# Chapter 1

# Landlords, Tenants and Leases

## Landlords

People who rent out real property, as they tend to do most things, do so for mixed motives – and motives in Hong Kong are as mixed as anywhere else. There is the street hawker who returns every night to his Kowloon cubicle assured by the thought that the handful of flats which he owns will see him safely through his retirement. There is the factory owner who rents a room to his caretaker so that the caretaker can be nearer to the factory and better carry out his duties. There is the widow in the New Territories who inherited a block of flats from her husband and who makes her regular trip into the city to see that it is still standing and to ensure that her solicitor is earning his fees. There is the middle-aged expatriate, eccentrically intent on settling down in the place that made him prosperous, who has a little house or modest flat on one of the islands which he is letting out until retirement. There is the government shouldering the enormous responsibility of housing millions of the Special Administrative Region's less fortunate and thousands of its civil servants. Above all, there is the property company with its towering multi-million dollar developments, concrete and glass monuments to Hong Kong's success, bringing the company both prestige and profit.

All these, and many others, are landlords. That is, each is colloquially called the owner of land and has granted a lease to a tenant. The lease is usually a document, a contract of tenancy recording the terms under which the tenancy is granted. These terms bind the landlord and the tenant until the contract expires or is brought to an end. The terms may be long and complicated, or they may be short and sweet. Since they are usually drafted by lawyers, they are more likely to be the former.

## Tenants

Those who hold the land from landlords are just as diverse. They may be impoverished students, rich multi-national companies, struggling parents of large families, public institutions like the universities and the MTR Corporation, farmers in the New Territories, or people who own flats yet live in rented accommodation and so are both landlords and tenants. Indeed, the government, Hong Kong's biggest landlord, is also one of its largest tenants.

## Terminology

'Tenant' therefore, like 'landlord', is a catch-all word. It signifies merely a person who holds land under a landlord in leasehold tenure. It is called 'leasehold' because the right to occupy is for a definite duration. If it were for an indefinite duration, it would be called 'freehold'. But freeholds are effectively unknown in Hong Kong; it is safe to say that all land is leasehold, the celebrated exception being the land on which St John's Cathedral is situated.

Because a leasehold interest is granted for a definite period, it is also called a 'term of years'. 'Lease' is similarly used in two senses: it means both the leasehold interest that the tenant has and the agreement that creates that interest, sometimes also called a 'tenancy agreement' or 'contract of tenancy' or, more technically, a 'demise' or 'grant'. However, the sense in which it is being used is usually clear from the context. Lawyers tend to reserve 'tenancy' for short leases and 'lease' for longer ones because as we shall see, short leases and long leases are two different kinds of animal. However, the distinction is simply convenient, not obligatory. To confuse laymen further, lawyers also have alternative names for the landlord and the tenant. They call the landlord, who lets the property, the lessor and the tenant, who takes the property, the lessee.

There is one last matter of terminology. Since the lease is by definition of finite duration, the land goes back to the landlord (or his successors) once the lease is ended. It is said to 'revert' to the landlord, so his right to possession and any other interest he has in the land during the period of the lease is described as the 'landlord's reversion'.

## Leases in the Hong Kong Context

More significant than the terminology though is the way a lease works in practice. The lease is a flexible device which can serve a variety of purposes according to the length of the grant and the identity of the landlord and tenant.

This is shown by its role in a typical Hong Kong development. When the government decides to release land for building, it usually does so by selling the land (or 'parcel' or 'lot') at an auction. Legally though, the government does not sell the land; it sells the right to possess and occupy it for a term of years. Admittedly, the number of years is large: in the past, commonly 75; more recently, the number of years left until 2047. This does not disturb the developer (invariably a company) which purchases the land because its interest is commercial: it wishes to recoup its investment in the construction and make a profit long before the term runs out. Because the price of land and level of rents in the territory are usually so high, it can do so within a relatively short time. The government grants a long lease (the government lease) to the highest bidder: the government becomes the landlord and the developer the tenant.

If the land is for residential use (the administration will specify whether this is the case in the government lease), the developer will usually wish to sell the buildings, or the units in them, and retire from the scene to count its gains. It may sell the whole building or buildings to a property company, or may sell parts of the building to companies or individuals. In either case, it transfers, or 'assigns',



its interest (the balance of the length of the lease) and ceases to be a tenant. The purchasers take its place. They in turn may wish to sell their leasehold interests later by assigning to new tenants. The process of transfer of leaseholds in this way is called 'conveyancing'. If instead the purchasers wish to retain an interest in the property, they will grant shorter leases to others. This is 'subletting', sometimes called 'underletting'. The person who takes the sublease may in turn grant a lease out of it to a further subtenant, so it is not unusual to have a string of landlords and tenants in respect of the same piece of land.

A similar sort of process occurs if the land is for commercial use. The developer buys the government grant, builds his shopping centre, office block or whatever, then usually instead of selling off its interest, it lets out parts of the building on short leases. This is because of the even greater income that can be reaped from renting out business premises than from renting out residential premises. The leases are usually quite short, two or three years. However, in more modern buildings of larger premises such as department stores, the leases tend to be longer, six or ten years, but with rent review clauses (stipulations that the rent will be revised to current market levels at regular intervals during the life of the lease). If the clause also stipulates that the tenant may leave if he does not like the reviewed rent, it is a 'break clause'. These tenants may sublet (provided they are not forbidden from doing so by their lease), though they are more likely to want to use the premises – unless, for instance, they have rented more than their immediate requirements in anticipation of future expansion.

With both kinds of development there should be a series of satisfied parties. The government is pleased because it has the fat premium that the developer has paid for the land and so is saved from increasing salaries tax. The developer is happy because it has income and profit. The bank which lent money to the developer so it could construct the buildings is relieved to have the money back, with interest. The construction company is content because it also has turned a profit and has had the work, as have its subcontractors and their employees. The estate agents who brokered the sales or lettings are delighted to have earned their commissions. The designers and decorators are glad because they have been kept busy. The occupants are satisfied because they have accommodation of a quality they could not have hoped to provide by acting on their own. Everyone, it seems, benefits from development, except perhaps pedestrians during the construction.

## Uses of Leases

The legal device that makes such projects possible is the lease. The lease also has other applications. Originally in medieval England it was a way around the Church's prohibition on the lending of money for interest. A penurious landowner could raise funds by granting the right to occupy in exchange for payment. The lender became the tenant and exploited the land, earning more from it than he had given for its use. As money lending (so long as it is licensed) is now more respectable, there is no longer a need for this, but the commercial usefulness of the lease is evident in such arrangements as the 'sale-and-lease-back'. Here, if the owner of property, perhaps a businessman, is in need of capital, he may sell the land (which in Hong Kong means the government lease) and enter into a short

lease as tenant of the new owner. In this way, he has released the capital tied up in the land whilst retaining use of the land for his own purposes.

Similarly, a tenant under a long lease can use his leasehold interest as security for a mortgage loan. Mortgages work in different ways, but it used to be usual in Hong Kong for the owner of land (the tenant holding from the government) who wished to use his interest in the land to raise money, to transfer his lease to the lender by a process called 'assignment'. The lender would become the owner of the leasehold interest, but permit the borrower to continue to use the land. Once the capital and interest had been repaid, the lender would transfer the remainder of the lease back to the borrower by a reassignment. Now, however, the common type of mortgage does not involve the creation of a lease: the lender simply takes a charge over the long-leaseholder's interest. This charge entitles the lender to repayment out of the proceeds when the land is eventually sold.

Apart from being a means of profit and an aid to commerce, a lease gives the landlord a chance to control what his tenant does on the land. This, rather than rent, may be the landlord's principal interest, as in the case of public housing where the rents do not reflect the market value of the space rented. The Housing Authority is as concerned about its tenants behaving themselves as it is about the amount of rent received. This is obvious from a glance at its standard form lease which imposes numerous specific obligations on the tenant; from the usual promise to pay his rent, to the duty to notify the authority of any births, deaths or other changes in his family. Even in Hong Kong there are occasionally private landlords who are as, or more, interested in regaining possession of their property as or than in the income they receive from it – such as those going away temporarily, or looking forward to using the premises on their retirement.

This use of the terms of the tenancy agreement to regulate the tenant's conduct reflects the contractual nature of the lease. A lease was originally no more than a contract for the hire of land. This historically is why leases, although they concern real property (land), are classified as personal property. The only remedy for breach of contract then was damages and there was no 'real action' available for recovery of the land of which the tenant had been dispossessed. This was sensible because the lease was regarded as a commercial transaction. Only later did it become recognised as giving the tenant an interest in land. And so the lease became more than a contract, it is property as well. This is reflected in the legal classification of a leasehold as a 'chattel real'. It is a chattel because it is personal property, not land. However, it is real in the sense that it concerns land (realty).

## Leases and Licences

Tenants are occupiers of land belonging to someone else, but not all occupiers of land belonging to someone else are tenants. There is a difference in the quality of occupation between a tenant with a three-year lease and a guest who comes to dinner or stays overnight. There is a similar difference between the tenant of a shop in a modern arcade and the licensed hawker who sets up in a market.[1]

The difference is reflected by the law saying that the latter in each case simply has permission to occupy and use the space. He has a licence which, if he pays for the privilege, is a contract, but it falls short of being a lease because a lease



passes an interest in land to the tenant. A licence creates no interest in land and, unlike a lease, is generally revocable: the grantor can withdraw permission for the licensee to occupy the premises even though by doing so he may be in breach of contract. The licensee's remedy in these circumstances will be an action for damages for breach of contract, not for possession. A further difference is that leases can normally be assigned to a third party whereas licences, being more personal in nature, generally cannot.

The distinction between a lease and a licence is not always as sharp as in the examples given above. Take the case of the owner of a flat who allows someone to occupy one of his rooms in exchange for money. Popularly we might call them flatmates or sharers, but has the owner granted an interest in the land to the sharer or has he just given him permission to use the place? Probably it is a licence, but a lawyer would insist on knowing more of the circumstances before giving an answer. A similar difficulty arose in a Hong Kong case, *Lam Man-yuen v Lucky Apartment* (1964). Lucky Apartment was a firm which owned three floors of a building in Hankow Road, Kowloon. These floors were divided into a number of rooms which were hired out to various occupants. The rooms were furnished, bed linen was provided and the rooms and linen were cleaned by an amah. Electricity was supplied at no extra charge. Servants brought hot water for tea. Keys to the rooms were kept at the entrance to the building. There was a gate or grille over the entrance, which was locked after midnight. The occupants had no key to the gate, so if they came back late they had to ring a bell to summon a watchman. In the lobby and the rooms was a notice headed 'Regulations for Guests' which dealt with matters such as noise after midnight and the keeping of dogs and cats. New occupants had to fill in a 'registration card'. Rooms could be hired at a daily rate. A manager, who was also a partner in the Lucky Apartment firm, lived on the premises. So it was a quasi-hotel, providing what might be called serviced rooms, if not serviced apartments.

One of the occupants was a Mr Lam who refused to vacate his room. He argued he was protected by the legislation providing tenants with security of tenure. Mr Lam had some factors on his side. For instance, the owners were not interested in who occupied the rooms, nor in how many people did so, so long as they received their rent. They were not concerned either with what happened on the premises. Mr Lam used his room not just for living in; he used part of it for storage and running a business. Such lack of interest indicated a landlord-tenant relationship, with the landlord content to allow the tenant to use the premises as the tenant liked for the length of the tenancy.

Lucky Apartment responded that Mr Lam was not a tenant. Their arguments prevailed: there were too many factors pointing to their maintaining some residual control over the property and showing that the occupants' interests were too transient to be a lease.

The *Lucky Apartment* case shows one reason that the distinction between a lease and a licence is of practical importance. Until 2004, tenants of post-war domestic premises in Hong Kong generally had security of tenure whereas licensees did not. Most of the cases were concerned with the application of security of tenure, but there could be other motivations behind a dispute between owner and occupier over the nature of the occupancy. For instance, a tenant may

share his accommodation and the landlord may claim the tenant is in breach of a clause in the lease forbidding subletting part of the premises; the tenant may respond that he has not sublet but merely granted a licence. Then again, a lease carries implied obligations: duties imposed by the law on both landlord and tenant even if their agreement is a simple, oral one. So, for instance, the tenant is under an implied obligation to pay rates and taxes whereas a licensee is not.

A licensee cannot sublet unless he is given specific authority to do so, but a lessee can, so long as he is not specifically forbidden to do so in the lease. Consequently the occupant who has sublet will argue for a tenancy, provided the lease has no covenant against subletting. Similarly, a contractual licence cannot be assigned, whereas a lease can be (again, unless there is a covenant forbidding it). However, if a licence is coupled with an interest it too may be assigned.

