(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 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.

**2.07** While it is true that where the seller guarantees good title[22] 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.

**2.08** 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

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).

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.

**4.23** However, there is a clear distinction between resulting trust on the one hand and constructive trust on the other.[24] It is convenient to describe all trusts not expressly created as implied trusts and divide implied trusts into resulting and constructive trusts.

**4.24** Trusts and equitable presumptions are commonly used in resolving property disputes. When property is acquired in B's name with A's money, a resulting trust would arise so that B, the trustee, may deal with the property as a legal owner, but it is A, the beneficiary, who is entitled to the benefits derived from such dealing, such as the proceeds of sale or rental income. As will be seen, if B is A's wife, then A is presumed to be making a gift of the property to B (under the presumption of advancement), and B will become the legal and beneficial owner. If two or more persons are acquiring the property as legal owners, or are contributing money for the purchase, there may be co-ownership at law or in equity.[25] Trusts and co-ownership are so intertwined that it is not possible to discuss one without referring to the other.

## *(a) Express trusts*

### (i) Formality

**4.25** Express trusts are declared by the grantor or settlor.[26] To create a trust expressly, where the subject matter of the trust is any land or interest in land, under the Conveyancing and Property Ordinance section 5(1)(b), the declaration of trust must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will.[27]

*Conveyancing and Property Ordinance*

**5. Instruments required to be in writing**

(1) Subject to the provisions hereinafter contained with respect to the creation of interests in land by parol —

...

(b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will;

**4.26** This does not mean that the declaration must be itself in writing. It means that the existence of the trust must be capable of being proved by some writing signed by the grantor or by his will. If the declaration of trust is parol[28] and cannot be proved by any written evidence, the trust will take effect at will only. It is valid but unenforceable.[29]

24 (1973) 37 Con 65; (1973) 4 CLJ 41; (1973) 89 LQR 2; AJ Oakley, *Constructive Trusts* (3rd Edn, London: Sweet & Maxwell 1997), Chapters 1–2.

25 See Chapter 5.

26 See for instance *Hotung v Ho Yuen Ki & Ors* [2005] 4 HKLRD 558.

27 This is the same as the Law of Property Act 1925 (UK) s 53(1)(b) which derives from the Statute of Frauds 1677 s 7. For the background of this section, see [1984] CLJ 306 (Youdan) at 307ff.

28 Ie by word of mouth.

29 *Gardner v Rowe* (1828) 5 Russ 258 at 262, *Gissing v Gissing* [1971] AC 886 at 910E–F, per Lord Diplock, *Cowcher v Cowcher* [1972] 1 WLR 425 at 430H–431A, *Midland Bank plc v Dobson* [1986] 1 FLR 171 at 175C–D, *Wratten v Hunter* [1978] 2 NSWLR 367 at 371B.

30 *Rochefoucauld v Boustead* [1897] 1 Ch 196.

31 Ibid at 206.

32 *Re Kayford Ltd* [1975] 1 WLR 279.

33 *Re Adams and the Kensington Vestry* (1884) 27 Ch D 394 at 419.

34 *McCormick v Grogan* (1869) LR 4 HL 82.

35 *Palmer v Simmonds* (1854) 2 Drew 221.

36 *Boyce v Boyce* (1849) 16 Sim 476.



*Conveyancing and Property Ordinance*

**6. Creation Of Interests In Land By Parol**

(1) All interests in land created by parol and not put in writing and signed by the persons so creating the same, or by their agents thereunto lawfully authorised in writing, have, notwithstanding any consideration having been given for the same, the force and effect of interests at will only.

**4.27** It should however be noted that the purpose of section 5(1)(b) is to prevent fraud which might otherwise arise against the trustee. However, in some cases, the trustee may be tempted to plead the lack of formality to deny the beneficiary's interest under the trust. It is to prevent fraud perpetrated by the trustee that 'equity will not permit a statute to be used as an instrument of fraud'.[30] In *Rochefoucauld v Boustead*, Lindley LJ expressed the view that:[31]

> it is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself. Consequently, notwithstanding the statute, it is competent for a person claiming land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant, and that the grantee, knowing the facts, is denying the trust and relying upon the form of the conveyance and the statute, in order to keep the land himself.

**4.28** Thus, if A acquires the property on an oral undertaking at the moment of acquisition or thereafter that he will hold the property on trust for B, then A cannot claim that the trust is void under section 5(1)(b) for want of written evidence.

**4.29** Section 5(1)(b) only applies to a declaration of trust of land or any interest in land. A declaration of trust of other forms of property can be made orally without written evidence.[32]

### (ii) Certainty

**4.30** To create a trust expressly, the intention to create a trust, the subject matter of the trust and the objects of the trust must all be certain.

**4.31** The intention to create a trust must be shown by imperative, not precatory words.[33] Words such as 'in the full confidence', 'recommending', 'my dying request' would not be enough today. If the grantor fails to express an intention to create a trust, the grantee (the intending trustee) holds the property beneficially free of any trust.[34]

**4.32** The trust property must be described with certainty. If the property to be assigned to the trustee is insufficiently defined, the whole transaction is void.[35] The grantor retains the property. If the extent of the beneficial interest is insufficiently defined, the trustee will hold the property on a resulting trust for the grantor.[36]

Browne-Wilkinson V-C, there was a sufficient link between the detriment and the common intention:[267]

> In my judgment where the claimant has made payments which, whether directly or indirectly, have been used to discharge the mortgage instalments, this is a sufficient link between the detriment suffered by the claimant and the common intention.

**4.118** It would be easy to establish such a link where the acts relied upon did inherently relate to the property as in *Eves v Eves* or *Grant v Edwards*. As Nourse LJ put it, 'it must be conduct on which the woman could not reasonably have been expected to embark unless she was to have an interest in the house'.[268] Nourse LJ's judgment has been cited with approval in *Mo Ying v Brillex Development Ltd*:[269]

> In the light of my findings regarding the absence of any alleged pooled family resources, it seems to me that the Wife can only rely on two matters to support her case on detriment: (1) that she paid for some of the household expenses (ie expenses not related to the Property) prior to 1997; and (2) that she resigned from work in around September 1997.
>
> In my view, neither of these matters (whether taken singly or together) can constitute reliance on the part of the Wife to establish a common intention constructive trust. As mentioned above, the sort of conduct sufficient to constitute detriment for the purpose of establishing a common intention constructive trust must be conduct on which the plaintiff could not reasonably have been expected to embark unless he/she was to have an interest in the property: see *Grant v Edwards* at 648G–H (Nourse LJ). The two matters relied upon by the Wife cannot be described as such conduct. Indeed, as the Wife herself said so in her cross-examination, the reason why she gave up her job in 1997 was to look after the children and to help them with their studies, and she did not want to regret for not having done so.
>
> Accordingly, even if the Wife has established a common intention to share the Property beneficially (which she has not), I would not have been able to find that the Wife acted to her detriment in reliance on any agreement, arrangement or understanding that she would take a beneficial interest in the Property.[270]

**4.119** Where the alleged detriment or contribution was made after the acquisition of the property, it is often more difficult to show that the contribution is referable to the acquisition of the property because the property had already been bought and paid for in full.[271] In *Winkworth v Edward Baron Development Co Ltd* a company, owned by a husband and wife, bought a property. They occupied the property as their matrimonial home intending eventually to buy it from the company. When they sold their former matrimonial home which they owned jointly, they paid the proceeds of sale into the company's bank account. Later, the plaintiff lent £70,000 to the company secured by a charge on the property. When the company went insolvent, the plaintiff mortgagee sought possession order against the wife who was by then in sole occupation of the property. The question was whether the wife had any beneficial interest in the property. It was argued that she did because the proceeds of sale of their former matrimonial home were paid into the company's bank account which

267 *Grant v Edwards* [1986] Ch 638 at 656.
268 *Grant v Edwards* [1986] Ch 638 at 648G–H.
269 [2014] 3 HKLRD 224, at paras 42 and 92 per Deputy Judge Eugene Fung SC.
270 Ibid at paras 90–93.
271 *Winkworth v Edward Baron Development* [1986] 1 WLR 1512 (HL). However, in *Hussey v Palmer* [1972] 1 WLR 1286, where an elderly lady contributed financially to the extension of the property already bought, she was given a share under a constructive trust.



reduced its overdraft. The House of Lords held that the payment of the proceeds of sale was not referable to the acquisition of the property which had already been bought and paid for in full.

***Winkworth v Edward Baron Development Co Ltd***

[1986] 1 WLR 1512

**Lord Templeman**: … It is now contended on behalf of Mrs Wing that the payment of £8,600.91 into the company's bank account in November 1980 obtained for Mrs Wing an equitable interest in Hayes Lane in the proportion that £8,600.91 bears to £70,000, and that her equitable interest takes priority over the claims of the company's creditors, secured and unsecured. This bold and astonishing proposition would enable Mrs Wing to continue in occupation of Hayes Lane, without any contribution to its expenses, until a court, on the application by the company under section 30 of the Law of Property Act 1925 [(repealed), now see section 14 of the Trusts of Land and Appointment of Trustees Act 1996], thought fit to order Hayes Lane to be sold with vacant possession for the benefit of the company and Mrs Wing as tenants in common in equity …

The argument on behalf of Mrs Wing exploits the equitable doctrine that a legal owner holds in trust for the persons who contribute to the purchase price of the property or make contributions referable to the acquisition of the property. The doctrine was discussed in *Burns v Burns* [1984] Ch 317, and other authorities mentioned in the judgment of Nourse LJ in the present case. The sum of £8,600.91, paid into the company's bank account from the proceeds of sale of The Drive belonging to Mr and Mrs Wing, reduced the company's overdraft which was secured by the solicitors' undertaking to hold the title deeds of Hayes Lane to the order of the bank. Therefore, it is said, the payment of £8,600.91 was referable to the acquisition of Hayes Lane by the company, and equity requires the company to hold Hayes Lane in trust for the company and Mr and Mrs Wing or one of them. The simple answer to this tortuous argument is that the payment of £8,600.91 was not referable to the acquisition of Hayes Lane which had already been bought and paid for in full. There was no connection between the payment for Hayes Lane and the incurring of the overdraft. There was no connection between the acquisition of Hayes Lane and the payment of £8,600.91. The proper inference to be drawn from the admitted facts is that Hayes Lane, acquired by the company, and the sum of £8,600.91 paid into the company's bank account, became assets of the company, managed by Mr Wing for the benefit of himself and Mrs Wing, as sole and equal shareholders and not as owners of equitable interests …

[Appeal allowed, Lords Keith of Kinkel, Griffiths, Mackay of Clashfern and Ackner all concurred].

**4.120** On the other hand, in *Aspden v Elvy*,[272] the plaintiff, who had transferred a barn to his former cohabiting partner, was able to establish a common intention that he should have a beneficial interest in the property on the basis of his substantial contributions, both financial and physical, to the subsequent conversion of the barn into a dwelling house. Reference was made to the following judgment of Griffiths LJ in *Bernard v Josephs*:[273]

272 [2012] EWHC 1387 (Ch).
273 [1982] 3 All ER 162 at 171, [1982] Ch 391 at 404. See also *James v Thomas* [2007] EWCA Civ 1212, cited in *Aspden v Elvy* [2012] EWHC 1387 (Ch) at para 96.

whether the owner's action is time-barred. There are, however, old English authorities to the contrary. In *Leigh v Jack*, Bramwell LJ made the following remark:[47]

> I do not think that there was any dispossession of the plaintiff by the acts of the defendant: acts of user are not enough to take the soil out of the plaintiff and her predecessors in title and to vest it in the defendant; in order to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it: that is not the case here, where the intention of the plaintiff and her predecessors in title was not either to build upon or to cultivate the land, but to devote it at some future time to public purposes. The plaintiff has not been dispossessed, nor has she discontinued possession, her title has not been taken away, and she is entitled to our judgment.

