cheung Pik Wan* at 927-928.

21 *Ng Luk Mui v Shiu Tsun Wai Vincent* [2011] 5 HKLRD 707 (CA) at para 40, per Kwan JA. In the case, a husband assigned his property to his wife as purchaser and the stated consideration was the amount she had raised to help him repay his debts. The wife was held to be a purchaser for value.

22 Note, however, that a donee does not meet the requirement of 'for value': see below at para 7.27.

(iii) *Of a legal estate*

7.20 The purchaser must have the legal estate vested in him. If he merely acquires an equitable interest, then the rule is 'where equities are equal the first in time prevails'.²³ This means that an earlier equitable interest will take priority over a subsequent equitable interest. In *Chu Kit Yuk v Country Wide Industrial Ltd*,²⁴ the vendor of a flat which was still under construction when it was bought from the developer entered into two separate provisional sale and purchase agreements on 11 March 1991 and 13 March 1991 respectively over the same flat by way of sub-sale. The first agreement was registered on 16 March 1991. The question was whether the first or second purchaser had the right to specific performance. Under the sale and purchase agreements, both purchasers only acquired an equitable interest; the legal estate could only be conveyed by deed on completion. However, as the two provisional agreements were in writing, as will be seen, the Land Registration Ordinance should apply. However, for some reason not apparent from the report, the case was dealt with under the common law rules. Godfrey JA delivering the main judgment of the Court of Appeal said that:

Whenever a vendor sells land twice over, he creates two competing equitable interests in the land. The first purchasers acquire an equitable interest in the land under their contract. So do the second purchasers. But the rule is that, where the equities are equal, the first in time prevails. Accordingly, the first purchasers must be preferred to the second purchasers, when it comes to which of them has the better right to specific performance, unless the equities are not equal. If, for some reason, the second purchasers have the better equitable right, they will be preferred to the first purchasers. How can that arise? It can certainly arise if the conduct of the first purchasers has been unconscionable, or inequitable; if, for example, they have led the second purchasers on, or in some other way behaved in relation to the second purchasers in a manner which warrants the disfavour of the court, then they can and indeed should be postponed to the second purchasers.²⁵

7.21 *Chu Kit Yuk* was considered in *Nu Life International Ltd v Healthy Living Products International Ltd*,²⁶ where the plaintiff sought relief against Healthy Living (the first defendant) and Mr M (the second defendant) in relation to a house Mr M had purchased earlier from Healthy Living. The plaintiff claimed that it was beneficially entitled to the house, and its claim came to the notice of Mr M after he had agreed to purchase the property but before he acquired the legal title. It was submitted that the plaintiff, being first in time, should take priority over Mr M. However, it turned out that the equities might not be regarded as equal because Nu Life International, whose identity was concealed when Mr M negotiated the purchase with Healthy Living, had 'armed Healthy Living with the power of going into the world under false colours'. This was based on what Lord Selborne said in the case of *Dixon v*

23 *Chu Kit Yuk v Country Wide Industrial Ltd* [1995] 1 HKC 363 (CA); *Cave v Cave* (1880) 15 Ch D 639.

24 [1995] 1 HKC 363 (CA).

25 See also *King's City Holdings Ltd v De Monsa Investments Ltd* [2013] 4 HKC 450 (CA), where on similar facts, the Court of Appeal applied the rule that where the equities were equal, the first in time was to prevail (at para 35).

26 [2008] 2 HKLRD 297.