An illustration of how the question of lease or licence may become relevant to a dispute was in *May King Development Co Ltd v Young Ching Huo Ltd* (1981). The developers of a building assigned flats in the building to the defendant. The assignment stipulated that the premises were to be used only for residential purposes. There was an equivalent stipulation in the government lease binding on the developers. The deed of mutual covenant between the developers and all the assignees, including the defendants, also stipulated that the building should be used for residential purposes only and that no part should be used as a boarding or lodging house.

The defendant had hired out individual rooms in the flats, largely to short-term occupants. The principal question was whether the flats were being used as a lodging house in breach of the deed of mutual covenant.

Fuad J treated the question as synonymous with deciding the nature of the occupation of those who hired the rooms: were they licensees (and therefore lodgers) or were they tenants? This may not have been justified, since although all lodgers are licensees, not all licensees are lodgers. However, this did not matter, since the judge concluded that the developers had 'not discharged the onus of establishing that the occupants . . . were lodgers or licensees'.[2] He found that the defendant had not retained general control over the flats sufficient to make the occupants only licensees.

As in all such cases, the judge considered all the circumstances in order to assess the nature and quality of the occupancy. The facts were not dissimilar to those in the *Lucky Apartment* case, yet Lucky Apartment's serviced flats fell on one side of the line (licence) whilst the serviced flats in this case fell on the other side. The important facts in *May King* were that the occupants did not share any facilities with the occupants of other rooms; no cooking was allowed in the rooms; the rooms were furnished as bedrooms with their own telephones; each occupant was given a key to his room and the flat in which his room was situated; cleaning and linen services were provided and charged for; the rooms were hired out on a weekly or monthly basis and a deposit was required; management staff registered occupants (including visitors), collected payments and looked after the flats and rooms but they were not present between 7 pm and 10 am; and there were no regulations or house rules, except that occupants should not create any disturbance.



The factors which indicated to the judge that the defendant did not retain sufficient control in order for the arrangement to be a licence were: the occupants retained their keys and so they had ready access to their rooms at all times (in *Lucky Apartment*, room keys were kept at the entrance and the occupants had no key to the front door grille, which was locked at night); and, unlike in *Lucky Apartment*, there were no regulations and management did not live on the premises.

Control is one of the elements which must be used in weighing the quality of the occupancy. A prime consideration is what the parties intended. This is not judged by what they currently say was their intention, because of course they are likely to say they intended to make or take a licence or a lease to suit their present purposes. Rather, it is judged by their conduct at the time they made the agreement.

In ascertaining intention, the terms of any agreement are relevant. Where there is a written agreement, the court can look at it for any expression of the purpose behind the arrangement and whether the rights of the occupier are those of a tenant or those of a licensee. The parties may use the word 'licence' or 'lease' to describe their agreement; there may be a term declaring that they do not intend to create a tenancy. However, such indications are not conclusive; they are merely factors to place in the balance. The court looks at the substance, not the form of the agreement.[3] For instance, the agreement might be labelled a licence, yet contain a clause forbidding the occupant from subletting. Such a clause is characteristic of a lease and would tend to indicate that the agreement is actually a lease despite its label.

There may be no written agreement, only an oral one. This itself is not conclusive as to whether the agreement is a licence or a lease. In the *May King* case, Fuad J said:

> I think it must be accepted that in Hong Kong little significance can be attached to the fact that there were no written agreements. Oral agreements are common enough and it is the nature of the agreement between the parties which is important and not its form.[4]

Where, however, the agreement is oral, the terms are unlikely to be extensive. This reduces the likelihood of a series of agreed terms similar to the tenant's covenants in a written lease, and increases the possibility that the arrangement is a licence.

A most important question is whether the occupant has exclusive occupation (or exclusive possession) of the premises. For many years, this was the sole or principal question: if the occupant had occupation of the premises to the exclusion of all others, it was felt that he must have an estate in the land and therefore was a tenant. There was some movement away from this during the 1970s and early 1980s as English courts grappled with agreements drafted as licences in order to avoid the application of the Rent Acts which gave tenants security of tenure and controlled their rent. In 1985, England's highest court at the time, the House of Lords, restored the concept of exclusive occupation to its former importance in *Street v Mountford*. It was held that a grant of exclusive possession of residential accommodation for a term at a periodic payment normally creates a tenancy, despite any statements in the parties' agreement that it created a licence and that the payment was a fee rather than rent.[5] Only in certain exceptional circumstances

would an inference of a tenancy not arise, such as where there was no intention to create legal relations or the exclusive occupation was attributable to another legal relationship (eg vendor and purchaser where the purchaser is let into occupation before completion of the sale), but these circumstances are most unusual.

Exclusive possession is usually treated as the same as exclusive occupation. In most cases there is no practical difference so it is safe to do so, although there is a distinction between possession and occupation. This distinction is explained in chapter 14. For now, it is sufficient to note that occupation is purely a factual matter, whilst possession involves considerations of law as well.

Whether the occupation is exclusive is a question of fact and depends principally but not entirely upon the terms of the agreement. If the grantor reserves the right to enter and inspect (eg to see if repairs are necessary), this indicates that the occupier has exclusive possession since, if he did not, the grantor would not need to reserve such a right. However, if the grantor reserves the right to go into occupation of the premises jointly with the occupiers, this leans against the grant of exclusive occupation. If the occupiers share the premises, but each has a separate grant for distinct payments from the landlord, this also indicates that their occupation is not exclusive.[6]

Even where exclusive possession has or appears to have been granted, it may arise out of some arrangement other than a tenancy. Examples are: where the occupant is an employee and has been given a licence to occupy his employer's premises only during the period of his employment in order to perform his duties; where the vendor of premises permits the purchaser to occupy them temporarily as a licensee until their sale and purchase transaction is complete; where the occupant is a relative or close friend of the owner and his occupation is attributable to an arrangement giving rise to a licence or an agreement which was not intended to be legally binding; and where the occupation is attributable to statute, rather than agreement.[7] Such examples are, of course, rare, so that it can be said that a grant of exclusive occupation is generally a firm indicator that an arrangement constitutes a tenancy (although in exceptional cases it may merely constitute a licence). Conversely, the lack of exclusive occupation generally means that the agreement is a licence.

The significance of exclusive possession is shown by *Lucky Shoe Repairing and Key Duplication Centre v Best Sharp Development Ltd* (1988) where the plaintiff gave the defendant the right to occupy part of a shop for the purpose of carrying on a business. The agreement between them provided for periodic payments by the defendant, but the plaintiff reserved to itself possession of and access to the portion used by the defendant, which suggested that no exclusive possession had been granted. Both the district judge and the Court of Appeal construed the agreement as a licence. Since the defendant apparently did not allege that the agreement was bogus and unrepresentative of reality, the courts correctly rested their decision solely on the agreement, as did the district judge in *Wing Hing Oil Co Ltd v Director of Buildings and Lands* (1988). Here, the occupier of a petrol station was held to be a licensee rather than a tenant even though the occupier had exclusive possession; so the decision is explicable only as one of those rare instances in which the parties' intention as revealed by the agreement and circumstances overrides their intentions as revealed by the grant of exclusive occupation.[8]



Another indicator of intention to create a tenancy is whether the grantee pays money for his occupation and the amount of such payment. Again, this is not conclusive, but if no payment is made it tends to show that the arrangement is a licence. If a payment is made, it does not necessarily mean that the agreement is a lease. Neither does a high payment necessarily show that the agreement is a lease: commercial licences (eg to sell refreshments or operate a money exchange at a particular place) may be very valuable.

Where the payment is in services of other benefits rather than money, this does not prevent the agreement from being a lease. However, such an arrangement would tend to indicate a licence, though it is conclusive only if the other indications were neutral or non-existent. So, an employee who is provided accommodation as part of his benefits may have a lease, but if the accommodation belongs to and is controlled by the employer and is rent-free, that would indicate a licence. This is more so if the accommodation is provided so that the employee can better perform the job or the period of occupation coincides with the period of employment and therefore is uncertain.[9]

If the grantor is not in a position to grant a lease (eg the grantor is a company with no constitutional power to grant leases) then it might be thought that any occupation agreement made must be a licence. This was the view taken by the court in *Attorney General v Chiu Pak Yue* (1963). The Director of Public Works granted a permit to the defendant to occupy what was in those days Crown Land. The defendant claimed this constituted a tenancy from year to year. The Full Court held it to be a licence, apparently for reasons which included: firstly, that the agreement was not between private parties, one party was the Crown; secondly that it was not a 'rent control' case, therefore the agreement should not be construed against the landlord; and thirdly, that the director had no power to grant a lease. The Summary Offences Ordinance, under which the permit had been issued, contained no provision empowering the director to grant leases; by deduction, the grant must have been a licence.[10]

There must, however, be doubt as to the validity of the last reason, despite its apparent logic. A licensee has no title to grant a lease, and neither has a tenant whose lease forbids him to sublet, but this does not mean that any tenancy which they purport to grant must be a licence rather than a lease. Assuming such a grant satisfies the requirements laid down in *Street v Mountford* of giving exclusive possession for a term at a periodic payment, it is intended to be and is in law a lease. This would be so even if both parties know and accept that the grantor cannot or should not create a lease. In *Bruton v London & Quadrant Housing Trust* (2000) the local government authority had given a licence over a block of flats which it owned to the housing trust so that the trust could provide temporary accommodation to homeless persons. The block was due to be demolished and redeveloped by the authority. So in the agreements which it made with the occupant, the trust emphasised that the accommodation was temporary and that the trust had only a licence, therefore, the occupants were given only a licence. Yet the reality was that they had exclusive possession of their flat for a term, so at law the agreements created a lease. It had been argued by the trust that because

it provided social accommodation at no rent and the occupant knew that the trust was not entitled to grant a lease, these constituted exceptional circumstances allowed for by *Street v Mountford*. However, this was not accepted by the highest court in the United Kingdom at that time, the House of Lords. It seems that such an agreement is effective as between the parties to grant possession to the tenant; in that contractual sense it creates a lease. But the agreement bestows no property right on the tenant because the landlord has no property interest (or estate in the land) to grant.[11]

Where a tenant sublets in breach of a restriction in his tenancy, the subletting is unauthorised but is not illegal. This may lead to trouble from the head landlord who is not obliged to recognise the subtenancy, but it does not mean that the subtenancy is not a tenancy.[12]

Generally a court will not look beyond or behind an agreement in order to discover the intention of the parties. However where one party, usually the occupier, alleges that the agreement is a pretence, sham, or an attempt to hide the true transaction, the court may hear evidence of the surrounding circumstances in order to determine the issue. In doing so, the court may look at conduct and events both before and after the agreement, taking into account matters such as the level of understanding and education of the parties, the nature of the relationship, between the occupiers, what was said during negotiations, the size and nature of the premises and the actual and pretended mode of occupation. If these matters point to the agreement concealing the parties' genuine intentions and is really a tenancy in disguise, for instance, in an attempt to avoid the application of legislation imposing rent and tenure controls on residential leases, it will be treated as a lease.[13]

So the law has settled on balancing the views of socially-concerned lawyers with those who keep to the traditional approach of assuming that a written agreement reflects parties' common intentions. The former feel that it is unrealistic not to take into account the motivations of parties in drafting and signing occupancy agreements and that there is a danger that the legislation concerning rent and tenure could be nullified by the widespread use of licences.

There was little evidence of this happening in Hong Kong when such controls existed. Now that statutory control has been reduced to a minimal level this consideration can hardly apply. The traditional view, however, is that this is no concern of judges, whose task is to interpret the nature of the agreement objectively, and that a party can avoid the legislation (just as he can avoid tax) if he uses the correct device — a licence.

The outcome of each case concerning the licence-lease distinction depends on its own facts, which limits its usefulness to later cases. The court must construe the agreement in and consider the circumstances of each case before it.

## Squatters

'Squatter' is an emotive word. In Hong Kong, for generations it conjured up mental pictures of huts clinging to hillsides, tolerated by the government only because there was nowhere else to put their inhabitants. In Europe, the image is one of vacant and dilapidated houses being taken over by large numbers of homeless people with long hair.

From the legal point of view, the squatters who put up and live in huts ('illegal structures') on public land are the same as those who take over other people's houses: they are trespassers. They occupy the land, but their occupation (unlike that of the licensee or tenant) is illegal and continues only by the indulgence of the government. The tenant also has something greater than occupation: possession.

Two other types of squatter are commonly encountered in Hong Kong: the first type is strangers who unilaterally appropriate a space in the common parts of a building, and the second type is incomers who take over apparently abandoned farmland in the New Territories. The former survive because the numerous owners of the building change over time and often are not sure whether in the past someone in authority gave the occupiers permission to use the space. The latter survive because ownership of the farmland may be obscure, or the owner has emigrated, or the owner is a developer awaiting development permission or an economic upturn.