**6.16** In *Williams Brothers Direct Supply Stores Ltd v Raftery Ltd*,[48] where land was waiting to be developed when the time was opportune, Sellers LJ said 'the true owners can, in the circumstances, make no immediate use of the land, and as the years go by I cannot accept that they would lose their rights as owners merely by reason of trivial acts of trespass or user which in no way would interfere with a contemplated subsequent user'.[49]

**6.17** In *Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd*,[50] Lord Denning MR went so far as to say that in such a case, 'by using the land, knowing that it does not belong to him, [the intruder] impliedly assumes that the owner will permit it: and the owner, by not turning him off, impliedly gives permission'. This doctrine of 'implied licence', and Bramwell LJ's remark that acts must be 'inconsistent with the owner's enjoyment' have been cited in subsequent cases. In *Powell v McFarlane*,[51] Slade J (as he then was) doubted whether that was indeed the ratio in *Leigh v Jack*[52] but felt bound by the decision in the case of *Wallis's*.[53] The doctrine in *Wallis's* was eventually abolished in England by the Limitation Act 1980, Schedule 1, paragraph 8(4):[54]

> For the purpose of determining whether a person occupying any land is in adverse possession of the land it shall not be assumed by implication of law that his occupation is by permission of the person entitled to the land merely by virtue of the fact that his occupation is not inconsistent with the latter's present or future enjoyment of the land. This provision shall not be taken as prejudicing a finding to the effect that a person's occupation of any land is by implied permission of the person entitled to the land in any case where such a finding is justified on the actual facts of the case.

**6.18** After the 'implied licence' doctrine was abrogated by statute, Slade LJ, giving the judgment of the Court of Appeal in *Buckinghamshire County Council v Moran* commented that, on any footing, it was too broad a proposition 'to suggest that an owner who retains a piece of land with a view to its utilisation for a specific purpose in the future can never be treated as dispossessed, however firm and obvious the

47 (1879) 5 Ex D 264 at 273.
48 [1958] 1 QB 159.
49 Ibid at 173.
50 [1975] QB 94.
51 (1977) 38 P & CR 452 at 484–485.
52 (1879) 5 Ex D 264.
53 [1975] QB 94; see also *Treloar v Nute* [1976] 1 WLR 1295 and *Gray v Wykeham Martin* (English Court of Appeal Transcript 10A/77, unreported).
54 Added by s 4 of the Limitation Amendment Act 1980 (UK).



intention to dispossess, and however drastic the acts of dispossession of the person seeking to dispossess him may be'.[55] Nourse LJ in the same case also endorsed the criticism that 'Bramwell LJ was striking out on his own, unsupported by the other members of the court, when he spoke of acts having to be done inconsistent with the enjoyment of the soil for the purposes for which the plaintiff intended to use it'.[56] In Nourse LJ's view, *Leigh v Jack* and *Williams Brothers* could be satisfactorily explained on the grounds that there was no enclosure of the land, that the defendant's acts of possession were trivial and that he did not have a sufficient *animus possidendi*.[57]

**6.19** It makes no difference that land is acquired or retained by the owner for a specific future purpose, though if the squatter is aware of the owner's intended future use of the land, the court is likely to require very clear evidence before it can be satisfied that the squatter who claims a possessory title has not only established factual possession of the land, but also the requisite intention to exclude the world at large, including the owner with the paper title.[58]

**6.20** Although the decision in *Wallis's Cayton Bay Holiday Camp* has not been reversed by statute in Hong Kong, Hunter J (as he then was) managed to decline it in *Man Kam Tong v Man Lin Tai*.[59] His Lordship was of the view that 'we are free to choose' between *Wallis's* case and earlier authorities, and decided the instant case on the basis of evidence rather than relying on any doctrine of licence as that proposed by Lord Denning.



***Man Kam-tong v Man Lin-tai***

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

**Hunter J**: At the outset I shall consider two particular points taken by the plaintiff. The first was that in any event there was no proof of continuous adverse possession because Sin Shu Hing was dispossessed by Sit and Chau as a result of the knitting factory incident. This fails on my findings of fact. Sit always remained Sin's custodian: there was no dispossession; and no *animus possidendi* as owner in either man.

The second point is more substantial, and is that the possession of Sin and of the defendant should not be regarded as adverse within the meaning of the Limitation Ordinance (Cap 347). The plaintiff, it is said, in and after 1947 had no immediate use for the property because he could not afford to repair it. This situation continued until well into the limitation period. The land was thus akin to development land and the possession of Sin and the defendant should be treated as being pursuant to a licence from the plaintiff. I was invited to follow the view expressed allegedly to this effect by Lord Denning MR in *Wallis's Cayton Bay Holiday Camp Ltd v Shell Mex and BP Ltd* [1975] QB 94 because no corrective legislation existed in Hong Kong similar to section 15(6) and para 8(4) of Sch 1 of the UK Limitation Act 1980.

This problem arises out or [sic] a line of authority in England dealing with the relevance of the paper title holder's intention to a claim to a possessory title. It goes back at least to a decision of the Court of Appeal in *Leigh v Jack* (1879) 5 Ex D 264 where Bramwell LJ said:

55 [1990] Ch 623 at 639A, per Slade LJ.
56 Ibid at 646, where Nourse LJ referred to counsel's submission in *Williams Brothers Direct Supply Stores Ltd v Raftery Ltd* [1958] 1 QB 159 at 169.
57 Ibid at 645–646.
58 Ibid at 639–640 per Slade LJ.
59 [1984] HKLR 181; [1985] 2 HKC 299 (noted (1984) 14 HKLJ 364 (Patrick J Sheehan)).

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]

### (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

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.

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).



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 Muckleston*,[27] which was cited by Robert Walker LJ in *Freeguard v The Royal Bank of Scotland plc*.[28] Having said that of the two competing equities, the earlier might be bound by some representation or by positive acts or by neglect, Lord Selborne went on to say:[29]

> By one or other of those means he may have armed another person with the power of going into the world under false colours; and if it be really and truly the case that by his act, or his improper omissions, such an apparent authority and power has been vested in that other person he is bound upon equitable principles by the use made of that apparent authority and power.

**7.22** The other situation where the owner of a subsequent equitable interest may have a better equity is where the first equitable owner has released the title deed to the purchaser which enables him to grant the subsequent equitable interest.[30]

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.

27 (1872) LR 8 Ch App 155.

28 (2000) 79 P & CR 81 (CA (Eng)).

29 (1872) LR 8 Ch App 155 at 160, cited in *Nu Life International Ltd v Healthy Living Products International Ltd* [2008] 2 HKLRD 297 at para 76.

30 *Rice v Rice* (1884) 2 Drew 73 VC, where the first interest was an unpaid vendor's lien. Such a lien arises by operation of law in favour of a vendor who is not paid in full. If the vendor brings proceedings against the purchaser on this ground and registers the writ as a lis pendens, the priority of the vendor's claim will be governed by the order of registration: *Pacific Capital (Investment) Ltd v Rich Resources Enterprises Ltd* [2002] HKCU 580 (HCA 13244/1999, 15 May 2002, unreported). For registrability of a lis pendens, see below at para 7.65.

In my view, I consider what Godfrey J was saying in the above-quoted passage in *Cheng Kwok Fai* was to explain that an estate agent in Hong Kong is not an agent in the strict legal sense. An agent in the strict legal sense is a person who acts on behalf of the principal so as to affect the principal's legal relations with a third party. In a case of true agency, where the agent is effectively the *alter ego* of the principal, so that the agent's acts are treated as the principal's acts, it is not surprising that the agent's knowledge is similarly attributed to the principal. However, an estate agent in Hong Kong cannot affect his principal's legal relations with a third party, and is therefore not an agent in the strict legal sense. This was explained by Lord Millett NPJ in *ING Baring Securities (HK) Ltd v Commissioner of Inland Revenue* (2007) 10 HKCFAR 417 at paras 137–138:

> In *Kennedy v De Trafford* [1897] AC 180 Lord Herschell observed (at p 188) that 'No word is more commonly and constantly abused than the word "agent"'. An agent properly so called is a person who acts on behalf of another, called the principal, so as to affect the principal's legal relations with a third party: see the definition in *Bowstead and Reynolds on Agency* (*op cit)* p 1. Where a contract is entered into by an agent acting on behalf a principal, it is the principal who obtains rights and incurs liability under the contract, not the agent. In such a case it is not inaccurate to describe the contract as the contract of the principal and not the agent.
>
> But many professional persons who act for clients and who are popularly described as agents are not agents in this sense at all. Estate agents are an obvious example. Stockbrokers are another. They transact business on the stock exchange as principals, not as agents for their clients. Stockbrokers are liable as principals on the contracts which they make with each other; their clients have no liability under those contracts. The only contractual liability which the client undertakes is to his own stockbroker under the contract between them in which each acts as principal.

I believe this was why Godfrey J in *Cheng Kwok Fai* described a Hong Kong estate agent as a 'broker'.

Accordingly, given that the Wife relied on the notice of an estate agent in the present case, it seems to me that she cannot simply rely on the general principle that '*any actual or constructive notice which an agent has … is normally imputed to his principal*'. The Wife must rely on something more to impute the notice of Mr Chu or Yue Kee to the Purchaser. Mr Wong appeared to recognise this and submitted that the question to ask was whether Yue Kee had actual or ostensible authority to receive information on behalf of the Purchaser in relation to the transaction.

The question posed by Mr Wong appeared to be taken from what Hoffmann LJ said in *El-Ajou v Dollar Land Holdings Plc (No 1)* [1994] 2 All ER 685 at 703c–e:

> Agent authorised to receive communications
>
> Thirdly, there are cases in which the agent has actual or ostensible authority to receive communications, whether informative (such as the state of health of an insured … or performative (such as a notice to quit …) on behalf of the principal. In such cases, communication to the agent is communication to the principal.

Mr Wong then submitted that the question he posed must be answered in relation to the specific facts of the case.

In cases where an agent's function is to receive communications on behalf of his principal, one can readily understand why the knowledge of the agent would be imputed to the principal. However, I have some doubt as to whether such a principle applies to an estate agent in Hong Kong. In a typical case, an estate agent's function is to perform a service by introducing a counter-party to his principal so as to enable his principal to conclude a particular transaction with that counter-party; his function is not to receive communications on behalf of his principal. No cases have been cited to suggest that an estate agent in Hong Kong has the general authority to receive communications for his principal. Accordingly, I am unable to accept Mr Wong's submission that notice of an estate agent in Hong Kong is imputed to his principal.