Provided he acts swiftly enough, the owner of the land can evict the squatters at any time. He may use reasonable force if necessary. The rules of court provide a summary procedure by which possession may be ordered.[14]

However, after 12 (formerly 20) years' occupation without the owner's consent ('adverse possession'), the squatter is protected by the law. At the expiration of 12 years, the owner is barred from bringing an action against the squatter for possession, in effect losing his rights by delay. The trespasser is colloquially said to acquire 'squatter's rights'.

There is, however, one significant exception to the adverse possession rule: it does not operate against the superior landlord (the government) until the tenant surrenders the lease.[15] Where a squatter has obtained a better title than the tenant or owner by adverse possession, the owner-tenant can nevertheless deprive the squatter by surrendering the government lease and accepting a regrant from the government. The limitation period applicable to the government is 60 years and it does not begin to run against the government until the surrender occurs. If the authorities grant a further long lease to the owner-tenant, the owner-tenant gains a further 12 years in which to sue the squatter.[16]

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## Further Reading

Nield, *Hong Kong Land Law* (Longman, 2nd edn, 1997) chs 7, 11 and 18
Goo and Lee, *Land Law in Hong Kong* (LexisNexis, 4th edn, 2015) ch 5
Bright, *Landlord and Tenant Law in Context* (Hart Publishing, 2007) ch 3
Robson and Watchman, 'The Hidden Wealth of Licences' [1980] Conveyancer 27
*Halsbury's Laws of Hong Kong,* Vol 36, Landlord and Tenant (LexisNexis, 2014 Reissue), **[235.007]–[235.017]**

## Notes

1 Although in *Yeung Kau Man v Urban Council* [1987] 3 HKC 182 the question of whether a hawker stall can be held under a lease was left open. See also *Chan Yik Tung v Hong Kong Housing Authority* [1989] 2 HKC 394.
2 *May King Development Co Ltd v Young Ching Huo Ltd* [1981] HKLR 280 at 288.
3 *Li Cheong v Wong Kar Tung* [1954] 38 HKLR 1; *The Great China Hotel Ltd v Wo Hing Co Ltd* [1947] 31 HKLR 56; *A Goeke & Co v Chy Loong* (1931) 25 HKLR 15.
4 *May King Development Co Ltd v Young Ching Huo Ltd* [1981] HKLR 280 at 287.
5 *Street v Mountford* [1985] 1 AC 809, [1985] 2 All ER 289 (HL). If there is no periodic payment there may still be a tenancy: *Ashburn Anstalt v Arnold* [1988] 2 All ER 147, [1988] 2 WLR 706.
6 *AG Securities v Vaughan* [1990] 1 AC 417, [1988] 3 All ER 1058 (HL).
7 *Street v Mountford* [1985] 1 AC 809 (HL) at 818, applied in *Har Sio Ying v Chung Yau Cheung* [1987] 3 HKLR 411; *Mahuvawalla v Iranee* (1949) HKLR 33.
8 *Lucky Shoe Repairing and Key Duplication Centre v Best Sharp Development Ltd* [1988] HKC 286; *Wing Hing Oil Co Ltd v Director of Buildings and Lands* [1988] 2 HKDCLR 25, [1988] HKCU 364.
9 *Vipac Engineers & Scientists Ltd v Karpovich* [1990] 1 HKLR 725, [1989] 2 HKC 358; *Matilda and War Memorial Hospital v Henderson* [1997] 1 HKC 509.
10 Other cases concerning grants by occupants with government permits are *Fong Siu Kam v Lo Shun Cheung* [1984] HKC 107 and *Tsui Choi v Yip Ching Shan* (unreported, HCMP 2791/1984, 13 July 1985). Note however that these were decided before *Street v Mountford,* above.
11 The *Bruton* decision is not without controversy but was accepted by the CFA in *Cheung Yat Fuk v Tang Tak Hang* (2004) 7 HKCFAR 70, [2004] 2 HKLRD 86 (CFA).
12 *Dellneed Ltd v Chin* [1987] 1 EGLR 75 ('*mai toi*' management agreement of restaurant in Soho, London); compare *Har Sio Ying v Chung Yau Cheung* [1987] 3 HKLR 411.
13 *Antoniades v Villiers* [1988] 2 All ER 173, [1988] 3 WLR 1205 (HL). Hong Kong cases on shams include *Wong Kau v Wong Hsien Chee* [1964] HKLR 422 (employment agreement allegedly a disguise for a tenancy of a ballroom); *Chau Yu v Kwan Chun Kuen* [1963] 4 HKLR 913, reversed [1964] 1 HKLR 309 (alleged prior oral agreement not proved) and *Lau Wing Kau v Ho Yik Suk Wa* [1956] DCLR 94.
14 Rules of the High Court (Cap 4A) O 113.
15 *Cheuk Chau Co Ltd v Chau Kwan Nam* (unreported, HCMP 274/1982, 6 July 1983). See also Limitation Ordinance (Cap 347) s 7.
16 *Chung Ping Kwan v Lam Island Development Co Ltd* [1996] 2 HKC 447 (PC): it is different if there is an exercise of an option to renew.

# Chapter 2

# Land Ownership and Land Values

## Fundamental Ownership

The Basic Law of the Hong Kong Special Administrative Region states that there is only one true owner of land in Hong Kong: the State. Article 7 declares that the lands within the HKSAR are State property. The State of course means the People's Republic of China.

This is not a revolutionary notion, because prior to July 1997 all land in Hong Kong belonged to the British Crown. In the case of the New Territories, that ownership was, from the outset, limited by time. That ownership was exercised through and administered by the Government of Hong Kong.

In similar fashion, the State exercises its ownership through the Government of the Hong Kong Special Administrative Region or, as it is gratefully known to those who are obliged to write cheques in its favour, the HKSAR. Article 7 of the Basic Law provides that the HKSAR government is responsible for the lease or grant of state land. In its own eyes, the role of the HKSAR government is more than that, for section 30 of the Hong Kong Reunification Ordinance asserts that all property vested in or belonging to the Crown immediately before 1 July 1997 is vested in and transferred to the HKSAR government.

Until 30 June 1997, the Crown exercised its power to dispense the use of its land through the Governor. Since then, that power has been exercised by the Chief Executive, his authority to do so also being attributable to the Reunification Ordinance.[1]

## Government Leases

The intention behind the provisions of the Basic Law and the Reunification Ordinance concerning land was that there should be as little change to the system of landholding as possible. This intention was foreshadowed in the Sino-British Joint Declaration made in 1984.[2] So the effect of Articles 120–123 of the Basic Law was that all Crown leases were allowed to continue.

The practice of the British administration from almost the earliest days of the colony was to grant leasehold estates only. Although the government would have been capable of granting interests in southern Kowloon and on Hong Kong Island which were not limited in time (that is to say, freehold rather than leasehold) the

practice was almost invariably to grant long leaseholds to purchasers. Initially, some leaseholds were for 999 years — effectively freehold — and at least two actual freeholds were granted though by statute, not agreement. Only one of those currently survives (the land on which St John's Cathedral stands) and the practice for the last hundred or so years of the colony was to grant 75-year terms with a right of renewal for a further 75 years.[3] In the New Territories, the length of term which could be granted to purchasers was restricted by the grant in the 1898 treaty under which Britain held those territories from China. That grant expired on 30 June 1997, so grants of land by the Crown there had to expire before then and consequently had to be leasehold. In essence therefore land tenure in Hong Kong was and is leasehold. 'Owners' of property are in fact long leaseholders.[4]

When the government sells land, it is usually at an auction. Increasingly a tender system is used, but the preferred method has been public auction at which developers bid and the market sets the price, subject to a reserve (which is a minimum figure which the bidding must reach before the government will sell). The piece of land is given a lot name and number indicating the district in which it is situated. Occasionally, if the purchaser is a non-profit-making entity such as a school or hospital, a non-competitive price will be agreed and the sale will be by 'private treaty'.

## *Conditions*

The purchaser will make his successful bid aware of the terms on which the government is prepared to sell. These terms are recorded in a written agreement called the 'Conditions of Grant', which is legally a contract, for the grant of a lease of the land. In the case of land development, one of the conditions will be that the developer shall build on the land within a specified time. If he does not, he may be able to purchase extensions of time by paying additional premiums, but breach of the conditions eventually will give the government grounds for taking the land back.

In theory, the Conditions of Grant are preparatory to the granting of a government lease (prior to 1 July 1997 a Crown lease), the deed which conveys the interest in land to the tenant-purchaser. Once all the conditions have been satisfied the government will make, and the purchaser will take, a grant of a long lease of the property. In practice though, the purchaser invariably relies on the Conditions of Grant as proof of his title, because actually having the lease prepared is inconvenient and expensive. The government has cooperated in this extraordinary informality by legislating in section 3 of the Interpretation and General Clauses Ordinance, that the term 'Government lease' where it appears in other ordinances includes Conditions of Grant. Also, in section 14 of the Conveyancing and Property Ordinance, a Government lease is deemed to have been issued once the Conditions of Grant have been complied with, compliance being shown by a certificate or letter to that effect from the Lands Department or, in the case of Conditions issued before 1970, being presumed.

There are documents other than the Conditions of Grant which feature in conveyancing and the development of land. The 'Conditions of Exchange' form the foundation of title where the owner was the government lessee of a piece



of land required for public purposes and agreed to exchange that land for a plot elsewhere of the same size. The 'Conditions of Exchange and Surrender' form the contract for the transfer of ownership of a new piece of land, where the owner may pay a premium for this contract if the new land is more valuable than the land which the owner is giving up. They may also be used where several adjacent small lots are surrendered and new conditions are granted in respect of the same land as one lot. Again, in theory, the conditions are preliminary to the grant of a government lease.

A 'deed of variation' will be necessary where the owner of land wishes to alter the terms of his government lease with the authorities' consent. The lease usually places strict controls on the use of land. It may, for instance, state that the plot is to be used only for agricultural purposes or that any building on it is not to exceed a certain height. In order to facilitate development, it may be prudent to relax such controls, and the authorities may agree to this, provided the owner pays a premium which is in effect a tax on the value added to the land by the relaxation. The government receives a great amount of income from such relaxations. Where the owner's title rests on Conditions of Grant, because a government lease was never granted, the alteration is achieved by a 'modification letter' rather than a deed.

When a government lease expires, the land reverts to the government. The administration can consequently resell the land to the highest bidder. In many cases, however, the lease gives the lessee an option to renew his lease and, if he decides to exercise this option, no new premium is demanded, only a modest increase in the government rent. Where there is no option for renewal, the administration will still resell to the last lessee (unless the land is required for public purposes) at a market price. This blow is softened by the lessee being able to apply for renewal during the final 20 years of the term and spread the premium payments over several years. In many cases, of course, the land will be occupied by a high-rise building divided between many flat owners: the premium can be apportioned between them, thus softening the blow still further. The contract recording the terms of the renewal is called the 'Conditions of Regrant'. The 'Conditions of Extension' are used where an owner wishes to acquire land adjacent to that which he already holds, perhaps to facilitate a development project. Again, the terms are recorded in the document and a premium is payable.

## *Government's role*

It is often observed that the government is both Hong Kong's largest landlord as well as its biggest tenant. The first part of this claim must surely be true since not only does practically every owner of land hold as lessee from the government but the government has also granted hundreds of thousands of leases, through the Housing Authority, to tenants of public housing. It also grants thousands of short-term tenancies, which are leases of seven years or fewer for specific purposes. The government also used to be a large tenant of both commercial and residential property, although this has declined greatly in recent years. However, the assertion of its being the greatest tenant was usually based on the fact that the New Territories were 'leased' from China. Even though that 'lease' is no more,

it was really different in nature from the normal agreement between landlord and tenant since it was a treaty between sovereign nations ceding land for a certain period. The treaty's provisions concerning the New Territories also lacked certain essentials required of leases at law. The 'premises' were ill-defined, and although a map was annexed to the treaty, the boundaries of the New Territories were not stated in words and were subsequently settled unilaterally by Britain. Rent, although discussed during negotiations, was not mentioned in the treaty.

In reality, there are five features which differentiate a long lease granted by the government from the usual landlord-tenant agreement. First, it is much longer in duration. Second, the periodic rent is insignificant in a government lease compared with the lump-sum payment for its grant (the premium) which is the predominant money consideration. Third, the function of the terms of the lease as a means of controlling the use of the land is greater in a government lease than it is between a typical landlord and tenant. Fourth, the administration can in theory take back (in euphemistic legal terminology, 'resume') the land if it is needed for public purposes though the government invariably prefers to use its powers under the Lands Resumption Ordinance: this privilege is not open to a private landlord. Lastly, government leases (and the various documents which precede or replace them) have an important fiscal role: they enable the administration to reap the value of the 'betterment' of land which occurs when public money is invested in services (or 'infrastructure') and permission for development is granted. This, as Financial Secretaries have not been slow to point out, has been striven for but not fully achieved by administrations elsewhere and enables rates of general taxation to be kept low. The importance of this to the public finances cannot be overstated.[5]

Whilst it is technically correct to speak of the government as a landlord in this context, it would be a mistake to think that the law of landlord and tenant has much to do with the government. It is really about the relationships between the lessee from the government — the owner of the land — and those who lease the land, or parts of it, subsequently. The rest of this book concentrates on those relationships.

## *Government lessees*

The grantee of the government lease or conditions becomes the registered owner of the land on the government's land register for the duration of the grant or until the land is resold. Usually the grantee builds on the land, divides it into shares and sells some of those shares together with the right to occupy parts of the building (flats or shops or offices or workshops) to others. They become registered owners of those parts and collectively are the new lessees of the land.

Purchasers of property from the government eventually resell the property. Where the purchaser is a developer, the whole purpose is in fact to resell the property, after building upon it. The building or buildings will be sold in small units such as shops or domestic flats. When this occurs, one lessee (the developer) is replaced by many (the purchasers of units). But there is still only one government grant, that to the developer. What happens is that the land granted by the government is divided up by the developer into shares and each of the purchasers acquires, by transfer, a certain number of those shares. The shares



are undivided, which means that no shareholder can point to a definite part of the land and say that that part is his. Attached to those shares is the right to the exclusive use of the unit purchased by the transferee (called in law an 'assignee'). That exclusive use is achieved by means of solemn promises, called covenants, contained in a document known as a Deed of Mutual Covenant or Deed of Covenant which is binding upon all purchasers.

The typical owner of a flat or other unit is therefore technically not the owner of that unit but the holder of shares in the land upon which the unit stands. The right to exclusive use and occupation of the unit which accompanies those shares gives him control, that is to say practical ownership, of it. Lawyers describe the right as an incident of the holding of the shares. Since each owner holds only a portion of the interest in the land, each is known as a tenant-in-common.

As the purchaser has the right to the exclusive use of his flat, he can grant a similar right to another person for a defined period, provided that the period is shorter than the number of years for which the government grant is to run. This other person will be a tenant and the purchaser will be the landlord.

The owner is of course entitled to sell and transfer his shares in the land and the accompanying unit to a purchaser. The system of transfer of land ownership from one owner to another is called 'conveyancing'. Conveyancing is a staple of the work of solicitors.

## *High rentals*

A feature of the landlord-tenant relationship in the HKSAR is the high level of rent demanded by landlords and paid by tenants. In fact rents have been expensive ever since Hong Kong was founded as a British colony. The rentals reflect the cost of land which in Hong Kong is amongst the most elevated on earth. The cost is often attributed to the fact that it is a small and overcrowded place. Yet Hong Kong is as large in size and population as greater London and similar in population density to Singapore, two cities which historically have less extortionate rentals.

Another reason often given for the cost of land is that the administration charges large premiums to purchasers of government leases, in pursuit of greater government revenue. It is true that premiums are extreme but the level, set by public auction or competitive tender with reserve prices based on current values, reflects the market rather than administrative desire. Also, by providing a great proportion of the population with subsidised public housing and charging moderate rentals to tenants providing certain desirable public services, the government reduces demand in the private sector.

Then it is said that the government holds back land and could dampen prices by releasing more of it, the implication being that land values are the result of administrative manipulation. There undoubtedly have been periods during which administrators have sought to manage the supply of land. But the process of reclaiming and forming new land, or assembling development sites from existing land, takes years and it is against the government's financial interest to hold back such land for long. If a culprit for retaining vacant land is needed, the major developers are better candidates for they accumulate 'land banks' of previously

agricultural property which they build upon and resell only when high prices can be achieved.

A factor which has increased demand for housing is demographic, namely the move towards smaller households. The extended Chinese family living under one roof is encountered less frequently than it used to be. Younger people prefer to live in western-style nuclear families consisting of a couple with two, one or no children. Divorce and choice have increased the numbers living alone. Yet this trend has happened elsewhere too, so cannot explain why Hong Kong's land remains so expensive.

Another factor is topography: most of the HKSAR's terrain is inimical of being built upon. The territory, a slab of mainland and numerous islands, is largely mountainous and difficult to access. As a result, swathes of it have been given over to beautiful country parks, protected from development. This renders comparison with cities and islands of similar size deceptive.

However, it is not as if there has been an overall stagnation in new construction which has strangled the supply of buildings. The built-up areas of the then colony expanded enormously during the second half of the twentieth century. Originally urban Hong Kong was restricted to two sides of the harbour: essentially a strip along the northern shore of Hong Kong island and the area of the Kowloon peninsula, less than ten per cent of the colony's land mass. Other islands and the area north of the Kowloon hills were little developed until the 1970s. Extensive reclamation and a dozen new towns have transformed that, yet still land costs take up a dominant part of the expenses of families and businesses.

Perhaps the explanation for persistently high rentals lies in an accumulation of circumstances including those already mentioned and a succession of events which have alternately exacerbated demand for accommodation and diminished its supply. Waves of immigration have affected demand, as have changes in the economy and surges in prosperity. War, disease and loss of economic confidence have periodically reduced supply. So has a misconceived policy concerning village houses which has led to inefficient development of disused agricultural land. Over the decades, whenever a balance has seemed within grasp, something has occurred to restore the imbalance. As a result, high prices have become engrained and accepted as a fact of local life.

## *Characteristics of Hong Kong's landlord and tenant relationship*

High rentals are just one of several special features of the landlord and tenant scene in the HKSAR. Others include:

(a) the use of tenancy agreements rather than formal leases;
(b) the prevalence in the residential market of bilingual estate agent's standard forms and one-size-fits-all printed stationers' forms, both of which may contain provisions which are inappropriate or out-of-date or may have important omissions;



(c) the preference for short two or three-year terms even in the business sector; also the inclusion of early termination or 'break' clauses in these short lettings;
(d) the use of identity card numbers to identify the parties;
(e) cross-references in the tenancy agreement to the government lease, the deed of mutual covenant and the occupation permit;
(f) large amounts of security deposit;
(g) provision for forfeiture of the deposit;
(h) attempts by landlords to hold on to those deposits as windfalls;
(i) prevalence in let property of unauthorised alterations (illegal structures);
(g) mixed use of certain types of property, such as shop-houses;
(k) unauthorised use of let property, such as industrial buildings converted to commercial use;
(l) complaints by tenants of damp and water ingress;
(m) the letting of land by traditional entities such as t'sos; and
(n) the temporary renting out of unused government land on short leases.

Few of these features are unique to Hong Kong. However, they are encountered more frequently in this jurisdiction than elsewhere and their combination gives a special flavour to tenancy law in practice.



## Further Reading

Cruden, *Land Compensation and Valuation Law in Hong Kong* (LexisNexis, 3rd edn, 2009) ch 1
Nield, *Hong Kong Land Law* (Longman, 2nd Edn, 1997) chs 1 and 12
Goo and Lee, *Land Law in Hong Kong* (LexisNexis, 4th edn, 2015) ch 1, parts 1–2
Sihombing and Wilkinson, *Hong Kong Conveyancing Law & Practice (Looseleaf)* (LexisNexis) ch II
Nield, *The Hong Kong Conveyancing and Property Ordinance* (Butterworths, 1988)
*Chitty on Contracts: Hong Kong Specific Contracts* (2nd edn, 2008) ch 12
Nissim, *Land Administration Law and Practice in Hong Kong* (Hong Kong University Press, 3rd edn, 2012) sec II

### Notes

1 Hong Kong Reunification Ordinance (Cap 2601) s 32.
2 Church of England Trust Ordinance (Cap 1014). Section 6(1) vests the land in trustees in fee simple. The grant stipulates that the land be used for Anglican religious worship. The other freehold grant was to the University of Hong Kong but was later replaced by a long lease.
3 A Draft Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Future of Hong Kong (26 September 1984), Annex III: the agreement was signed in Peking on 18 December 1984 and

ratified on 27 May 1985. The Hong Kong government acted on the joint declaration by passing the New Territories Leases (Extension) Ordinance (Cap 150) which came into effect on 25 April 1988 and purported to extend all New Territories leases to 2047.

4 The summary of the procedure in respect of government grants in this and the following paragraphs owes much to Hartley Bramwell's *Conveyancing in Hong Kong* (Butterworths, 1981) ch 1.

5 The role of the government lease in controlling development and taxing betterment is summarised by Hunter J in *Shun Shing Hing Investment Co Ltd v Attorney General* [1983] 2 HKC 314.

# Chapter 3

# Preliminaries to the Lease

## Capacity

A preliminary question is whether the intending landlord and tenant respectively have capacity (the ability in law) to make and take leases. The general rule is that any person not under any personal disability has power to grant and take a lease.

Aliens (but not enemy aliens) are included in this general rule: the Aliens (Rights of Property) Ordinance puts this matter beyond doubt. There are, however, several circumstances in which a body or an individual is, or may be, under a disability.

### *Corporations*

Corporations may take and make leases provided that it is permitted by their constitutions. In the case of a statutory corporation, such as a hospital and a university, the constitution is the ordinance creating it. The ordinance will usually give express power for the corporation to hold and grant interests in land. In the case of a company incorporated with limited liability under the Companies Ordinance, section 115(2) confers statutory power to hold land in addition to powers found in its memorandum of association. The memorandum is usually widely drafted so as to permit the company to make and take leases.

A corporation must always act within the powers bestowed by its constitution (*intra vires*). If the company is a foreign company, it must not only act *intra vires* in making or taking a lease, it must also file with the Registrar of Companies a certified copy of its constitution, a list of its directors and the name of someone living in Hong Kong who can represent the company.[1]

### *Partnerships*

Partnerships (or firms) are unincorporated business associations and partners are liable for the acts of themselves and the other partners. A lease may be given, or taken, in the name of the partnership, or of one or more of the partners. However, all of the partners are liable to be sued if a dispute arises.[2]

## *Clubs*

Many of the larger clubs in Hong Kong are corporations (companies limited by guarantee) so their ability to make or take leases is governed by the Companies Ordinance and their memorandum of association. However, most clubs, especially smaller social, sporting or recreational ones, are unincorporated associations. These kinds of club are mostly members' clubs which means that club property is owned by the members jointly. There are also proprietary clubs where the property is owned by the proprietor, usually a limited company, and run for profit. The members there simply use club facilities in exchange for their fees and subscriptions.

Members' clubs often wish to take leases of premises. The difficulty is that the club is usually not incorporated and so, unlike a limited company, it has no (fictional yet legally recognised) personality separate from that of its individual members, who are usually numerous and constantly changing. The club therefore has to appoint nominees (perhaps officers and committee members) or trustees to take the lease. Nominees are usually used for short leases, trustees for longer leases. Each nominee or trustee is personally liable if any of the terms of the lease are broken by the club members.

## *Infants or minors*

Lawyers use the word 'infants' to describe not just babies and young children but all people under 18 years of age. The modern name for young people below the age of majority is minors. The age of majority was lowered from 21 to 18 in 1990 by the Age of Majority (Related Provisions) Ordinance. Before this, a lease signed by a minor was generally voidable at the minor's option. This remains the case, but if the minor decides to repudiate a contract, section 4 of the ordinance empowers the court, if it thinks it just and equitable to do so, to return any property acquired by the minor under that contract to the other party. Suppose therefore a minor takes a lease for two years from 1 January 2016. He is then 17 years old. He may declare that he will not honour the agreement and will not pay rent at any time before turning 18 and within a reasonable time after that. If he does so declare he must, of course, also leave the premises. Let us say that the minor turns 18 halfway through the term of the lease, on 1 January 2017, and that a reasonable time to exercise the option to avoid the lease is six months. He must therefore avoid before the beginning of July 2017 or face paying the rent for the final six months. Should the minor decide to leave, he is not entitled to the return of rent which he has paid during his period of occupation; further, he is liable for the breach of any obligations which occurs before avoidance. However, he does escape liability for rent during the rest of the lease's term.

Where a landlord discovers that his tenant is under 18, he cannot use the tenant's minority as an excuse for forcing her out. If the minor wishes to remain in occupation, she may do so for the length of the lease, provided of course that she does not break the terms of the agreement. The lease is avoidable at her, not the landlord's, option.