**7.41** In *Mo Ying*, it was held, at first instance, that notice of an estate agent in Hong Kong was not imputed to the purchaser if the agent was in fact acting as a broker.[76] On appeal, as shown above, Cheung JA dealt with the estoppel issue without questioning the judge's conclusion on constructive or imputed notice. Yuen and Kwan JJA also expressed their views on estoppel or waiver.[77]

**7.42** Once the legal estate is passed to the purchaser for value without notice, the equitable interests are destroyed. Anyone who claims through that purchaser can take free of the equitable interests even if he has notice of them.[78] This is subject to the principle that a man cannot take advantage of his own wrong. Thus, if a trustee disposes of trust property to a purchaser without notice, and later re-acquires the property, he will hold it subject to the trust.[79]

## 4. Priority Under the Land Registration Ordinance

**7.43** The mechanism of deeds registration under the Land Registration Ordinance is, on the whole, relatively simple.[80] It is based on two fundamental principles. First, registration gives priority to the holder of the interest registered. Thus, a registrable interest once registered binds the whole world.[81] Secondly, non-registration of a registrable interest renders the interest void as against a subsequent bona fide purchaser or mortgagee for valuable consideration.[82] However, as will be seen, the rules are not always consistent in their application. It should also be noted that the doctrine of notice is not wholly redundant, for example, if a third party does not qualify for the protection under the Land Registration Ordinance, the common law rules will apply to determine the question of priority between the owner of an unregistered

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76 *Mo Ying v Brillex Development Ltd* [2014] 3 HKLRD 224 at para 113, where Deputy Judge Eugene Fung SC explained the use of the word 'broker' by Godfrey J in *Cheng Kwok Fai v Mok Yiu Wah Peter* [1990] 2 HKLR 440 at 445F.

77 *Mo Ying v Brillex Development Ltd* [2015] 3 HKC 104 (CA) at para 11.10, where Yuen JA took the view that 'the wife had waived her rights to the proprietary interest she had in the property and/or had failed to come to the court with clean hands', and at para 20, where Kwan JA was prepared to hold that there was 'positive conduct' on the part of the wife, or that her inaction has acquired a 'positive content' in that not only had she raised no objection to the sale, she had permitted or consented to the husband entering into a lease-back arrangement with the purchaser.

78 *Wilkes v Spooner* [1911] 2 KB 473.

79 *Re Stapleford Colliery* (1880) 14 Ch D 432.

80 For details, see Antony Sin, *The Annotated Ordinances of Hong Kong: Land Registration Ordinance (Cap 128)* (original annotator: S H Goo (2009)) (2015 Reissue, Hong Kong: Lexis Nexis).

81 However, this is not expressly spelt out in the provisions in the Land Registration Ordinance.

82 Failure to register by solicitors is a breach of duty of care: *Yeung Shu v Alfred Lau & Co (a firm)* [1996] 4 HKC 341.

taking effect as an equitable charge,[272] would be subject to prior mortgages, whether legal or equitable.

***Bank of China (HK) Ltd v Kanishi (Far East) Ltd & Anor***

[2002] 2 HKLRD 52

**Ma J**: This was Mr Fung's primary case: that even if the Claimant is to be treated as an equitable mortgagee, the Court should nevertheless make absolute the charging order.

I agree the Court has jurisdiction to make a charging order absolute even where there exist prior interests in the relevant property. Nothing in the High Court Ordinance or in the Rules prevents this.

Indeed, I would say there is some support for this in section 20B(3) whereby a charging order takes effect as an equitable charge. This presupposes (at the very least does not preclude) the possibility of competing interests, equitable or otherwise, in the property.

Further support also lies in Mr Fung's submission, with which I agree, that the discretion vested in the Court is unfettered. I have already referred to section 20(3)(b) whereby the Court is required to consider whether any other creditor of the debtor would likely be 'unduly' prejudiced by the making of the order. Again, this presupposes the possibility of creditors which may have an existing interest in the relevant property.

While the Court may refuse to make absolute a charging order *nisi* on the ground that unsecured creditors may be prejudiced (see for example cases in which the judgment debtor is in the process of being wound up or about to be: *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1983] 2 AC 192), it does not in my view follow that just because a creditor is secured (for example an equitable mortgagee), this is somehow an automatic bar to a charging order being made. To be fair, I do not think that Mr Yin was really suggesting this to be the case.

The cases also show consistently that charging orders can co-exist with prior equitable interests. The rule is that charging orders take effect subject to prior mortgages, whether legal or equitable: *Whitworth v Gaugain* (1846) 1 Ph 728; *Chung Khiaw Bank Ltd v United Overseas Bank Ltd* [1970] AC 767, at 747; *Halsbury's Laws of England* Vol 32 (4th Edn reissue) at paras 446 and 492.

Mr Yin did, however, submit that as an equitable mortgagee, the Claimant was in the best position to have vested in it the legal estate: see *Coote's Law of Mortgages* (9th ed) at pp 1239–1243. This occurred on or about 10 April 2001 when the Instrument of Transfer was filled in and stamped. Thus, so the argument ran, the Claimant became the legal as well as equitable owner and the Judgment Debtor's interest in the Shares was only in the equity of redemption. It was contended that an equity of redemption was not a beneficial interest in the Shares such as could be made the subject matter of a charging order and besides, the Judgment Creditor had not applied for a charging order on the equity of redemption.

In my view, where the interest of a judgment debtor is in the equity of redemption, this is sufficient to enable a charging order to be made on the relevant property. The requirement in section 20A(1) is that the judgment debtor should have 'an interest … beneficially'

creditors; the burden was on the defendants to show why the orders nisi should not be made absolute (at paras 19, 27).

272 High Court Ordinance s 20B(3): 'Subject to the provisions of this Ordinance, a charge imposed by a charging order shall have the like effect and shall be enforceable in the same courts and in the same manner as an equitable charge created by the debtor by writing under his hand'.



in the assets referred to in section 20A(2). The equity of redemption is an interest held beneficially by a judgment debtor in the relevant property. As to the nature of an equity of redemption see, for example, *Halsbury's Laws of England* Vol 32 (4th Edn reissue) at paras 503–504. I would perhaps just observe that if it were somehow a bar to a charging order that the only interest of a judgment debtor was an equity of redemption, some of the cases referred to in para 35 above might not have been decided the way they were.

I would also add it makes no difference that the legal estate in the property has vested in the mortgagee: the mortgagor (the Judgment Debtor) still has the equity of redemption. However, insofar as it does make a difference in the present case that the legal estate in the Shares has passed to the Claimant, the provisions of RHC Order 50, rule 5(1) will apply so as not to give the Claimant an unfair advantage.

I am therefore of the view that there is no bar to the making of a charging order even if there exist prior interests in the relevant property and the interest of the judgment debtor therein is only in the equity of redemption. In such a situation, it is also right that the charging order is made against the relevant property itself because once redeemed, it then becomes vested (or re-vested) in the judgment debtor.

Accordingly, there being jurisdiction to make a charging order absolute even where there exist prior equitable interests in the property, ought the charging order be made absolute in the present case?

Here, the Court, in the continuing exercise of its discretion, must carry out the balancing exercise between competing interests (a matter to which I have already alluded). Mr Yin made the following points:

(a) Prejudice would be caused to the Claimant if the charging order were made absolute.

(b) The Court should not act in vain because if the value of the Shares did not exceed the amount of the indebtedness owed properly to the Claimant, there would be no point in making the charging order absolute.

As to prejudice, no specific evidence of this appears in the affidavit evidence served by the Claimant. Certainly, the Claimant's interest as equitable mortgagee in the Shares will have priority over the interest that the Judgment Creditor would have in them in the event a charging order absolute is made. It will be remembered that the Judgment Creditor's interest would be that of an equitable chargee: section 20B(3) and therefore subject to prior equities.

### *(D) Unregistered versus unregistered*

**7.139** Section 3(2) of the Land Registration Ordinance provides that an unregistered interest shall be postponed to a subsequent bona fide purchaser or mortgagee for valuable consideration. It is clear that section 3(2) applies where both interests are registrable but unregistered.[273] As Havilland de Sausmarez J had said in *Kwok Siu Lau v Kan Yang Che*,[274] section 3(2) 'places a heavy disability on unregistered deeds, postponing them to other instruments whether *registered or unregistered*'. The only requirement is that the subsequent party must be a bona fide purchaser or mortgagee for valuable consideration. There is no further requirement that the subsequent purchaser must have registered his interest or must be without notice.

273 *Kwok Siu Lau v Kan Yang Che* [1913] 8 HKLR 52 at 64–65, 67.

274 Ibid (emphasis added).

construction, the benefited land could be identified and the intention to benefit could be established, the benefit would be annexed.[45]

**8.36** However, it should be noted that implied annexation can only be inferred from the conveyance containing the covenant. It cannot be inferred from the surrounding circumstances. The intention to annex the benefit must be shown in the conveyance itself. In *J Sainsbury plc v Enfield LBC*,[46] W inherited a certain estate in 1882, and in April 1894, sold part of the land to the plaintiff's predecessors in title who covenanted not to use the land for building purposes or for trade or business. W also covenanted not to make roads or footways on a particular area of the land. W's other parts of the estate were subsequently sold at various times to various individuals who were the defendants in this case. The plaintiff acquired the land from his predecessors and in 1985 contracted to sell it to J Sainsbury plc subject to a condition that the land was no longer bound by the 1894 restrictive covenants. J Sainsbury plc and the plaintiff applied together for a declaration that the 1894 covenants were no longer binding. The issue was whether the defendants had acquired the benefit of the covenants in equity. It was common ground that the covenants could, if enforced, benefit the defendants' land, and the land was sufficiently identified such that benefit could be annexed to it if they had intended annexation to take place.

**8.37** There was no scheme of development nor was there any assignment of the benefit of the covenants. The 26 lines of covenants, as reported in the law report, without a simple punctuation mark except a full stop at the end, made no express reference to the land. There was, therefore, no express annexation. Was there any implied annexation? Morritt J, having reviewed the existing authorities, came to the conclusion that the intention to benefit the benefited land must be apparent from the conveyance. In the circumstances of the case, he could not infer an intention to annex the benefit to the benefited land. This was because, while W's covenants made reference to the land, the purchasers' covenants did not. Morritt J therefore inferred that there was no intention to annex the benefit. He said that if annexation had been intended, it was remarkable that there was no reference to the land in the purchasers' covenants. This approach is different from that of Rubin J in *Shropshire County Council v Edwards*, where Rubin J allowed implied annexation even though the first covenant made reference to the land and the second did not.

**8.38** It should also be noted that the covenant that is expressed to be made for the benefit of the covenantee's land must actually benefit the land. In other words, it must 'touch and concern' the covenantee's land.[47] The covenantee and his successors in

45 Ibid at 277.

46 [1989] 2 All ER 817.

47 *Supreme Honour Development Ltd v Lamaya Ltd* [1990] 2 HKLR 294 (HC); *Lamaya Ltd v Supreme Honour Development Ltd* [1991] 1 HKC 198, [1989–91] CPR 116 (CA) (a right to name a building does not touch and concern land). In *Incorporated Owners of Nine Queen's Road Central & Anor v Minkind Development Ltd* [2004] 1 HKC 270, Barnett J said, at para 34, that there was 'no warrant for displacing the existing law as set out in *Lamaya*'. See also *Yazhou Travel Investment Co Ltd v Bateson & Ors* [2004] 1 HKLRD 969, [2004] 1 HKC 292 (Deputy Judge Muttrie) (naming right not an interest in land capable of touching and concerning the land); *Pak Fah Yeow Investment (Hong Kong) Co Ltd v Proper Invest Group Ltd* [2008] 5 HKC 474 (Deputy Judge Au) (appeal dismissed by the Court of Appeal, [2009] 3 HKC 285; leave to appeal was granted, [2009] HKCU 811 (CACV 311/2008, 29 May 2009, unreported)).



title must be able to benefit from the covenant. The test is essentially the same as that in *Spencer's* case[48] or the requirement of 'accommodation' in the law of easement.[49] The emphasis is on the land, not the covenantees' personal benefit. It must be made to enhance the value of the land. It must either affect the way in which the land is occupied or affect its value.[50] If it is a mere personal covenant that will only benefit the covenantee personally not as owner of the benefited land, the successor in title of the covenantee will not be able to enforce the covenant even though it was made for his benefit.[51] In *Smith v River Douglas Catchment Board*,[52] the covenant by the defendant Catchment Board to keep river banks in repair was held to have touched and concerned the covenantee's land, which was flooded when repair was neglected, because 'it affects the value of the land per se and converts it from flooded meadows to land suitable for agriculture'.