There are exceptions to the rule that contracts, including leases, entered into by minors are voidable. When the subject matter of the contract is a 'necessary' or when the contract is generally for the minor's benefit, such contracts bind the minor. 'Necessaries' are not quite the same as 'necessities' and vary with the circumstances of the case, especially the status and condition in life of the minor Most of the cases interpreting necessaries concern contracts for the sale of goods in which the minor was the purchaser. Most of the cases on contracts for the benefit of minors concern employment or apprenticeship agreements. There is little guidance on whether a lease is a necessary to an infant tenant. Arguably, in the case of a residential tenancy, the lease is a necessary, provided the premises are not too lavish. It may not be so if the lease is of business premises from which the minor has been running a business. Therefore it is possible that in the situation postulated above of the 17-year-old tenant, he would not be allowed to avoid the lease if the landlord raised the argument that the tenancy was a necessary.[3]

It is unlikely that a minor would purport to let premises as a landlord. There is no equivalent in Hong Kong of the English Law of Property Act provision which prohibits the holding of land by infants and declares that land must be held by trustees for the infant. In practice, however, where land is to be conveyed for the benefit of someone under 18 years old, a solicitor will ensure that the land is held by trustees (often relatives) with the minor as a beneficiary. Any lease of such land will then be granted by the trustees.

## *Mentally disordered persons*

Mentally disordered persons may grant and accept leases only through committees appointed to look after their affairs under the Mental Health Ordinance. After a person has been certified as incapable of managing his own affairs following examination and inquiry, the committee (which often comprises relatives and a professional adviser) takes over and enters into any contracts, including leases, on the patient's behalf. Any lease entered into by the committee must not exceed three years in duration.

If the patient had entered into agreements before the committee assumed responsibility, the agreements are void if it can be shown that at the time of the agreements he was incapable of understanding the nature of the transactions.[4]

## *Charities*

Charities have unrestricted powers to make and take leases.

## *Agents*

Agents may enter into leases on behalf of the landlords or tenants who have employed them, provided their actual or apparent authority from their 'principals' (as the employing landlords or tenants are called) extends to signing and negotiating leases. If a landlord, for instance, places responsibility upon an estate agent to find suitable tenants, the scope of the agent's authority depends, in the

first instance, on the agreement between the landlord and the agent. The landlord may limit the agent's authority to finding possible tenants only and instruct her not to enter into any tenancy agreement without the landlord's approval. If the agent goes beyond her authority and purports to sign an agreement on the landlord's behalf, the landlord may nevertheless be bound, despite the limitation in his instructions to the agent, if it is usual for that sort of agent (eg a managing agent) to have such authority or if it seemed to the tenant that the agent had full authority. In these circumstances, the law may take the side of the tenant because the agent had 'usual' or 'apparent' authority. The doctrine of apparent authority may be harsh on the landlord; however he took the risk of employing the agent.

The landlord's redress in these situations is to seek compensation from the agent for breach of their contract of agency.

A landlord who is going abroad for an extended period will usually leave the letting and management of his properties to an estate agent or solicitor. He will be wise to grant the agent wider powers by giving her power of attorney, a special kind of agency which can be created only by deed.

A landlord or tenant employing an agent should therefore be precise in his instructions as to whether the agent is merely to introduce another potential party, or is allowed to negotiate terms as well, or is allowed to go even further and make an agreement on his behalf. Even if he gives the agent permission to make an agreement to take or make a lease (or it appears to the other party that the agent has that permission, so that the doctrine of apparent authority applies), he may not be legally bound by such an agreement if it is purely oral and there is no written evidence of its existence. This is because of the special rules concerning agreements for leases, which we will shortly examine.

Parts of the New Territories are owned by t'so or t'ong. These are customary lineage associations, sometimes called trusts, their land being held for the benefit of their members who are usually from the same clan or family. They are recognised and governed by section 15 of the New Territories Ordinance. The land is often rural and rented out for farming or, more recently and lucratively, for vehicle parking or open storage of containers, building materials, scrap and so forth. Such associations operate through managers chosen by the members and approved by the District Office of the Home Affairs Department. These managers are agents and quasi-trustees. Once approved and registered, the managers have full power to deal with the land as though they were owners of the land. Any dealing (including a lease) should however, be approved by and executed in front of the District Officer. The Court of Appeal has suggested that this is a mere administrative requirement and need not be observed for a tenancy agreement.[5] Often there are multiple managers and not all of them can be found to sign a tenancy agreement.

## *Squatters*

Squatters, that is to say trespassers, who have acquired title to land by 12 years' adverse possession may grant a lease to that land. This is because, although they originally lacked title, they have acquired title against the registered (or paper) owner by long possession and operation of law, and by virtue of that they are able



to put a tenant into possession. They are even able to let the land before they have occupied the land for 12 years since they have actual possession during that time.[6]

## Agreements for Leases

Another preliminary question is whether an intending landlord and tenant have entered into an agreement for a lease prior to the execution of the lease (or formal tenancy agreement) itself. Such an agreement is a contract under which the intending landlord agrees to give, and the intending tenant agrees to take, a lease in the future. It is sometimes called an 'estate contract'. The practice in Hong Kong is to enter into such a tenancy agreement — an agreement to enter into a lease — and never proceed to make a lease. This is because tenancies are usually for a duration no longer than three years. The practice is so common that the parties, and even lawyers, think of the agreement as equivalent to a lease: for nearly all practical purposes, it is.

The agreement must of course satisfy the requirements of a contract: there must be offer and acceptance, consideration, intention to create legal relations and so forth. It must also be an agreement for a lease and not an arrangement of some other sort. This will be a matter of interpretation of the document or, if there is no document, what was said. The document may, for instance, constitute no more than an offer from the would-be tenant to take a lease, so there would be no agreement until the offer is accepted by the would-be landlord. That offer may or may not be capable of withdrawal, so if it is capable of withdrawal and is withdrawn prior to acceptance, there is no agreement to lease. The document may instead be a 'booking form' (a reservation of a right to take a lease). This is particularly likely where the property to be leased is still under construction. In this case, the would-be tenant has an option to take a lease which, legally, is an open offer by the landlord to grant a lease if the tenant accepts it by exercising the option.

Large landlords often have a form or letter of offer which is quite lengthy, contains more than the basic terms, and is usually intended to be binding once signed by both parties. Such a document will invariably provide for a formal agreement or lease to be made on the landlord's standard terms or on terms dictated by the landlord. The principal estate agencies use a pre-printed form of preliminary agreement to be filled in by the agency and signed by the tenant and the landlord immediately at the successful conclusion of negotiations. These contain standard terms and are designed to be followed by a longer, though again standard form of tenancy agreement.

Where the lease is particularly in demand or the landlord is the government or a public authority, the offer to lease from potential tenants may be in the form of a tender or a bid at auction. In these circumstances, the terms on which the landlord is prepared to contract will be publicised in advance to parties interested in tendering or bidding. Unless otherwise stipulated, the agreement will be made upon the landlord's acceptance of the tender or bid. In short-term tenancies of government land, the tender notice will often state that the tender together with the written acceptance of it shall constitute an agreement binding until the tenancy agreement is signed.

## *Certainty*

Like all contracts, an agreement for a lease must be sufficiently certain. In particular, the parties (the intended lessor and lessee) must be identified, the premises must be named or described, the commencement and duration of the term of the lease must be stipulated or identified, and the rent and other consideration must be stated so as to be ascertainable. For instance, an agreement to let named premises at a 'reasonable rent' is not sufficiently certain.[7]

Since a lease must have a certain beginning and a certain ending, if the start of the lease is not defined, there is no agreement for a lease. However, it is sufficiently certain if the commencement date can be defined by reference to an event. This may be a future contingent event provided that it has occurred by the time the agreement is enforced. So, the landlord of a shopping mall or office building under construction may wish to let the shops or offices before the building is complete to ensure that rent is received as early as possible once they are ready for occupation. The landlord will make agreements with tenants that the leases will begin when the landlord gives notice to the tenant, say within a few days of issue of the occupation permit.

The difficulties of discerning whether there is a concluded agreement for a lease and one that is intended to be binding are illustrated by *World Food Fair Ltd v Hong Kong Island Development Ltd* (2007). In this case, the parties began negotiations in 1996 for the plaintiff to lease units at the defendant's shopping mall (which was then under construction) for use as a food court and restaurant. An oral agreement concerning the amount of rent and certain other terms was reached in January 1997 when the plaintiff paid an initial deposit of HK$200,000. The date of commencement of the proposed tenancy was then uncertain because permission to occupy the building had yet to be given by the Building Authority. In July 1997 a draft tenancy agreement came into existence (but was not signed), the plaintiff was given possession of the units for purposes of fitting them out and the defendant agreed to provide certain kitchen facilities for the food court. The plaintiff had also engaged an interior decorator to design and construct the restaurant.

The plaintiff began to look for subtenants for the food counters and to hire restaurant staff. However, after a change in management later that month, the defendant changed its mind: it no longer wanted a food court at the mall. The defendant refused to proceed with the agreement, demanded that the plaintiff leave the premises and, despite the fact that it, not the plaintiff, was calling the matter off, claimed to forfeit the deposit. The plaintiff, who had incurred large expenditure in anticipation of the lease, sued the defendant for return of the deposit and damages for breach of the oral agreement.

The trial judge found that there was no agreement: the parties had only reached a broad consensus but had not gone beyond the stage of negotiations, because too many important matters remained to be agreed and everything was subject to a formal lease being agreed later anyway. The Court of Appeal unanimously disagreed. They found that there was an oral agreement on all the vital terms for a tenancy which had been partly performed. This performance was, the judges thought, the best indicator that the parties intended their agreement to be binding.



The payment of the deposit was said to be of great significance since it committed the plaintiff to taking a tenancy, and the fact that the plaintiff's workmen were allowed in to do fitting-out work was conclusive.

The Court of Final Appeal, however, took a different view. They found that there was no agreement because one of the basic terms, the commencement date of the tenancy, had not been agreed on. The payment of a deposit and the giving of access for fitting-out were consistent with, but not proof of, a concluded agreement since these acts might have been done in anticipation of a binding agreement to be made later. Indeed the description of the deposit as 'initial' suggested that it had been paid to show the intending tenant's seriousness about taking a tenancy and that the parties had not yet reached final agreement.[8]

*World Food Fair* is an unusual case in that the parties made no agreement in writing despite the scale and value of the contract they were contemplating. The practice of large landlords, not to mention the parties' legal advisers, would not allow the arrangement to proceed so far without at least a letter, or an exchange of letters, signed by both parties setting out their understanding. These documents still need to be construed to see if they evidence a concluded agreement for a tenancy and one that is intended to be binding.

Oral arrangements raise an additional problem of evidence which is dealt with a little later in this chapter. Assuming that there is a preliminary signed document, what approach should be taken towards ascertaining whether it is a contract for a tenancy?

If negotiations between the parties are continuing, this probably means that there is no contract as yet because there has been no offer which has been accepted. Where the document provides for the making of a formal agreement later, this may indicate that any agreement made in the document is not meant to be binding because it is conditional upon the making of the formal agreement. However, equally it may be the intention that the later agreement will simply formalise the binding temporary agreement made in the document. Time-honoured words such as 'subject to contract', 'subject to lease' or similar should be used on correspondence and other documents to ensure that the agreement is conditional upon a further, formal agreement being entered into. Therefore, at the date of the documents, there is no contract even though one or both parties may believe they have a 'gentleman's agreement', one binding in honour only. Provisional agreements (which when they are in Chinese are sometimes called 'lum see' agreements) cause particular problems in this regard. Such agreements, if sufficiently certain, have binding legal effect between landlord and tenant even though they may be intended to be 'holding agreements', temporary in nature. If, however, they are incomplete, tentative or conditional, probably they are not binding.[9]

When deciding whether an agreement has the force of a contract, a court has to read the whole document and interpret its contents objectively, in the context of facts surrounding its making. The description of an agreement as provisional, interim or temporary is not inconsistent with it being binding and means no more than that there is an intention that a formal agreement shall be entered into later. These descriptions may indicate that the agreement shall be operative for the time being. The fact that the agreement provides for payment of a deposit is a

neutral factor, since the deposit may simply signify the good faith of the proposed tenant or serve as a 'booking fee' so as to reserve the premises pending the making of a binding agreement. Further, a provision for forfeiture of the deposit, although possibly enforceable on its own, does not necessarily make the rest of the agreement enforceable.[10] Consequently, the performance of acts preparatory to a lease after the signing of a document, such as the tenant being given access to the premises and commencing fitting-out work, is similarly equivocal since these acts could be pursuant to a binding agreement or could be merely in confident anticipation of a binding agreement.