**8.39** The exact land to which the parties intend the benefit to annex must be ascertainable, eg for the benefit of 'the property known as the Bleak House' or for the benefit of 'No 1, Eastern Road'. If the description of the benefited land is not clear, eg 'the land adjoining the burdened land', then the claimant has to produce extrinsic evidence to identify the particular benefited land the parties had in mind.[53]

**8.40** Once an intention to annex can be shown and the land is sufficiently indicated, prima facie there is an express annexation.

**8.41** Where a covenant is made for the benefit of the whole of the covenantee's land, the annexation will only be effective if the whole of the land is capable of benefiting. Thus, in *Re Ballard's Conveyance*,[54] a restrictive covenant made for the benefit of an 'estate which was about 1,700 acres wide' could not run with the land when in fact only a small part of it could benefit from the covenant. This problem can be solved today by drafting the covenant for the benefit of the 'whole or any part or parts of the benefited land' or 'each and every part of the benefited land'. This practice was accepted by the English Court of Appeal in *Marquess of Zetland v Driver*.[55] But if the covenant is made for the benefit of the whole of the estate capable of benefiting, any purchaser of only a part of it would be able to enforce the covenant even if the benefit is not expressly annexed to each and every part of the estate. Brightman LJ in *Federated Homes Ltd v Mill Lodge Properties Ltd*[56] said that if the benefit of a covenant was annexed to the benefited land, prima facie it was annexed to every part thereof, unless a contrary intention appeared. Despite Brightman LJ's dictum, the practice has been to annex the benefit to each and every part of the benefited land.

48 (1583) 5 Co Rep 16a, 77 ER 72.

49 *P & A Swift Investments v Combined English Stores Group plc* [1989] AC 632 at 640E–F.

50 *Mayor of Congleton v Pattison* (1808) 10 East 130 at 135, 103 ER 725 at 727; *Rogers v Hosegood* [1900] 2 Ch 388 at 395; *Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board* [1949] 2 KB 500 at 506; *P & A Swift Investments v Combined English Stores Group plc* [1989] AC 632 at 640F.

51 Neither can he rely on s 26 of the Conveyancing and Property Ordinance (Cap 219) as he was at the time of the covenant non-existent: *Re Ecclesiastical Commissioners for England's Conveyance* [1936] Ch 430.

52 [1949] 2 KB 500 at 506.

53 *Wrotham Park Estate v Parkside Homes Ltd* [1974] 1 WLR 798.

54 [1937] Ch 473.

55 [1939] Ch 1.

56 [1980] 1 All ER 371.

lease and will simply grant sub-leases. The Hong Kong Housing Authority, a Government agency, also has management responsibility over certain land. It is responsible for a combined total of over 300 rental home ownership or private sector participation estates that provide housing accommodation for a little over three million people, making it the biggest builder and the largest estate management organisation in Hong Kong.[4]

**9.03** Whether it is a Government lease (or a share in a Government lease under a co-ownership) or a sub-lease, the landlord and tenant relationship is generally the same, although the terms of the leases are different.

## 2. Definition

**9.04** A lease is a legal estate under section 2 of the Conveyancing and Property Ordinance (Cap 219). It is called a 'term of years absolute' which is defined in section 2 as including 'a term for less than a year, for a year or years and a fraction of a year and from year to year'.

### *(a) Term*

**9.05** To be a lease, what is granted must be for a definite period, rather than for an indefinite one, fixed in advance at the commencement date. There must be a certain beginning and a certain end. Thus, the commencement date of the lease must be certain, or can be made certain before the commencement of the term.[5] Similarly, the maximum duration of the lease must be certain at the date of commencement.[6] In *Lace v Chantler*,[7] a lease granted 'for the duration of the war' was held void.[8] So is a lease for 'so long as the company is trading'.[9] An agreement purporting to 'continue until the land is required by the council for road widening',[10] or for as long as the tenant is not in breach of the covenant did not create a lease.[11]

**9.06** In *Lace v Chantler*, there was a verbal agreement to let a furnished dwelling house at a weekly rent. However, the rent book contained a term stating that the premises were taken 'furnished for duration' of the war. The landlord served a notice

4 See Roger Nissim, *Land Administration and Practice in Hong Kong* (Hong Kong: Hong Kong University Press 1998) at p 91.

5 *Re Estate of Kong Wing Hong* [2014] 2 HKLRD 517 (commencement date was left blank, tenancy void); *One Queen Co Ltd v Chan Siu Lan & Anor* [1989] 1 HKC 146 (CA); *Say v Smith* (1563) 1 Plowd 269 at 272, 75 ER 410 at 415; *Brilliant v Michaels* [1945] 1 All ER 121 at 126. For certainty of terms, see (1993) 13 Legal Studies 38 (S Bright).

6 *Har Sio Ying v Chung Yau Cheung* [1987] HKLR 411 at 415H; *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386 at 392B. The English Court of Appeal's view, in *Ashburn Anstalt v Arnold* [1989] 1 Ch 1, that a lease was valid so long as the maximum duration could be made certain retrospectively at the date of the determination, which was within the parties' control, was rejected by the House of Lords.

7 [1944] KB 368.

8 *Lace v Chantler* [1944] KB 368. In England, such 'leases' were retrospectively turned into determinable leases of ten years by s 1(1) of the Validation of War-time Leases Act 1944.

9 *Birrell v Carey* (1989) 58 P & CR 184 at 186. See [1990] Conv 288 (JE Martin).

10 *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386 (HL). See also (1993) 23 HKLJ 234 (K Lynch).

11 *Har Sio Ying v Chung Yau Cheung* [1987] HKLR 411.



to terminate what she thought to be a weekly tenancy. The tenant argued that it was a tenancy for the duration of the war and could not be terminated by the notice. The English Court of Appeal held that it was a weekly tenancy as a tenancy for the duration of the war could not be validly created.

***Lace v Chantler***

[1944] KB 368

**Lord Greene MR**: The question … arises whether a tenancy for the duration of the war creates a good leasehold interest. In my opinion, it does not. A term created by a leasehold tenancy agreement must be expressed either with certainty and specifically or by reference to something which can, at the time when the lease takes effect, be looked to as a certain ascertainment of what the term is meant to be. In the present case, when this tenancy agreement took effect, the term was completely uncertain. It was impossible to say how long the tenancy would last. Mr Sturge in his argument has maintained that such a lease would be valid, and that, even if the term is uncertain at its beginning when the lease takes effect, the fact that at some future time it will be rendered certain is sufficient to make it a good lease. In my opinion, that argument is not to be sustained.

I do not propose to go into the authorities on the matter, but in *Foa's Landlord and Tenant* (6th Edn) p 115, the law is stated in this way, and, in my view, correctly: 'The habendum in a lease must point out the period during which the enjoyment of the premises is to be had: so that the duration, as well as the commencement of the term, must be stated. The certainty of a lease as to its continuance must be ascertainable either by the express limitation of the parties at the time the lease is made, or by reference to some collateral act which may, with equal certainty, measure the continuance of it, otherwise it is void. If the term be fixed by reference to some collateral matter, such matter must either be itself certain (eg a demise to hold for "as many years as A has in the manor of B") or capable before the lease takes effect of being rendered so, (eg for "as many years as C shall name."') The important words to observe in that last phrase are the words 'before the lease takes effect.' Then it goes on: 'Consequently, a lease to endure for "as many years as A shall live," or "as the coverture" between B and C shall continue, would not be good as a lease for years, although the same results may be achieved in another way by making the demise for a fixed number (ninety-nine for instance) of years determinable upon A's death, or the dissolution of the coverture between B and C.' In the present case, in my opinion, this agreement cannot take effect as a good tenancy for the duration of the war.

**9.07** The principle in *Lace v Chantler* was said to have reaffirmed 500 years of judicial acceptance in England of the requirement that a term must be certain, and applied to all leases and tenancy agreements.[12] This principle of certainty was more recently endorsed by the House of Lords in *Prudential Assurance Co Ltd v London Residuary Body*.[13] Here, the owner of a strip of land fronting a highway sold the land to the council which contemporaneously leased it back to him for a period 'until the land is required by the council for the purposes of the widening of' the highway. The council later assigned the reversion to the first defendants who were a highway authority, and the tenancy was assigned to the plaintiffs. The first defendants issued a common law notice to quit, and then sold the land to the second to fourth defendants. The plaintiffs sought an order that the tenancy could only be terminated when the

12 *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386 at 394E–H.

13 [1992] 2 AC 386.

(c) of agricultural land;[245]
(d) which is a service occupancy tenancy;[246]
(e) held from the Government, the Hong Kong Housing Authority, the Hong Kong Housing Society or the Hong Kong Settlers Housing Corporation Limited, or a sub-tenancy created out of such a tenancy;
(f) in writing created after 18 December 1981 for a fixed term of five years or more provided that the tenancy is not at a premium or fine, and the rent cannot be increased during the term, and the tenancy cannot be determined by the landlord other than by forfeiture;
(g) excluded from Part I by an order of the Chief Executive;[247]
(h) authorised by the Commissioner of Rating and Valuation for a period not exceeding one year;[248]
(i) in writing for a term not exceeding one year which is endorsed by the Commissioner of Rating and Valuation.[249]

**9.91** It will be apparent from the above that the tenancies covered by Part IV are those that are excluded from Part II which are not also excluded from Part IV. These are:

(a) tenancies of luxury premises by reference to the rateable value;
(b) tenancies in new buildings since 19 June 1981;
(c) new tenancies, that is, first tenancies since 10 June 1983;
(d) tenancies transferred from Part II by the Commissioner of Rating and Valuation.

### (i) Security of tenure

**9.92** Previously, for tenancies governed by Part IV, the tenancy did not come to an end unless terminated in accordance with that Part.[250] Under section 119, the landlord could only terminate the tenancy by a notice in the prescribed form (Form CR 107) and given to the tenant not more than four or less than three months before the date of termination.[251] Where the landlord had given notice under section 119 to terminate

245 As defined in s 36 of the Rating Ordinance (Cap 116): Landlord and Tenant (Consolidation) Ordinance s 116(2)(ba).
246 That is the landlord is the employer and the tenant is the employee in accordance with the terms and conditions of the employment, and the tenant is required to vacate the accommodation on ceasing to be so employed: Landlord and Tenant (Consolidation) Ordinance s 116(2)(bb).
247 Such an order may be made under Landlord and Tenant (Consolidation) Ordinance s 4: s 116(2)(c) of the Ordinance.
248 That is under an authority under Landlord and Tenant (Consolidation) Ordinance s 53(7A)(a)(ii) or s 119H(2)(a): s 116(2)(d) of the Ordinance.
249 Landlord and Tenant (Consolidation) Ordinance s 116(3), (4).
250 Landlord and Tenant (Consolidation) Ordinance s 117(1).
251 Landlord and Tenant (Consolidation) Ordinance s 119(1), (2). Where the tenancy could have been terminated by the landlord by a notice to quit (eg a fixed term tenancy which gives the landlord a right to give notice to quit, or a periodic tenancy), the date of termination must not be earlier than that stipulated in the tenancy: s 119(3)(a). Where the tenancy cannot be terminated by a notice to quit (eg a fixed term tenancy which does not give the landlord a right to give notice to quit), the date of termination must not be earlier than the expiry date of the tenancy: s 119(3)(b).



the tenancy, the tenant could apply to the Lands Tribunal for a new tenancy.[252] The tenant could also make a request to the landlord for a new tenancy,[253] and if he had made such a request, he could apply to the Lands Tribunal for a new tenancy.[254]

**9.93** The Lands Tribunal would have to make an order for the grant of a new tenancy unless the landlord successfully opposed the application under section 119E.[255] The landlord could oppose the application on any of the following grounds:

(a) any rent lawfully due from the tenant had not been paid, or any breach of covenant or condition which amounted to a cause of forfeiture;[256]
(b) the premises were reasonably required by the landlord for occupation as a residence for himself, his father, his mother or any son or daughter of his over the age of 18, unless in the case of a tenancy, the tenant satisfied the Lands Tribunal that in all the circumstances of the case it would be manifestly unjust and inequitable to do so,[257] and in the case of a sub-tenancy the Lands Tribunal was satisfied having regard to all the circumstances including alternative accommodation available to the parties, greater hardship that would be caused by refusing to grant a new tenancy;[258]
(c) the landlord intended to rebuild the premises, but either the rebuilding would result in an increase in the number of dwellings or accommodation for domestic or non-domestic use, or the rebuilding was in the public interest, or the cost of restoring or repairing the premises would not be economically reasonable;[259]
(d) the tenant or sub-tenant had continued to cause unnecessary annoyance, inconvenience or disturbance to the landlord or to any other person after a warning in writing had been served by the landlord or principal tenant;[260]

252 Landlord and Tenant (Consolidation) Ordinance s 117(1)(a).
253 Landlord and Tenant (Consolidation) Ordinance s 119A(1).
254 Landlord and Tenant (Consolidation) Ordinance s 117(1)(b).
255 Landlord and Tenant (Consolidation) Ordinance ss 119D(1), 119G(1).
256 Landlord and Tenant (Consolidation) Ordinance s 119E(1)(a). As to forfeiture, see Chapter 8.
257 The test is whether it would "cause an ordinary person who knew all the circumstances to throw up his hands in dismay at the thought of possession being ordered and exclaim 'that cannot be right'": *Cox v Scanlon* [2005] 4 HKC 526, [2006] 1 HKLRD 326 at para 22. It is not enough to show that refusing to grant the order of a new tenancy would probably cause greater hardship to the tenant than to the landlord if it was granted (*Williams v Chan* [2003] 3 HKLRD 578) or that it would cause inconvenience to the tenant (*Cox v Scanlon*).
258 Landlord and Tenant (Consolidation) Ordinance (Cap 7) s 119E(1)(b). This is equivalent to s 53(2)(b) for Part II tenancies, as to which see *Wong Chor Wan v Yuen Yau & Anor* [1983] 1 HKC 192 (CA); *Wong Chi Hoi v Ma Hung Kim* [1983] 1 HKC 196 (CA). The landlord is not entitled to rely on this ground if his interest was acquired within 12 months before the termination of the current tenancy: Landlord and Tenant (Consolidation) Ordinance s 119E(2).
259 Landlord and Tenant (Consolidation) Ordinance s 119E(1), (1)(c).
260 Landlord and Tenant (Consolidation) Ordinance s 119E(1)(d). As to the meaning of 'warning in writing', see *Law Hung v Loong Hock Ltd* [1987] 3 HKC 100 (a case on the equivalent requirement in s 53(1)(d)). A tenant who persistently fails to pay rent may be regarded as causing unnecessary inconvenience to the landlord: Landlord and Tenant (Consolidation) Ordinance s 119E(3).

> an end .... So long as the tenant has not been turned out of possession he is within the terms of the enactment, for the lessor is proceeding to enforce his right of re-entry. The enactment then being in terms retrospective must be construed according to its terms as being retrospective.

The judgments of Sir George Jessel MR and Bowen LJ were to the like effect and it is now settled law that where a landlord forfeits a lease by issuing and serving a writ for possession the tenant may apply for relief before but not after the landlord has recovered judgment and re-entered. But although the court limited the time during which a tenant could apply for relief against forfeiture constituted by the issue and service of the writ, the court had no power and in my opinion did not intend to deprive a tenant of any right to apply for relief after a forfeiture constituted by re-entry without judgment. *Quilter v Mapleson* is authority for a case where the landlord forfeits by issue and service of a writ but is not authority for a case where the landlord forfeits by re-entry.

In *Rogers v Rice* [1892] 2 Ch 170 a landlord forfeited by the issue and service of a writ, recovered judgment and re-entered pursuant to the writ of possession then issued and was held to be no longer 'proceeding by action' within section 146(2). The tenant sought and was refused leave to set aside the verdict and the judgment. The tenant later issued an originating summons seeking relief from forfeiture under section 146(2). Lord Coleridge CJ said that a section 146 notice had been given and ignored, and continued, at pp 171–172:

> The action proceeded to judgment, the judgment was executed, so far as possession was concerned, and at the time when the present proceeding was commenced the lessor was in possession. The action then, so far as related to enforcing the right of re-entry, was at end, and it cannot be said that the landlord was 'proceeding' to enforce his right of re-entry. The case is clear on the terms of the Act, but I cannot omit to notice that the same view was taken by the judges of the Court of Appeal in *Quilter v Mapleson*, 9 QBD 672, 677, where all three judges gave their opinion to this effect, though that was not the point on which their decision turned.

The decision can be supported on the grounds that no court could properly exercise its discretion to relieve against forfeiture after the landlord had issued and served a writ, recovered judgment in the action and entered into possession pursuant to that judgment. The decision can also be supported on the grounds set out in the speech of my noble and learned friend, Lord Oliver of Aylmerton. But the court had no power and in my opinion did not intend to deprive a tenant of any right to apply for relief after a forfeiture constituted by re-entry without judgment.

In *Pakwood Transport Ltd v 15, Beauchamp Place Ltd* (1977) 36 P & CR 112 the Court of Appeal rejected an argument by a landlord who had served a section 146 notice that the tenant could not apply for relief from forfeiture until proceedings for forfeiture had been instituted by the landlord. All three Lords Justices derived from *Quilter v Mapleson*, 9 QBD 672 and *Rogers v Rice* [1892] 2 Ch 170 the proposition that, in the words of Orr LJ, 36 P & CR 112, 117:

> a lessee could not apply for relief against re-entry or forfeiture after the landlord had obtained a judgment of the court entitling him to re-enter on a forfeiture; and it is claimed, and in my judgment rightly claimed, that the same principle must apply where the landlord has peaceably recovered possession. In other words, once he has either recovered possession or obtained an order for possession he can no longer be said to be 'proceeding by action or otherwise to enforce a right of re-entry or forfeiture.'

My Lords, I accept that it is now settled law that a tenant cannot apply for relief after the landlord has recovered judgment for possession and has re-entered in reliance on that judgment. But I do not accept that any court has deprived or is entitled to deprive a tenant of any right to apply for relief if the landlord proceeds to forfeit otherwise than by an action instituted for that purpose.



Orr LJ continued, at p 117:

> On this basis the argument for the lessor appears to me to involve an absurdity, in that if the landlord has done no more than serve a section 146 notice, it is too early for the tenant to apply for relief; but if the landlord's next step is peaceably to recover possession, it is then too late for the tenant to apply. For my part, I am not prepared to accept an argument which leads to this absurdity, and I have no hesitation in holding that a landlord who serves a section 146 notice is at that stage 'proceeding to enforce a right of re-entry or forfeiture' in that the service of such a notice is a step which the law requires him to take in order to re-enter or forfeit.

My Lords, I accept the conclusion that a landlord who serves a notice under section 146(1) can be said, for the purposes of section 146(2) to be proceeding to enforce his rights under the lease. A tenant authorised by section 146(2) to apply to the court for relief against forfeiture if he fails to comply with a section 146 notice may make that application after service of the notice for the purpose of elucidating the issues raised by the notice, ascertaining the intentions of the landlord, and setting in train the machinery by which the dispute between the landlord and the tenant can be determined by negotiation or by the court. But the fact that the tenant may apply to the court for relief after service of the section 146 notice does not mean that if he does not do so he loses the right conferred on him by section 146(2) to apply for relief if and when the landlord proceeds, not by action but 'otherwise' by exercising a right of re-entry. No absurdity follows from a construction which allows the tenant to apply for relief before and after a landlord re-enters without first obtaining a court order.

In the words of Laskin JA in *Re Rexdale Investments Ltd and Gibson* [1967] 1 OR 251, 259 dealing with provisions in the Ontario legislation indistinguishable from section 146(2), the argument that a tenant cannot apply for relief after a landlord has determined the lease by re-entry:

> depends on a detached grammatical reading of the phrase 'is proceeding' ... which makes nonsense of the phrase 'or otherwise' (as covering physical re-entry) by making ineffective, in any practical sense, the provision for relief from forfeiture applicable to such re-entry. We do not construe statutes, especially when they are remedial ... to the point of self-contradiction. In my opinion, the phrase 'is proceeding' is more properly read in the sense of 'has proceeded,' and I am fortified in this view by the fact that the exercise of the power of termination is manifested effectively by the mere taking of proceedings as well as by physical re-entry. What [section 146(2)] means, therefore, is that when the landlord has terminated the lease by action or by actual re-entry without action, the tenant may seek relief from forfeiture in the pending action, if any, or, if none, by proceedings initiated by him. In the latter case, one would expect prompt reaction by the tenant.
>
> ... The English cases relied on ... [*Rogers v Rice* [1892] 2 Ch 170; *Lock v Pearce* [1893] 2 Ch 271 and *Quilter v Mapleson*, 9 QBD 6721] are distinguishable, if need be ... by the fact ... that they relate to re-entry in pursuance of a judgment for possession.

These observations by a distinguished Canadian judge who subsequently became Chief Justice of the Supreme Court of Canada, support the views which I have formed concerning the construction of section 146 and the ambit and effect of the earlier decisions.

Mr Reid argued that your Lordships should not interfere with 19th century decisions and for my part I do not intend to do so on this occasion or to question the result of the decision of the Court of Appeal in *Pakwood Transport Ltd v 15, Beauchamp Place Ltd*

unpointed flank wall of P's adjoining house was exposed to the weather. P claimed he had an easement of protection from the weather but his action failed.

***Phipps v Pears***

[1965] 1 QB 76

**Lord Denning MR**: [The right to protection from the weather, the plaintiff said,] was analogous to the right of support. It is settled law, of course, that a man who has his house next to another for many years, so that it is dependent on it for support, is entitled to have that support maintained. His neighbour is not entitled to pull down his house without providing substitute support in the form of buttresses or something of the kind, see *Dalton v Angus*.[25] Similarly, it was said, with a right to protection from the weather. If the man next door pulls down his own house and exposes his neighbour's wall naked to the weather whereby damage is done to him, he is, it is said, liable to damages.

The case, so put, raises the question whether there is a right known to the law to be protected — by your neighbour's house — from the weather. Is there an easement of protection?