Ironically, the estate agent's caution not to over-commit the client, which leads the agent to stipulate that a preliminary agreement is subject to contract, often defeats the agent's desire to earn a commission payment. Almost always, an agent's commission becomes due only on the signing of the tenancy agreement, so if either party declines to enter into the formal contract, the agent loses the right to be paid. In rare cases, the preliminary agreement will stipulate that the agent's commission is to be paid regardless of whether the tenancy is entered into, so the preliminary agreement may have effect as an agreement between the potential tenant or the potential landlord on the one side and the agent on the other, even though it has no effect as between landlord and tenant.[11]

The uncertainty does not necessarily arise from the terms which were agreed or from the parties' intention; rather, it may arise from whether the agreement was a new tenancy agreement or merely a continuation or variation of the existing one. This is prone to happen where the alleged agreement is between a sitting tenant and the landlord, rather than between a new tenant and the landlord. For instance, in one case concerning a tenancy of a car park where the rent could be increased under the existing agreement, the tenant interpreted a letter in which the landlord increased the rent and deposit (both of which the tenant was willing to pay) as an offer of a new tenancy rather than a variation of the existing tenancy. The Court of Appeal however held that it was a variation, not a new tenancy agreement.[12] In other cases involving sitting tenants, where the alleged new tenancy agreement is entirely oral, the question may be whether any such agreement was made at all. This is especially likely to happen if the tenant is desperate to stay on but the landlord, whilst initially willing to negotiate, decides not to grant a new tenancy.

## *Importance*

The contract's importance in the law of leases lies in the fact that the court may grant specific performance of the contract. This means that the court orders the unwilling party to keep his side of the bargain at the request of the willing party. This forces a party who changes his mind and does not wish to go ahead with the agreement to grant or to accept a lease. As a result, a party who has an agreement for a lease is in almost the same position as a party who has a lease itself.

## *Evidence*

The common law does not insist upon formality in contracts. There are, however, a number of statutory exceptions to the common law which insist that the contract



be in writing before it is enforceable. This is usually because the economic significance of the transaction involved means that the court must be certain as to its existence and contents before holding an unwilling party to the contract. A lease is itself one of those economically significant contracts. A contract for a lease is not quite so significant, but since it can lead to a lease (through an order for specific performance) and the lease may last for many years, the law requires solid evidence of the existence of such a contract before it will enforce the agreement. Section 3(1) of the Conveyancing and Property Ordinance provides that:

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

A contract for a lease is a contract for the disposition of an interest in land so the subsection will apply to such a contract.

The origin of section 3(1) can be traced back, through section 5(1) of the Law Amendment and Reform (Consolidation) Ordinance (known to generations of local lawyers as LARCO) and earlier English legislation, to a provision of the Statute of Frauds 1677.[13] Section 3(1) does not say that contracts for the disposition of an interest in land must be in writing. It provides that if they are not at least recorded in a written note or memorandum which is signed by 'the party to be charged' (usually the proposed defendant in proceedings concerning the contract) or his agent, the other party (the proposed plaintiff in the proceedings) may not bring an action upon the contract. Hence, if there is merely an oral agreement between landlord and tenant about the future grant of a lease, it can be enforced or relied upon only if there is a signed document showing the existence of the oral contract.

The subsection does not require the contract to be in writing (though if it is, that is enough), but it does require written and signed evidence of the contract before that contract will be enforced. The writing requirement, however, becomes an obstacle only if one party refuses to go ahead with the lease: if the agreement for a lease is purely oral and both parties stick to their promises and execute the lease, there is of course no difficulty about the lack of written evidence. In these circumstances, the oral agreement is not invalid, it is merely unenforceable. If there is a lease in proper form, neither party need rely on the oral agreement: he has the lease instead.

Even where a party is relying on an oral agreement and the written evidence of its existence is scanty or non-existent, he may be saved, either by the ease with which the courts can be satisfied that the requirements of section 3(1) have been met, or by the doctrine of part performance. The doctrine of part performance is dealt with later. Here we will examine more carefully what is demanded by section 3(1).

There are three requirements under section 3(1). First, if the agreement is not written, there must be a note or memorandum in writing of the agreement. The note or memorandum does not have to be in any particular form or in one document, for instance it can consist of letters from one party to another, provided the documents are linked to each other by referring to one another expressly or implicitly. The memorandum can be drafted after the contract has been

concluded; it does not have to be contemporaneous with the contract. Second, the memorandum must contain the essential terms of the agreement: the parties, premises, rent, date of commencement and length of lease at least, and any other material term forming a substantial part of the oral bargain. If it is alleged that the memorandum does not contain all the terms of the contract, the court will hear evidence from witnesses about exactly what was agreed. The court will not usually listen to such evidence if the agreement itself, as opposed to a note of it, is in writing. This is the 'parole evidence rule' which is to the effect that unless the contract is ambiguous, the court will not hear oral evidence to explain its terms.[14]

Third, the memorandum must be signed by the party refusing to proceed with the agreement or his agent. This is to prevent fraud by a plaintiff who draws up a memorandum unilaterally, recording the terms he alleges were agreed to, and presents it to the court as evidence. The evidence will be accepted only if it appears that the defendant himself authenticated and assented to the document as accurate. This being the principle, the courts do not insist on a full signature: the party's initials, or his name, or even his chop or stamp is enough. The subsection also does not require the signature to be at the end of the document. If it appears anywhere on the paper, that is sufficient. Further, the defendant's lawfully authorised agent may sign on his behalf. A written appointment will make matters clearer, but an agent does not have to be appointed in writing in order to be lawfully authorised. However, the defendant (who, in the language of the law of agency, is called a 'principal') must have given the agent authority to sign on his behalf. The agent may be the party's husband, wife, or another relative who acts gratuitously. He may also be a paid agent such as an estate agent engaged by a prospective tenant to find accommodation or by a landlord to find a tenant.[15]

There is however one important restriction upon the application of these requirements. They do not apply where the agreement is for a lease at market rent which is shorter than three years in duration and the tenant takes immediate possession of the premises. This is because section 6(2) of the Conveyancing and Property Ordinance says that:

> nothing in section 3 … shall affect the creation by parol of leases taking effect in possession for a term not exceeding 3 years … at the best rent which can reasonably be obtained without a premium.

An agreement or lease is by parol where it is created by word of mouth, or by informal writing or a mixture of both.

## *Oral agreements*

The great majority of oral tenancy agreements will be for a term of three years or fewer at market rent and the tenant will have gone into possession, so would appear to be saved by section 6(2). What if an oral or informal agreement is for longer than three years or otherwise fails to satisfy section 6(2)? Then, it will fail the requirement of writing in section 3(1) set out in previous paragraphs and be unenforceable. Furthermore, it cannot constitute a lease (as opposed to an agreement for a lease) because a lease is a legal estate and section 4(1) of the



Conveyancing and Property Ordinance stipulates that a legal estate in land can be created only by deed. A deed is a formal document that is signed, sealed and delivered, as is explained in the first part of the segment on formality, below. Section 6(1) of the same ordinance says that interests in land created by parol (ie orally or partly orally and partly in writing) and not put into writing and signed by the creator of the interest have the force and effect of interests at will only. So an oral letting which fails to satisfy section 6(2) results in a tenancy at will.

Yet a tenancy agreement is strictly not a lease but an agreement to grant a lease. Since the agreement is (subject to section 3(1)) enforceable by the equitable remedy of an order for specific performance, it creates an equitable interest rather than a legal one, so section 4(1) does not apply. However, another provision in the Conveyancing and Property Ordinance, section 5(1)(a), provides that no equitable interest in land can be created except by signed writing. Consequently a purely oral agreement which falls outside the exception for short leases in section 6(2) would be both unenforceable by virtue of section 3(1) and ineffective to pass an equitable interest. The same can be said of an agreement made partly orally and partly in writing which does not satisfy all the requirements of section 3(1).

So an oral, or deficient written, agreement for a tenancy may have effect greater than that of a tenancy at will. This is because there are two circumstances in which the requirements need not be met. One is where the agreement has been partly performed; this is considered in the section immediately below. The other is under the exception for short lettings already mentioned, which will now be examined more closely.

The rules that oral or deficient agreements are unenforceable and do not create equitable interests and that legal estates can be created only by deed do not apply to the grant of a lease which:

(1) takes effect in possession;
(2) is for a term not exceeding three years, whether or not the lessee is given power to extend the term; and
(3) is at the best rent which can be reasonably obtained without a premium.[16]

Since most tenancy agreements in Hong Kong are for fixed terms of one, two or three years or are periodic monthly lettings, the exception seems to make signed writing a peripheral, if not superfluous, consideration. Indeed, many lawyers and estate agents think that the typical letting for a period of three years or shorter does not need to be by deed or even in writing, although it usually is in writing. This is however strictly not the case because the exception contains two requirements besides that the term not exceed three years. The rent must be the best rent and the lease must take effect in possession.

The best-rent requirement is easily satisfied. As will be discussed in chapter 6, the best rent is a rack rent, that is to say the full annual value of the premises on the market at the time and on the terms of the letting. So the best rent equates to the full market rent and is likely to be achieved provided that the landlord and the tenant negotiate the amount in the normal way. Only if there is some special consideration, such as the parties being related, which causes a discount on the market rent to be given, will the best rent not be achieved.[17]

The requirement that the tenancy take effect in possession has been held to mean that the tenant must have the right to possession of the property immediately upon the making of the agreement.[18] There must be no delay between the making of the agreement and the taking of possession so if the landlord cannot hand over the premises at once (because, for instance, a previous tenant is still in occupation) or the tenant is not yet ready to move in, so that the lease begins later than the date upon which the agreement was made, the exception will not apply. Often there will be some delay of course, hence the requirement of immediate possession is inconvenient and inconsistent with practical reality and reasonable expectations. Fortunately in most instances the parties will have committed their full agreement to writing and signed it, or they have acted upon their agreement and begun to perform it.

## *Part performance*

If there is no, or no sufficient memorandum in writing, an action may still be brought on an oral agreement for a lease if there has been part performance of the agreement. Part performance is a venerable doctrine of equity, the body of law developed in England during the 17th and 18th centuries to complement and moderate the strictness and occasional absurdities of the rules of common law. The doctrine of part performance softens the edges of the hard rule in section 3(1). The doctrine survives irrespective of section 3(1) because section 3(2) states that the section 'does not affect the law relating to part performance'.

The doctrine stems from the idea that if the party relying on the oral agreement has performed a substantive part of his side of the bargain to his detriment and that act is unmistakably referable to the agreement, the other party should not be able to avoid her obligations due to a lack of writing. The Statute of Frauds (on which section 3(1) is based) was passed to prevent frauds by a party pretending that an oral agreement for a lease or sale of land existed. However, ironically it can also work to facilitate fraud, by enabling one who has entered into a contract to avoid keeping her promises. In striving to prevent one evil, the statute inadvertently opened the way to another.

Suppose that T enters into an oral agreement with L to take a lease of L's flat for 21 years, and part of the agreement is that L should carry out certain alterations to the flat. Whilst the alterations are being carried out, T visits the flat from time to time and makes suggestions as to the way the work should be done. T's suggestions are carried out, but once the alterations are completed, T refuses to honour the agreement and take a lease. The requirement of evidence in writing in section 3(1) will frustrate L if he sues T for specific performance of the contract. However L will be able to argue that he has done an act of part performance of his side of the deal, which was the carrying out of the repairs. This was so in *Rawlinson v Ames* (1925), on which the above facts are based, where Rawlinson, the landlord, was awarded a decree of specific performance requiring Ames to take the lease.

A local illustration of acts of part performance (and, incidentally, of a memorandum satisfying section 3(1)) is *Chan Yat v Fung Rubber Manufacturing* (1967). The defendant company orally agreed to lease a factory, then being built,



for ten years at a rent of $57,000 a month. The lease was to commence seven days after notification had been given to the company that an occupation permit had been issued. The company paid a deposit and its managing director wrote to the company's bank informing the bank of the terms of the agreement and enclosing a brochure prepared by Chan Yat regarding the factory. The company was notified that the occupation permit had been issued, but the parties could not agree on the terms of the lease. Trying to back out of the deal, the company said that the memorandum of the agreement was insufficient for it to be enforced. The court held that the managing director's letter, coupled with the brochure, amounted to an adequate memorandum. The court also considered whether there were acts of part performance. The payment of the deposit and writing to the bank by the defendant were considered not to be, but the facts that the plaintiff had stopped trying to let the premises, had completed the building of the factory, had permitted the defendants to install machinery and drill a well, and that the plaintiff had paid the cost of electrical installation, were considered part performance.

Acts of part performance must be by the plaintiff; that is why the defendant's writing a letter in this case was not such an act. Other examples of part performance are: the plaintiff-tenant taking exclusive possession of the premises; the plaintiff-landlord carrying out improvements or repairs and allowing the defendant to take possession; the plaintiff-landlord accepting payment of increased rent by a tenant who is already in possession and the plaintiff-tenant spending money on repairs and improvements. However, a plaintiff-tenant simply staying on the premises is not itself a sufficient act (as it could be explained on grounds other than the existence of an oral agreement), nor is the payment of money.[19]

Apart from showing the act of part performance, the plaintiff must produce evidence (usually oral) of the agreement between him and the defendant and show that it would be fraudulent to allow the defendant to rely on the lack of written evidence. The remedies which the plaintiff will seek are damages, or an order for specific performance of the agreement, or both.