There are two kinds of easements known to the law: positive easements, such as a right of way, which give the owner of land a right himself to do something on or to his neighbour's land: and negative easements, such as a right of light, which gives him a right to stop his neighbour doing something on his (the neighbour's) own land. The right of support does not fall neatly into either category. It seems in some way to partake of the nature of a positive easement rather than a negative easement. The one building, by its weight, exerts a thrust, not only downwards, but also sideways on to the adjoining building or the adjoining land, and is thus doing something to the neighbour's land, exerting a thrust on it, see *Dalton v Angus* per Lord Selborne LC.[26] But a right to protection from the weather (if it exists) is entirely negative. It is a right to stop your neighbour pulling down his own house. Seeing that it is a negative easement, it must be looked at with caution. Because the law has been very wary of creating any new negative easements.

Take this simple instance: Suppose you have a fine view from your home. You have enjoyed the view for many years. It adds greatly to the value of your house. But if your neighbour chooses to despoil it, by building up and blocking it, you have no redress. There is no such right known to the law as a right to a prospect or view, see *Bland v Moseley*[27] cited by Lord Coke in *Aldred's Case*.[28] The only way in which you can keep the view from your house is to get your neighbour to make a covenant with you that he will not build so as to block your view. Such a covenant is binding on him by virtue of the contract. It is also binding in equity on anyone who buys the land from him with notice of the covenant. But it is not binding on a purchaser who has no notice of it, see *Leech v Schweder*.[29]

Take next this instance from the last century. A man built a windmill. The winds blew freely on the sails for thirty years working the mill. Then his neighbour built a schoolhouse only 25 yards away which cut off the winds. It was held that the miller had no remedy: for the right to wind and air, coming in an undefined channel, is not a right known to the

25 (1881) 6 App Cas 740 (HL).
26 Ibid at 793.
27 (1587) cited in *Aldred's Case* [1558–1774] All ER Rep 622.
28 (1610) 9 Co Rep 57b.
29 (1874) 9 Ch App 463.



law, see *Webb v Bird*.[30] The only way in which the miller could protect himself was by getting his neighbour to enter into a covenant.

The reason underlying these instances is that if such an easement were to be permitted, it would unduly restrict your neighbour in his enjoyment of his own land. It would hamper legitimate development, see *Dalton v Angus* per Lord Blackburn.[31] Likewise here, if we were to stop a man pulling down his house, we would put a brake on desirable improvement. Every man is entitled to pull down his house if he likes. If it exposes your house to the weather, that is your misfortune. It is no wrong on his part. Likewise every man is entitled to cut down his trees if he likes, even if it leaves you without shelter from the wind or shade from the sun; see the decision of the Master of the Rolls in Ireland in *Cochrane v Verner*.[32] There is no such easement known to the law as an easement to be protected from the weather. The only way for an owner to protect himself is by getting a covenant from his neighbour that he will not pull down his house or cut down his trees. Such a covenant would be binding on him in contract: and it would be enforceable on any successor who took with notice of it. But it would not be binding on one who took without notice.

## *(e) No exclusive or joint user*

**12.18** The right must not give the dominant owner an exclusive or joint possession of the servient land.[33] The idea of an easement is that the dominant owner will be able to use part of the servient land for the benefit of the dominant land, but not to the exclusion of the servient owner's use of his own land. As Lord Scott of Foscote put it in *Moncrieff v Jamieson*,[34] an easement must be exercised 'reasonably and without undue interference with the servient owner's enjoyment of his own land'. Thus, in *Copeland v Greenhalf*,[35] D who used a narrow strip of P's land for storing vehicles awaiting and undergoing repairs failed in his claim that the right was an easement. It was held that the right was not an easement because it excluded P's use of his own land.

***Copeland v Greenhalf***

[1952] Ch 488

**Upjohn J**: I think that the right claimed goes wholly outside any normal idea of an easement, that is, the right of the owner or the occupier of a dominant tenement over a servient tenement. This claim (to which no closely related authority has been referred to me) really amounts to a claim to a joint user of the land by the defendant. Practically, the defendant is claiming the whole beneficial user of the strip of land on the south-east side of the track there; he can leave as many or as few lorries there as he likes for as long as he likes; he may enter on it by himself, his servants and agents to do repair work thereon. In my judgment, that is not a claim which can be established as an easement. It is virtually a claim to possession of the servient tenement, if necessary to the exclusion

30 (1861) 10 CBNS 268; (1862) 13 CBNS 841.
31 (1881) 6 App Cas 740 at 824.
32 (1895) 29 ILT 571.
33 Easements are non-possessory rights in land. See *Gray & Gray* at para 5.1.6. See also *Hong Kong Kam Lan Koon Ltd v Realray Investment Ltd (No 5)* [2007] 5 HKC 122 at para 143, per Lam J.
34 [2007] 1 WLR 2620 (HL) at para 45.
35 [1952] Ch 488.

to purchase the red land when Mr Shaw's lease was terminated. In 1982, when Mr Shaw surrendered his lease, the defendants exercised their option to purchase the red land. The plaintiffs argued that the red land should be valued on the basis that the red land enjoyed a right of way over the green land. The English Court of Appeal held that as the plaintiffs had transferred the green land in 1975 to the defendants, they ceased to have any power to grant any perpetual easement over it. So the plaintiffs could not sell the red land to the defendants with an easement over the green land.

***MRA Engineering Ltd v Trimster Co Ltd***

(1988) 56 P & CR 1

**Dillon LJ**: Mr Merrett, for the plaintiffs, says that the right of way which Mr Shaw had had had been enjoyed with the red land and therefore passed as an appurtenant to the red land under section 62(2) but was elevated into an easement in fee simple.

Of course, where an owner of land sells part of the land to a purchaser who has been in occupation of that part of the land before — for instance, as a tenant — and that person has had as appurtenant to his tenancy some right of way for the duration of the tenancy over land which the vendor is retaining, that right of way will pass by virtue of section 62 on the conveyance of the freehold of the land of which the purchaser was previously tenant, and it will pass, as the conveyance is in fee simple, as a right of way in fee simple appurtenant to the freehold. That is the ordinary mechanism of grant, and it can only apply where the owner of the land over which the right of way is thus impliedly granted has a sufficient estate to support making such a grant. Section 62 is concerned with what is granted and it cannot include something which at the time of the relevant conveyance the grantor had no power to grant.

In the present case, as there was no reservation in the conveyance of the green land in 1975, the plaintiffs, as vendors of the red land, had no power to grant to any third party any perpetual easement over the green land. The green land had, indeed, been conveyed to the defendants in 1975 subject to Mr Shaw's right of way, but that was appurtenant to his lease, which was surrendered before there was any exercise of the option. Therefore it must follow, in my judgment, that there is no basis for saying that the plaintiffs could have granted, after the surrender of Mr Shaw's lease, any easement over the green land. Accordingly, no such easement could pass under section 62(2) on any conveyance of the red land in favour of anyone by the plaintiffs subsequent to the surrender of Mr Shaw's lease or, indeed, before that, because Mr Shaw's rights were his rights under the lease and not the rights of the plaintiffs as the reversioners.

**12.57** As the effect of section 16 of the Conveyancing and Property Ordinance is too sweeping, to prevent precarious rights from becoming irrevocable, one should either revoke the rights before the assignment or expressly exclude the effect of section 16 in the assignment.[111] In practice, it is important for the seller's solicitor to discuss

111 Section 16 refers to 'rights, interests, privileges, easements or appurtenances'. 'The fact that there may be one or two matters which are expressly included in the conveyance does not operate as an indication of an intention that the remainder of the matters referred to in s 16 were not included': *Silver Carnival Ltd v Longbase Investments Ltd* [2005] 2 HKC 681 (CA) at para 15.



with the seller whether a special condition should be included in the initial contract and the subsequent assignment to exclude the effect of section 16.[112]

## *(e) By implied grant*

**12.58** There are three circumstances in which the law is prepared to imply an easement in favour of the grantee against the grantor:

### (i) Necessity

**12.59** Where the claimant bought land from the seller who also owns the adjoining land without an easement over the adjoining land, and the land he bought is inaccessible, the court is willing to imply the grant of an easement on the grounds of necessity.[113] Thus, in *Altmann v Boatman*,[114] a right to use a staircase which was the sole access to a flat was implied by the court. The necessity must be one that exists at the date of the assignment, and not one that merely arises after that date.[115] It is not sufficient to show that a particular access over the grantor's land is more convenient or reasonably necessary for the proper enjoyment of the claimant's dominant land. It is however necessary to show that without the easement, the dominant land cannot be used at all.[116] In *MRA Engineering v Trimster*, as there was a public footpath to gain access on foot to the red land, no easement of necessity could be implied into the conveyance. The fact that there could be no access by car merely made the use of the red land difficult and inconvenient. The red land would not become inaccessible or useless.

**12.60** However, the court will only imply an easement of necessity where there is no express contrary intention by the parties. The court will not as a matter of public policy imply an easement of necessity regardless of the intention of the parties in favour of land which will become unusable without the easement. Brightman LJ in *Nickerson v Barraclough*[117] said that an easement of necessity must depend on the intention of the parties and the implication from the circumstances. Therefore, if the grantor had expressly stated that no right of access was being granted, an easement of necessity could not be implied even if the land would be landlocked without the easement. Such a view may seem harsh but it is understandable as an implied grant cannot override the express intention of the parties.

112 See IR Storey, *Conveyancing* (4th Edn, London: Butterworths 1993) at pp 192–193; Thompson, op cit at pp 172–174, 554. See also *Selby District Council v Samuel Smith Old Brewery* (2000) 80 P & CR 466 at 474 (CA (Eng)), where it was stressed that the section 'will not apply where a contrary intention is apparent from the conveyance or contract'.

113 *Clark v Cogge* (1607) 2 Roll Abr 60, pl 17, 79 ER 149; (1981) 34 CLP 113 (P Jackson); (1940) 56 LQR 93 (DA Stroud). If the claimant bought the landlocked land not from the owner of the adjoining land, there is no claim of easement on necessity over the adjoining land.

114 (1963) 186 EG 109.

115 *Wan Yuk Wing v Wong Kwok Hing Patrick* [2009] 5 HKLRD 143; *Tang Tim Fat & Anor v Chan Fok Kei & Ors* [1993] 2 HKLR 373, [1992] 2 HKC 623; *Holmes v Goring* (1824) 2 Bing 76 at 84; *Corporation of London v Riggs* (1880) 13 Ch D 798 at 806.

116 *MRA Engineering Ltd v Trimster Co Ltd* (1988) 56 P & CR 1 at 6.

117 [1981] 2 All ER 369.

a right expressly, there is no reason in principle why it should not be presumed to have done so if the circumstances warrant and if the special position of State land allows it.

72. I am satisfied that, once the fee simple rule is abandoned, the common landlord rule has no logical foundation. It is based on the premise that by assenting to his tenant's possession of the dominant tenement the landlord has consented to the tenant's user of rights over the servient tenement, so that the user is not "as of right". The premise only has to be stated to be seen to be wrong.

*What is the law of Hong Kong?*

73. I have so far considered the English authorities. But the question we have to decide is not whether the rules under discussion represent the law of England, but whether they represent or should continue to represent the law of Hong Kong.

74. English law was first introduced into Hong Kong by the Supreme Court Ordinance 1844. This provided that:

> ... the law of England shall be in full force in the said Colony of Hong Kong, except where the same shall be inapplicable to the local circumstances of the said Colony, or of its inhabitants: Provided nevertheless, that in all matters and questions touching the right or title to any real property in the same Colony, the law of England shall prevail ...