## *Specific performance*

An order for specific performance, unlike damages, is a discretionary remedy. Since specific performance originated in equity, the court will not order it if the plaintiff is guilty of some misconduct or if the order would cause some hardship to the defendant. So if the tenant who seeks enforcement of an oral agreement for a lease has not paid the rent, the court will not hold the landlord to the bargain. Likewise if the tenant has delayed unduly in going to court, or has committed a fraud or other misrepresentation against the landlord. Equally if the landlord has now let the premises to an alternative tenant, or if forcing the landlord to let to the plaintiff would involve him in breaking the terms of the lease under which he himself holds, the court will not make the order because of the hardship it would cause. In these circumstances, damages are considered a more appropriate remedy.

It is sometimes said that because of the availability of an order for specific performance, an agreement for a lease is as good as a lease, but this is not quite true. An agreement for a lease is almost as good as a lease, provided it is sufficiently

5 [1963] 1 HKLR 58 at 304, 319. If the notice's date is defective, the tenant must challenge its validity promptly or he may be held to have waived the point, as in *Fung Kwai-ching v Yick Kit-bing* [1974] HKDCLR 10, [1974] HKCU 32. A catch clause saved a notice of termination in *Hussain v Bradford Community Housing Ltd* [2009] EWCA Civ 793.

6 *Hau Gay Yau v Wong Muk Din* [2014] HKCU 2049 (unreported, CACV 15/2014, 1 September 2014).

7 Where the tenancy falls within Landlord and Tenant (Consolidation) Ordinance (Cap 7) Pt I V, s 119Y(1) of that ordinance provides that service can be by personal service, by leaving the notice with an adult occupier of the premises or by affixing the notice to a prominent part of the premises, in addition to the methods provided for under Conveyancing and Property Ordinance (Cap 219) s 62 and at common law.

8 Section 122(5).

9 *Winnapal Trading Ltd v Cheng Ying Keung* [1987] HKCU 1 (unreported, HCA 6409/1986, 9 January 1987) (SCt); *Goodsun Industries Ltd v Yanion Co Ltd* [1989] HKCU 12 (unreported, HCA 5973/1987, 18 January 1989); *Shun Ho Energy Development Co Ltd v Golden Crown Industries Ltd* [2015] HKCU 1484 (unreported, CACV 161/2014, 30 June 2015); *Clarke v Grant* [1950] 1 KB 104; compare *Tse Luk Mui v Shing Shun Firm* [1926–1941] HKC 237, (1938) 30 HKLR 60; *Lam Choi-chiu v Kwok Tung-sang* [1971] HKDCLR 1, [1971] HKCU 31 and *Wing Tai Hang v Dah Luen Investment Co Ltd* [1981] HKLR 703, [1981] HKCU 73; *Yue Wah Chuk v McKeon* [2005] HKCU 63 (unreported, DCCJ 7088/2003, 24 August 2004).

10 *Yu Wing Kei v Chan Tak Kwong* [2009] HKCU 1569 (unreported, HCSA 21 and 22/2009, 15 October 2009).

11 *Tat Ming Investment Co Ltd v Yiu Kimura* [2008] HKCU 1139 (unreported, DCCJ 3508/2006, 23 July 2008); *Yu Wing Kei v Chan Tak Kwong* [2009] HKCU 1569 (unreported, CACV 77/2004, 15 October 2009, Chinese judgment).

12 *Wing On Properties and Securities Co Ltd v Wave Front Enterprise (Hong Kong) Ltd* [2007] 2 HKC 54.



# Chapter 12

# Forfeiture and Repudiation

## Forfeiture

The landlord may forfeit the lease from the tenant if the tenant breaks a covenant or condition in their agreement and the breach 'gives rise to forfeiture'; that is, the breach must trigger the landlord's power to forfeit. This power is automatic in the case of a breach of condition. The question of whether a provision is a condition (breach of which ends the lease without further action by the landlord) or a covenant (breach of which gives the landlord the option to end the lease) is a matter of interpretation of the words used in the provision and of the intention of the parties. In the case of a breach of covenant, the power must be expressed in the lease and is found in what is commonly called the 'forfeiture clause'. Simpler Chinese tenancy agreements and printed forms may not include such a clause or may contain an imperfectly drafted version. However, a condition for forfeiture is implied by statute into most leases.[1]

### *Forfeiture clause*

This clause, which is also known as a 'proviso for re-entry', is found in every well-drafted lease, usually towards the end, following the covenants. The precise words vary, but are usually similar to this:

> If the rent or any part of the rent hereby reserved shall be in arrears for 15 days (whether formally or legally demanded or not) or if any covenant on the tenant's part herein contained shall not be performed or observed, it shall be lawful for the landlord at any time thereafter to re-enter upon the premises or any part thereof in the name of the whole and thereupon this agreement shall absolutely determine.

The words 'not be performed or observed' are included to cover failure to comply with both positive and negative covenants.

The forfeiture clause in the standard agreement of the Housing Authority is a slight variation on this theme (see clause 4(b) of the agreement, reproduced as Example 1 in the appendix). The default provisions in commercial leases tend to be considerably more complex, as can be seen from the examples in the appendix. Section 117(3) of the Landlord and Tenant (Consolidation) Ordinance implies into private residential leases a number of covenants along with 'a condition for

forfeiture' if those covenants are broken. The wording of this condition is not stipulated in the ordinance so it is not clear whether what is to be implied is a term similar to the proviso for re-entry above (giving the landlord an option to re-enter in the event of a breach) or a condition in the strict sense, which would mean that the lease automatically terminates in the event of a breach.

A proviso for re-entry is a 'usual covenant' and so will be read into all agreements for leases and into leases which specify that the usual covenants shall apply to them.[2]

A breach of covenant renders the lease voidable rather than void, at the landlord's option. The tenancy therefore continues despite a breach until the landlord does some act which shows an intention to determine the lease. Since the forfeiture clause *empowers* the landlord to enter, he is not obliged to retake possession if the tenant is in breach. The failure to do so may, however, prejudice the landlord's later exercise of power (see 'Waiver', below). The power is the landlord's: the tenant has no right under the forfeiture clause to 'give up' the lease if he is in breach of covenant.

Whether the tenant has failed to perform or observe any covenant is a question of fact and of interpretation of the covenant in question. The ordinary rules of construction of contracts apply: the court must discover the intention of the parties, primarily from the words that they employ but also from the context of those words. The relevant context includes the other terms of the lease and the factual background against which the parties made the lease. Subject to that, the court leans towards a literal construction so that, for instance, a covenant which simply forbids subletting of the premises would not be broken by the subletting merely of part of the premises.

## *Formalities*

The re-entry clause, like the example above, usually stipulates that, where the landlord is relying on a breach of covenant to pay rent, he need not formally demand the rent before forfeiting. If the clause omits this stipulation, the landlord should demand the rent first. There is no need for a demand if half a year's rent is owed and if any goods found on the premises and available for distress are insufficient to satisfy the arrears.[3]

In the case of forfeitures other than for non-payment of rent or for insolvency (or for assigning, subletting and parting with possession before 1 November 1984), the landlord must comply with the notice provisions of section 58 of the Conveyancing and Property Ordinance. Section 58 provides that a right of re-entry or forfeiture shall not be enforceable unless the landlord serves notice on the tenant. This notice must specify the breach complained of and, if the breach is capable of remedy, require the tenant to remedy it. The time within which the breach is to be remedied may be stated but that time must be reasonable — if it is not, the landlord will not be entitled to re-enter. The notice must also specify the compensation, if any, which the landlord requires for the breach.

If the tenant fails to remedy a remediable breach and to make reasonable monetary compensation to the landlord's satisfaction within a reasonable time of service of the notice, the landlord can proceed to enforce the forfeiture.



Which breaches are remediable? Breach of any positive covenant is ordinarily, indeed nearly always, capable of remedy. The remedy consists of carrying out what the covenant requires, even if belatedly. The classic example is breach of a covenant to repair.[4] The notice under section 58 will tell the tenant what repairs must be carried out. If he carries them out quickly and pays reasonable compensation, he will be able to claim relief against forfeiture (see below).

Most negative covenants are also capable of remedy. A breach of covenant as to use of the property has been held capable of remedy, provided the tenant acts promptly once he knows of the breach. So, where a tenant (who has covenanted not to use the premises for business or for immoral or illegal purposes) sublets, and the subtenant, unknown to the tenant, uses the premises for those purposes, the tenant can perhaps save his tenancy by speedy remedial action once he receives his landlord's notice. On the other hand, breach of the covenant against assignment, subletting and parting with possession has been held a once-and-for-all breach incapable of remedy: once there has been an assignment or subletting, that fact cannot be removed. By the same reasoning, violation of the proviso concerning the tenant's bankruptcy or liquidation would be irremediable. However, it may be going too far to say that such breaches can never be remedied since the question is whether the harm can for practical purposes be put right. The courts have moved towards the approach that all breaches can be remedied, especially if the harm can be put right by compensation.[5]

Despite this approach, there may be certain exceptional types of covenant or certain types of breach which are not capable of remedy. The breaking of a covenant which would leave a lasting stigma if broken, such as a covenant not to use the premises for immoral purposes, has been held to be incapable of remedy. The reasoning here is that the breach has lasting effect on the reputation and value of the premises.[6] One covenant encountered in Hong Kong tenancy agreements breach of which might leave a lasting effect, at least in the minds of more traditional Chinese residents, is a clause forbidding use of the premises for the business of an undertaker, funeral home or coffin shop.

The remediability of a breach is relevant only to the validity of the landlord's section 58 notice. If the landlord has difficulty deciding whether the breach is remediable or not, the notice should call on the tenant to remedy it 'if it is capable of remedy'. He must take care that the notice does not demand more than the covenant obliges the tenant to do.[7] A notice is not invalidated by failure to require compensation, at least in cases of immoral or illegal use, provided the landlord does not require compensation.

After a reasonable time has been given for remedying the breach (or for the tenant to leave or make proposals), the landlord can begin proceedings for possession based upon the forfeiture. The landlord may do this even if the tenant has remedied the breach. The landlord may couple this with a claim for damages. The tenant may raise a defence, such as waiver or estoppel, but usually his best hope of remaining in occupation is to ask for relief against forfeiture. If the tenant has remedied the breach, the chances of obtaining relief are greater.

To carry out a forfeiture, the landlord must re-enter the premises, either physically or symbolically. The usual manner of re-entry is symbolic, that is, to sue for possession. The forfeiture takes effect on issue and service upon the

tenant of the landlord's writ claiming possession. Service is necessary because the forfeiture is not complete until notice of it is given to the tenant. Once the writ has been served, the landlord has elected to determine the term even if he does not pursue the claim to judgment.

It is theoretically possible for the landlord, instead of suing for possession, actually to re-enter, that is, to resort to self-help. However, there are dangers in re-entering without an order for possession. The re-entry must be peaceable: if force is used, the landlord will be liable to prosecution under section 23 of the Public Order Ordinance. That is why this has been called a 'dubious and dangerous' method of gaining possession.[8]

## *Relief against forfeiture*

The notice provisions in section 58(1) of the Conveyancing and Property Ordinance may be regarded as preliminary to the tenant's exercise of the statutory right to apply for relief given by section 58(2). This statutory right is given in respect of forfeitures other than for non-payment of rent. Separate statutory rights to relief are given in respect of non-payment of rent by section 21F(2) of the High Court Ordinance and similar provisions in the District Court Ordinance and the Lands Tribunal Ordinance. The notice provisions in section 58 accordingly do not apply to forfeiture for non-payment of rent.

Before 1984, the power of Hong Kong's High Court to grant relief against forfeiture was not statutory (except in respect of a breach of covenant to insure), but rested on the power of the courts of equity in England to grant relief.[9] It had been held that the power was not limited to breaches of covenant to pay rent.[10] In cases of non-payment of rent in the District Court and the Lands Tribunal, the power was (and still is) primarily derived from their respective ordinances. Since amendments to the Supreme (now High) Court Ordinance in 1987, which added sections 21F, 21G and 21H, the same has been true of the High Court.[11]

Differing views have been expressed by judges as to whether the power to grant relief against forfeiture in cases of non-payment of rent is entirely statutory or whether the equitable power survives.[12] What can be said with certainty is that the ordinances do not expressly abolish the equitable power and that the statutory power does not cover all circumstances — for instance, where the landlord has re-entered by taking physical possession without legal action.[13] In cases of other breaches, the equitable powers have been held to have been replaced by the statutory powers.