75. This was replaced by another Ordinance in 1873 which contained the same exception and which it is not necessary to consider. In 1966, this was replaced by the Application of English Law Ordinance which remained in force until the resumption of the exercise of sovereignty by China on 1 July 1997. Section 3 provided:

> The common law and the rules of equity shall be in force in Hong Kong, so far as they may be applicable to the circumstances of Hong Kong or its inhabitants and subject to such modifications thereto as such circumstances may require ...

76. Prior to 1 July 1997, "common law" was defined as "the common law of England", but this was not limited by reference to any particular time. The common law as it was developed by the judges applied in Hong Kong provided that it was suited to local circumstances. This did not give Hong Kong judges a discretionary power to legislate by modifying the common law. They were required to apply English law, but a modified form of English law suited to local circumstances. On appeals to the Privy Council, the Board would defer to the views of the local courts on what was and what was not suited to the circumstances of Hong Kong.

77. On 1 July 1997, the 1966 Ordinance ceased to apply in Hong Kong as being contrary to the Basic Law. But the continuity of existing laws was of fundamental importance in the establishment of the Hong Kong Special Administrative Region under the principle of "one country, two systems" and constituted a vital element of the Joint Declaration and the Basic Law. Article 8 of the Basic Law provides:

> The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.

Section 3 of the Interpretation and General Clauses Ordinance now defines "the common law" as "the common law in force in Hong Kong".

78. The disappearance of any reference to local circumstances and the modification of English law was an inevitable consequence of the resumption by China of the exercise of sovereignty over Hong Kong. But it should not inhibit the courts of Hong Kong, and



in particular this Court which has succeeded the Privy Council as the final appellate court of Hong Kong, from developing the common law in the context of Hong Kong. The language of the 1966 Ordinance was appropriate when Hong Kong was a British colony and Hong Kong judges were obliged to apply an occasionally modified version of English law. This is no longer the case. Just as Australian and New Zealand judges apply and develop their own versions of the common law, so in future our judges must develop the common law of Hong Kong to suit the circumstances of Hong Kong. It is well recognised that the common law is no longer monolithic but may evolve differently in the various common law jurisdictions.

79. The status of English and other common law decisions as binding precedents in Hong Kong was authoritatively set out by Li CJ in this Court in *Solicitor (24/07) v Law Society of Hong Kong*. The effect of that case may be shortly stated. Decisions of the Privy Council on Hong Kong appeals before 1 July 1997 remain binding on the courts of Hong Kong. This accords with the principle of continuity of the legal system enshrined in art.8 of the Basic Law. Decisions of the Privy Council on non-Hong Kong appeals are of persuasive authority only. Such decisions were not binding on the courts in Hong Kong under the doctrine of precedent before 1 July 1997 and are not binding today. Decisions of the House of Lords before 1 July 1997 stand in a similar position. It is of the greatest importance that the courts of Hong Kong should derive assistance from overseas jurisprudence, particularly from the final appellate courts of other common law jurisdictions. This is recognised by art 84 of the Basic Law.

80. In that case, the Chief Justice made it clear that this Court has the power to depart from previous decisions of the Privy Council on appeals from Hong Kong and its own previous decisions, but observed:

> The doctrine of precedent is a fundamental feature of our legal system based on the common law. It gives the necessary degree of certainty to the law and provides reasonable predictability and consistency to its application. Such certainty, predictability and consistency provide the foundation for the conduct of activities and the conclusion of business and commercial transactions. But at the same time, a rigid and inflexible adherence by this Court to the previous precedents of Privy Council decisions on appeal from Hong Kong and its own decisions may unduly inhibit the proper development of the law and may cause injustice in individual cases. The great strength of the common law lies in its capacity to develop to meet the changing needs and circumstances of the society in which it functions ...

81. On the resumption of the exercise of sovereignty by China the Privy Council ceased to be the final appellate court of Hong Kong and its place was taken by this Court. The jurisdiction to ascertain, declare and develop the common law of Hong Kong formerly exercisable by the Privy Council is now exercisable by this Court. It will continue to respect and have regard to decisions of the English courts, but it will decline to adopt them not only when it considers their reasoning to be unsound or contrary to principle or unsuitable for the circumstances of Hong Kong, but also when it considers that the law of Hong Kong should be developed on different lines.

*The disturbance of settled titles*

82. In developing the law, the courts must always be mindful of the need to avoid disturbing settled laws on which people have relied when arranging their business or other affairs. Sun Honest has urged us not to depart from the rules which limit and virtually defeat the application of the doctrine of lost modern grant in Hong Kong. This would, it is said, disturb settled titles. Any landowner who sought legal advice would be told that

But the law cannot stop at this point, with banks on inquiry only in cases where the debtor and guarantor have a sexual relationship or the relationship is one where the law presumes the existence of trust and confidence. That would be an arbitrary boundary, and the law has already moved beyond this, in the decision in *Burch*. As noted earlier, the reality of life is that relationships in which undue influence can be exercised are infinitely various. They cannot be exhaustively defined. Nor is it possible to produce a comprehensive list of relationships where there is a substantial risk of the exercise of undue influence, all others being excluded from the ambit of the *O'Brien* principle. Human affairs do not lend themselves to categorisations of this sort. The older generation of a family may exercise undue influence over a younger member, as in parent-child cases such as *Bainbrigge v Browne* 18 Ch D 188 and *Powell v Powell* [1900] 1 Ch 243. Sometimes it is the other way round, as with a nephew and his elderly aunt in *Inche Noriah v Shaik Allie bin Omar* [1929] AC 127. An employer may take advantage of his employee, as in *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144. But it may be the other way round, with an employee taking advantage of her employer, as happened with the secretary-companion and her elderly employer in *Re Craig, decd* [1971] Ch 95. The list could go on.

These considerations point forcibly to the conclusion that there is no rational cut-off point, with certain types of relationship being susceptible to the *O'Brien* principle and others not. Further, if a bank is not to be required to evaluate the extent to which its customer has influence over a proposed guarantor, the only practical way forward is to regard banks as 'put on inquiry' in every case where the relationship between the surety and the debtor is non-commercial. The creditor must always take reasonable steps to bring home to the individual guarantor the risks he is running by standing as surety. As a measure of protection, this is valuable. But, in all conscience, it is a modest burden for banks and other lenders. It is no more than is reasonably to be expected of a creditor who is taking a guarantee from an individual. If the bank or other creditor does not take these steps, it is deemed to have notice of any claim the guarantor may have that the transaction was procured by undue influence or misrepresentation on the part of the debtor.

**13.53** It is true that the high degree of trust and confidence and emotional interdependence which normally characterises a marriage relationship provides scope for abuse,[115] but whether there is undue influence or misrepresentation is to be decided on a case-by-case basis. Undue influence has a connotation of impropriety. Statements or conduct by a husband that do not pass beyond the bounds of what may be expected of a reasonable husband in the circumstances should not, without more, be castigated as undue influence.[116] Likewise, when a husband is forecasting the future of his business, and expressing his hopes or fears, a degree of hyperbole may be only natural, and courts should not too readily treat such exaggerations as misstatements.[117]

**13.54** Notice of any undue influence, etc by the debtor (for example, knowledge of the true purpose of the loan which raises the possibility of undue influence, etc by the debtor on the mortgagor) which is acquired by the lender's solicitor can also be imputed to the lender. Where, however, the solicitor is acting for both the mortgagor

115 *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773 at 801 (HL).

116 Ibid at 800. See also *Bank of China (HK) Ltd v Fung Chin Kan & Anor* [2003] 1 HKLRD 181 (CFA), where a wife alleged that her husband 'behaved violently' and that she had 'no alternative' but to 'concede to his request' as she did not want to impair the marriage. It was held that such facts did not begin to raise a case of undue influence.

117 Ibid at 800.



and the lender in the same transaction, knowledge of some fact about the transaction which it is his duty not to disclose to the lender without the mortgagor's consent cannot be imputed to the lender.[118] This is because in such a case, the solicitor cannot disclose the fact to the lender without the mortgagor's consent. Yet it is at the same time his duty to inform the lender of it. There is, therefore, a conflict of interest and the proper course for the solicitor to take would be to notify the lender that he can no longer act for the lender. It follows, therefore, that such knowledge acquired by the solicitor cannot be imputed to the lender.

**13.55** What are the necessary steps required to be taken by the lender? Lord Browne-Wilkinson said that in order to avoid being fixed with constructive notice, where the lender only knows that the wife is to stand as surety for her husband's debts, the lender should insist that she attends a private meeting (in the absence of the husband) with a representative of the lender at which she is told of the extent of her liability as surety, warned of the risk she is running and asked to take independent legal advice.[119] In exceptional cases, where the lender knows of more facts which make the presence of undue influence not only possible but probable, the lender should insist that the wife is separately advised.[120] While Lord Browne-Wilkinson's guidance is to operate prospectively, it has been used as the yardstick to measure the propriety of past transactions. Thus, in *Midland Bank plc v Massey*,[121] the Court of Appeal held that it was sufficient for the bank to require the surety to seek independent advice. As Lord Nicholls saw it, Lord Browne-Wilkinson was not trying to suggest that a private meeting was the only way a bank could discharge its obligation to bring home to the wife the risks she was running: '[P]rovided a suitable alternative is available, banks ought not to be compelled to take this course'.[122]

**13.56** Once the mortgagee has advised the mortgagor to take independent advice, the mortgagee is entitled to assume that the solicitor consulted by the mortgagor has provided honest and proper advice and the mortgagee is not under any duty to inquire into what has transpired at the interview between the mortgagor and the solicitor.[123] If the surety is independently advised by a solicitor who does not act for the lender, the lender is entitled to assume that the solicitor has properly discharged his professional duty to the surety.[124] So long as the lender has required the surety to sign a form of declaration in the presence of a solicitor, whose honesty and competence the lender

118 *Halifax Mortgage Services Ltd v Stepsky* [1995] 4 All ER 656.

119 *Barclays Bank plc v O'Brien* [1993] 4 All ER 417 at 430g. It seems, however, that the banks' practice is not to have a private meeting with the wife: *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773 at 804 (HL). See also the findings of the survey conducted by M Pawlowski and S Greer: [2001] Conv 229 at 237.

120 *Barclays Bank plc v O'Brien* [1993] 4 All ER 417 at 430b, 431b.

121 [1994] 2 FLR 342.

122 *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773 at 805–806. Cf [1999] Conv 176 (MJ Draper): 'For transactions post-dating *O'Brien* it is submitted that the steps described by Lord Browne-Wilkinson are prescriptive in nature and it will be an ill-advised lending institution which departs from them on the basis of decisions concerning transactions pre-dating *O'Brien*' (at 198).

123 *Massey v Midland Bank plc* [1995] 1 All ER 929 (CA (Eng)); *Banco Exterior Internacional v Mann* [1995] 1 All ER 936 (CA (Eng)); *Royal Bank of Scotland plc v Etridge (No 2)* [1998] 4 All ER 705 (CA (Eng)).

124 *Midland Bank plc v Serter* [1995] 1 FLR 1034; *Royal Bank of Scotland plc v Etridge (No 2)* [1998] 4 All ER 705 (CA (Eng)).

decamps abroad the creditor loses his money. If disaster strikes the debtor and the mortgaged securities but the surety remains capable of repaying the debt then the creditor loses nothing. The surety contracts to pay if the debtor does not pay and the surety is bound by his contract. If the surety, perhaps less indolent or less well protected than the creditor, is worried that the mortgaged securities may decline in value then the surety may request the creditor to sell and if the creditor remains idle then the surety may bustle about, pay off the debt, take over the benefit of the securities and sell them. No creditor could carry on the business of lending if he could become liable to a mortgagee and to a surety or to either of them for a decline in value of mortgaged property, unless the creditor was personally responsible for the decline. Applying the rule as specified by Pollock CB in *Watts v Shuttleworth* (1860) 5 H & N 235 at 247–248, 157 ER 1171 at 1176, it appears to their Lordships that in the present case the creditor did no act injurious to the surety, did no act inconsistent with the rights of the surety and the creditor did not omit any act which his duty enjoined him to do. The creditor was not under a duty to exercise his power of sale over the mortgaged securities at any particular time or at all.

Their Lordships will humbly advise Her Majesty that this appeal should be allowed, the order of the Court of Appeal set aside and the order made by Rhind J restored. The respondent must pay the appellant's costs in the Court of Appeal and before their Lordships' Board.

**13.108** In *Downsview Nominees Ltd v First City Corp Ltd*,[237] a company issued a debenture to a bank and a debenture to P1. P1 appointed receivers and managers of the company under the debenture. The bank assigned its debenture to D1 which was controlled by D2 who was appointed receiver and manager under that debenture not for the purpose of enforcing the security under that debenture but to disrupt the receivership under P1's debenture and to prevent P1 from enforcing its debenture. The receivers appointed by P1 relinquished control to D2. Four days later, P1 offered to buy D1's debenture at a price equivalent to the amounts outstanding and secured under that debenture, but the offer was rejected. The company continued to trade during D2's receivership and made substantial losses.

**13.109** Later, as directed by the court, D1 assigned its debenture to P1 and D2 ceased to act as receiver. P1 assigned its own debenture to P2. On an action by Ps, the Privy Council held that a mortgagee or receiver and the manager appointed by him owed no general duty of care in negligence to the mortgagor or subsequent encumbrancers in the exercise of their powers and management of the mortgagor's assets. But they owed an equitable duty to exercise their powers in good faith for the purpose of obtaining repayment and the duty was owed to the mortgagor and any subsequent encumbrancers. On the facts, Ds were in breach of such duty.

**13.110** Once the power is exercisable, the mortgagee can sell the property whenever he likes.[238] However, where a delay in the sale would cause the mortgagor to suffer financially, in the absence of clear evidence of an upward surge in the property market, the court may order a sale at the request of the mortgagor or any person interested either in the mortgage money or in the right of redemption.[239]

237 [1993] 2 WLR 86

238 *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949 at 965G.

239 *Palk v Mortgage Services Funding plc* [1993] 2 WLR 415.



**13.111** As mentioned, the mortgagee is under a duty to act in good faith in deciding whether to sell. Once he has decided to sell, he must exercise a degree of care to take all reasonable steps to obtain the best price reasonably obtainable. He must 'act in a prudent and business-like manner, with a view to obtain as large a price as may fairly and reasonably, with due diligence and attention, be under the circumstances obtainable.'[240] He must 'take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decides to sell it'.[241] In *Cuckmere Brick Co Ltd v Mutual Finance Ltd*,[242] the mortgagee, having been informed of the granting of a planning permission relating to the mortgaged property, failed to make adequate reference to the full extent of the permission in the auction advertisement. As a result the sale was undervalued. The Court of Appeal held that the mortgagee was liable in damages for breach of the duty of care. This duty of care cannot, in the light of *Downsview*, be regarded as part of the general duty of care in tort, but must be treated as one aspect or a manifestation of the mortgagee's duty to act in good faith.

***Cuckmere Brick Co v Mutual Finance Ltd***

[1971] 1 Ch 949

**Salmon LJ**: I will now turn to the law. It is well settled that a mortgagee is not a trustee of the power of sale for the mortgagor. Once the power has accrued, the mortgagee is entitled to exercise it for his own purposes whenever he chooses to do so. It matters not that the moment may be unpropitious and that by waiting a higher price could be obtained. He has the right to realise his security by turning it into money when he likes. Nor, in my view, is there anything to prevent a mortgagee from accepting the best bid he can get at an auction, even though the auction is badly attended and the bidding exceptionally low. Providing none of those adverse factors is due to any fault of the mortgagee, he can do as he likes. If the mortgagee's interests, as he sees them, conflict with those of the mortgagor, the mortgagee can give preference to his own interests, which of course he could not do were he a trustee of the power of sale for the mortgagor …

It is impossible to pretend that the state of the authorities on this branch of the law is entirely satisfactory. There are some dicta which suggest that unless a mortgagee acts in bad faith he is safe. His only obligation to the mortgagor is not to cheat him. There are other dicta which suggest that in addition to the duty of acting in good faith, the mortgagee is under a duty to take reasonable care to obtain whatever is the true market value of the mortgaged property at the moment he chooses to sell it: compare, for example, *Kennedy v de Trafford* [1897] AC 180; [1895–99] All ER Rep 408 with *Tomlin v Luce* (1889) 43 Ch D 191, 194.

The proposition that the mortgagee owes both duties, in my judgment, represents the true view of the law. Approaching the matter first of all on principle, it is to be observed that if the sale yields a surplus over the amount owed under the mortgage, the mortgagee holds this surplus in trust for the mortgagor. If the sale shows a deficiency, the mortgagor has

240 *Matthie v Edwards* (1846) 2 Coll 465 at 480, 63 ER 817 at 824. See also *Aodhcon LLP v Bridgeco Ltd* [2014] EWHC 535 (Ch), [2014] 2 All ER (Comm) 928.

241 *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949 at 968H–969A; *Palk v Mortgage Services Funding plc* [1993] 2 WLR 415 at 421A. See also *New Territories Housing Development Co Ltd v Hong Kong & Shanghai Banking Corp* [1978] HKLR 465, [1977–1979] 1 HKC 501 (the bank did not act in bad faith for not showing matching offers to the buyer and asking the buyer to improve on his offer) (noted (1979) 9 HKLJ 78 (H Bramwell)).

242 [1971] Ch 949. See (1971) 87 LQR 303.

land, if for certain reasons the managers fail to take action, the members should be entitled to commence an action for possession against a trespasser.[70] As between the members and the trespasser, the equitable estate of the members in the property must prevail over the wrongful occupation of the property by the trespasser.[71] The birth of every new member of the Tso or Tong would start a new limitation period.[72] A minor beneficiary (member) has a right to recover land held in the name of a Tso or Tong at any time before the expiration of 6 years from the date on which he reaches the age of majority, and thus the estate of the trustee (manager) in respect of such land is not extinguished and his right of action would not be barred if and so long as the right of action to recover the land by any minor beneficiary has not accrued or has not been barred, by virtue of section 10(2) and (3) of the Limitation Ordinance (Cap 347).[73]

**14.31** It is also possible for Tong land to be co-owned by several Tongs or by a Tong and another individual.[74] In such a case, it is also possible for the co-owner to apply for partition or sale of land under the Partition Ordinance (Cap 352).[75]

(CACV 193/2002, 11 December 2002, unreported) for the authoritative view that managers are to be treated as trustees and vested with the legal estate of the land. Man Ping Nam was suing as a manager of 'Man Sham Chung Wui'. The 'Wui' was an unincorporated association or business Tong akin to a co-operative society where members who held distinct shares of interest in it pooled their resources in pursuit of causes for their mutual benefit: *Man Ping Nam v Man Mei Kwai* [2002] HKCU 1433 (CACV 193/2002, 11 December 2002, unreported); *Man Ping Nam v Man Tim Lup* [2010] 2 HKLRD F7.

70 Of course, the managers as trustees would have to be joined as parties to the action; but this does not mean that a member could not start an action: *Leung Kuen Fai v Tang Kwong Yu Tong* [2002] 2 HKLRD 705 at para 33, per Deputy Judge Lam.

71 Ibid at para 33, per Deputy Judge Lam.

72 A new limitation period under ss 7(2) and 22 of the Limitation Ordinance (Cap 347) would start to run; the new limitation period would not expire until 6 years after the member ceases to be an infant: *Leung Kuen Fai v Tang Kwong Yu Tong* [2002] 2 HKLRD 705 at para 45 per Deputy Judge Lam, cited in *Tang Man Kit v Chong Kee Ting Vicwood* [2011] HKCU 1339 (HCA 1222/2010, 14 July 2011, unreported) at para 17. Deputy Judge Lam's judgment was applied by the Court of Appeal in *Wong Shing Chau v To Kwok Keung* [2008] 5 HKC 372. See also *Wealth Hill International Investment Ltd v Wong Kwan Siu* [2013] 3 HKLRD 300 at para 72, citing *Tsang Wing Kit Eric & Anor v Occupiers & Ors* [2009] 3 HKC 496 at 501, which in turn applied *Leung Kuen Fai*.

73 *Tang Man Kit v Chong Kee Ting Vicwood* [2011] HKCU 1339 (HCA 1222/2010, 14 July 2011, unreported) at para 17, where Recorder Chow SC summarised Deputy Judge Lam's judgment in *Leung Kuen Fai v Tang Kwong Yu Tong* [2002] 2 HKLRD 705. In *Tang Man Kit*, members of a 'Heung' were held to be beneficial owners within s 10(1) of the Limitation Ordinance. For details of the Limitation Ordinance, see Chapter 6.

74 *Beautiglory Investment Ltd v Tang Yet Tai Tong & Ors* [1993] 2 HKC 591 at 598D.

75 *Beautiglory Investment Ltd v Tang Yet Tai Tong & Ors* [1993] 2 HKC 591; *Brisilver Investment Ltd v Wong Fat Tso & Anor* [1999] 3 HKC 567. For partition, see Chapter 5.

# Chapter 15 Rule Against Perpetuities

## 1. Introduction

**15.1** Sheer perplexity surrounds the rule against perpetuities. This is partly due to its technicality but more so to its obscurity. Such perplexity is further reinforced by the change of social circumstances which purportedly gave rise to the present rule. This chapter is meant to be an exposition of the Rule against Perpetuities at common law as well as the modern statutory modifications as effected by the Perpetuities and Accumulations Ordinance (Cap 257).

## 2. The Common Law Rule

**15.2** Our starting point is a well-respected and often-quoted statement by John Chipman Gray:[1]

> No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.

**15.3** Just like any other rule or principle that commands respect, Gray's statement is classic but mythic, requiring elucidation and intellectual construction. To confine our task in articulating what the rule against perpetuities is, we should look at what the rule is *not*. Morris and Leach put it most succinctly:[2]

> It is not a rule invalidating interests which last too long. Thus a gift to A for life, remainder to B in fee is entirely valid, although the remainder may last for ever …
>
> The Rule against Perpetuities is not a rule against suspension of the power of alienation of property through the creation of interests in unborn or unascertained persons. In nearly all cases where the Rule is applied today, the fee simple in the land or the corpus of a fund of personality is vested in trustees who can always sell the land or change the investments of the fund under some express or statutory power …
>
> The Rule against Perpetuities must be distinguished from the rules against restraints on alienation … A restraint on alienation is some provision which, even after an interest has become vested, prevents the owner thereof from disposing of it at all or from disposing of it in particular ways or to particular persons …

**15.4** So much for what the rule against perpetuities is not, what is it indeed? In rather simple terms, it is a requirement of certainty pertaining to a tie between vesting and some life in being, as pinpointed in Gray's statement. However, it has to be stressed that not every disposition of interests would give rise to the problem of perpetuity, only those of *contingent* interests would.

1 JC Gray, *The Rule Against Perpetuities* (4th Edn, Boston: Little Brown 1942) § 201.

2 JCH Morris and WB Leach, *The Rule Against Perpetuities* (2nd Edn, London: Stevens & Sons 1962) at p 2.