Non-payment of rent is by far the most common cause of forfeiture. Consequently, in practice, the statutory powers to relieve the tenant against forfeiture arising from failure to pay rent are the most important. These powers are effectively the same in the High Court (Court of First Instance), the District Court and the Lands Tribunal. Where a landlord is suing to enforce a right of forfeiture (or re-entry) for non-payment of rent only, if the tenant pays into court all the rent arrears and the costs of the action within the time for acknowledging service of the writ (14 days from service of the writ), the action ceases and the tenancy continues. If the case goes to a trial or hearing, and the court is satisfied that the landlord is entitled to enforce his right of forfeiture, the court orders



possession of the property to be given to him but only after a certain period which is at the discretion of the court, but which must not be less than seven days.[14] This is to give the tenant a second chance to pay up and redeem his lease. This rule applies even if judgment goes by default, the tenant not giving notice of intention to defend or filing a defence. The order lapses and the tenancy is revived if, before the date ordered for possession, the tenant pays into court all the rent arrears and a sum on account of costs fixed by the court. The court may extend the period for payment specified in its order at any time before possession of the land is recovered by the landlord under the order, which means even after the period has expired and even after the landlord has taken steps to enforce the order. So in effect, the tenant has a third opportunity to save the lease; although this will require him to make an application to court to convince the judge that he really will be able to pay the arrears and costs. If the tenant does not make the payments in accordance with the order for possession, that order may be enforced and the tenant is barred from obtaining relief.[15]

The statutory powers concerning relief against forfeiture for non-payment of rent in the High Court and the Lands Tribunal apply only where the landlord is proceeding to enforce his rights by court action. If the landlord resorts to self-enforcement by re-entering the premises physically, any relief granted to the tenant would have to be based on the equitable power. The District Court has special power to relieve against forfeiture within six months where the landlord has re-entered without action. In the case of relief against forfeiture based on other grounds, section 58(2) of the Conveyancing and Property Ordinance states that a lessee may apply for relief where a lessor is proceeding 'by action or otherwise' to exercise his right of re-entry or forfeiture, so the courts' powers under that statute are not restricted to cases where there is legal action.[16]

The statutory relief in cases of non-payment of rent is automatic on the first occasion. The court has no discretion over whether to grant it, nor can it give the tenant fewer than seven days to pay.[17] The tenant therefore need not apply for this relief, although it is obviously sensible for him, if possible, to remind the court of the terms of the relevant statute.

However, the relief is automatic and need not be asked for only once. Where the tenant has previously defaulted in payment of rent and has been given relief, the court can relieve him a second or further time only if he applies and convinces the court that he has good cause for not paying. This limitation was a late and hurried addition to the 2002 landlord and tenant amendment legislation and was made in response to complaints by small landlords that they were the victims of 'rogue tenants' or 'professional tenants' who were skilled in not paying rent and in exploiting the leniency of the law giving non-payers time to pay. Landlords are naturally reluctant to initiate proceedings where there is hope (as a result of past behaviour or assurances by the tenant) that the rent owing eventually will be paid and where they hold a deposit as security. Once proceedings are begun, the process requires time. Even if the case is plain, the hearing of an application for summary judgment will not take place for months.

No doubt the abolition of an unlimited right to relief against forfeiture in non-payment of rent cases has reduced the time within which a landlord may obtain possession from a bad tenant. Yet the process can still take months, even

years, since the tenant can make excuses and then apply for extensions of time to pay, appeal against refusals and make repeated promises to the court and the landlord that payment will shortly be forthcoming. The contrasting fortunes of four different tenants in separate cases illustrate this.

In one the tenant, a torture claimant, paid only part of the rent after relief had been granted but said that he mistakenly thought he had paid all that was owing. The Court of Appeal gave him a last date to pay which was not met, then extended that time and he eventually did pay. In a second, the tenant claimed that he had been willing to pay but was too busy to take the money to the landlord and had expected the landlord to come to collect the rent arrears. He missed the extended deadline given by the court but asked for more time. This was refused: no good ground for a further extension had been given. In a third, relief against forfeiture for non-payment had been granted but the tenant failed to pay, saying that he had a counterclaim against the landlord. The tribunal gave him a second chance because by denying that the tenant was the tenant of the premises, the landlord had interfered with the tenant's application for an excavation permit to enable electricity to be put into the premises. Subsequently the period for payment was further extended but the tenant again defaulted and did not turn up at a further hearing. In the fourth, the tenant missed the date for payment due under the first grant of relief against forfeiture. He applied for a second grant, asserting that he had had cash flow difficulties. This did not impress the tribunal.[18]

The legislature's intervention to restrict relief where the tenant is behind with the rent is a departure from the principle historically underlying that relief. The justification for the intervention of equity was that a proviso for re-entry for failure to pay rent was no more than a coercive remedy of the landlord for obtaining arrears of rent. The courts were willing to excuse the tenant if he paid the arrears, interest and costs, provided that he was not guilty of any inequitable conduct himself.

Relief under section 58, that is to say where the forfeiture is based upon a breach other than of a covenant to pay rent, is not automatic. This is so even where the breach lies in non-payment of money similar to rent such as management fees, air-conditioning charges and promotion fees.[19] The tenant may apply for relief (usually in the defence he files to the landlord's statement of claim) and the court may grant or refuse relief, although in exercising this discretion it must have regard to the conduct of the parties and to all other circumstances. A grant of relief may be on such terms as the court thinks fit. The usual terms are that the tenant must pay all the landlord's costs and compensation to the landlord. The compensation will include reasonable expenditure on professional assistance with reference to the breach.

The powers, both statutory and equitable, give the court great flexibility. It is hazardous to suggest the factors which will influence the court in exercising its discretion. The nature and seriousness of the breach will obviously be relevant; for instance the court will generally be reluctant to forfeit for a minor and easily remedied breach of a covenant to repair. Forfeiture in such a case would be a remedy grossly out of proportion to the wrong. Where the breach has been corrected by the tenant, the speed with which this was done (and with which the application for relief made) will be relevant. The tenant's knowledge of the



breach will also have a bearing on the matter: where the premises have been legitimately sublet, he may be excusably ignorant of the breach. Yet if he was fully aware of the facts, his conduct may have been so flagrant, gross and wilful as to justify refusal of relief. In one case the court refused relief to a tenant who was in breach for failure to pay rates and interest (both easily remedied) because the tenant had also sublet without permission, a further breach which had come to light only after proceedings had begun and which therefore had not been the basis of the forfeiture.[20] The principle, that contractual promises and rights should be observed and therefore that the landlord should not be denied forfeiture, is also a consideration to be thrown in the balance. However, since relief against forfeiture is of its very nature a legally sanctioned interference with contractual rights, this is probably not a weighty consideration.[21]

The statutory power in the Court of First Instance and the Lands Tribunal to grant relief ends once the landlord has obtained an order for possession from the court and has retaken possession pursuant to that order. Relief may however be granted under the equitable power after he retakes possession if he does so by self-help and without an order. Also, in the District Court there is express statutory power to grant relief in cases of non-payment of rent where the landlord has re-entered without a court order, but the application must be made within six months of the re-entry.[22]

A subtenant may apply for relief against forfeiture by his immediate landlord (the tenant) or by the head landlord. The difficulty for a subtenant is that he may not hear that the head landlord is forfeiting the tenant's lease before possession is ordered. Where the head landlord serves the writ on the subtenant, there will be no such problem. The tenant is the one who may be ignorant of the proceedings, but the subtenant should immediately inform him of the writ.

The court can impose conditions on the grant of relief to the subtenant and may well require that he pay the back rent and costs, remedy any outstanding breach and enter into a new lease directly from the landlord on the same terms as in the lease of the tenant, so the terms may not be attractive to the subtenant. In any event, the power is exercised sparingly. Where a lease is forfeited, the underlease automatically ceases as well.[23]

## *Waiver*

The landlord's right of re-entry will be lost if he waives the forfeiture. Waiver occurs where the landlord, knowing of the tenant's breach, does some unequivocal act indicating, implicitly or explicitly, that the lease continues and therefore that he has chosen not to insist on his rights. An explicit waiver is where the landlord says to the tenant, in effect, 'I do not mind that you have broken the terms of the lease, I wish the lease to continue'; but this type of waiver is rare. Waiver is, however, frequently invoked in Hong Kong possession cases. The tenant usually relies on an implied waiver arising out of some conduct of the landlord allegedly inconsistent with his demand for possession.

To establish a waiver, the tenant must show that the landlord knew of the breach; that the landlord did an act; and that the act was attributable only to the continued existence of the lease.[24]

Knowledge of the breach (the facts on which the forfeiture is based) is essential because the landlord cannot be held to have relinquished his contractual rights by virtue of an act done in ignorance of the relevant circumstances.[25] Knowledge can, however, be attributed to a landlord through his agent. The agent must have actual or apparent authority to receive such information on the landlord's behalf. If the agent is a rent collector only, he does not have such authority but if, instead or as well, he manages the property or has a close relationship with the landlord, it is reasonable to conclude that the landlord would become aware of the breach in the normal course of events.[26]

The indication that the landlord regards the lease as continuing must be an assertive act; a passive attitude or acquiescence is not enough. The landlord may do nothing in the face of a breach because he feels he has no choice, not because he approves of what the tenant has done or wishes the tenancy to continue. Even positive acts may be equivocal and not indicate an intention to treat the lease as subsisting: the acts must be interpreted against their background and in their context.[27]

The most common example of an act of waiver is acceptance of rent due after the breach. Demanding, distraining or suing for such rent is also sufficient. By showing that he regards the rent as still payable, the landlord is representing that he regards the lease (under which the rent is due) as subsisting despite the tenant's breach and therefore that he will not be forfeiting the lease for that breach.

A qualified acceptance of rent ('I will take it, but without prejudice to my right to forfeit') may not, however, be an act of waiver where the tenant enjoys security of tenure by virtue of continuation of the lease by statute, since the landlord has no choice but to tolerate the tenant's occupation until he can obtain an order for possession on one of the statutory grounds.[28] The acceptance of rent in those circumstances would be equivocal, since the landlord cannot end the lease by forfeiture. Acceptance of rent in respect of a tenancy subject to Part IV of the Landlord and Tenant (Consolidation) Ordinance or a tenancy governed by common law only would be a waiver, for in these cases the option of forfeiting the lease is not closed by legislation.

Written leases commonly contain a stipulation that acceptance of rent shall not be deemed a waiver of the landlord's right to sue. It is doubtful if such clauses have much effect, since a waiver of its nature is based on events which occur after the lease has been entered into and the essence of which is an indication by the landlord that he has abandoned his rights and treats the lease as continuing. The idea, in short, is that he cannot both have his cake and eat it. To give effect to a 'no-waiver' clause in the lease would not only contradict the essence of waiver but would also use a term of the lease to save the very thing undermined by the waiver — another term of the lease. Furthermore, if the landlord's act constitutes a waiver of the breach, it may also, presumably, constitute a waiver of his reliance on the 'no-waiver' clause.[29]

A waiver extends only to the particular breach or breaches which the landlord has knowledge of at the time of the act of waiver. There cannot be a general waiver. If a landlord knows that the tenant has sublet in breach of the lease, by subsequently accepting rent the landlord forgoes the right to forfeit for that breach. If in addition, there is a second breach unknown to the landlord, such as



the tenant or the subtenant using the premises for an illegal purpose contrary to the terms of the lease, the acceptance of rent will not preclude the landlord's suing for possession in respect of that second breach — although he must not accept any rent once he learns of the second breach. Similarly, the waiver of the subletting does not operate as a waiver of all subsequent sublettings.[30]

The landlord's act therefore waives past, but not future, breaches. Here, the distinction between continuing and once-for-all breaches is material. A breach may be isolated, as where the tenant fails to pay rent in respect of one period within the stipulated number of days, or it may be continuing. Examples of continuing breaches are the tenant's using the premises for a forbidden purpose or failing to keep the premises in repair. Subletting is not a continuing breach. In cases of continuing breach, the lease is broken (and the power of forfeiture triggered) with every day and every moment that the forbidden use, failure to repair, or whatever goes on. A veil is drawn over past events by the waiver, so once-for-all breaches become spent, but continuing breaches incur the risk of forfeiture in respect of their extension beyond the act of waiver.

It follows that a landlord who discovers a continuing breach and does not object to it may still forfeit the lease by later refusing to accept rent and warning the tenant that, unless the breach is remedied, he will seek possession. To protect the tenant from capricious action by the landlord, a waiver of a continuing breach will operate for a limited time at least. A landlord cannot accept rent with knowledge of the breach, then immediately start forfeiture proceedings on the basis that the breach has continued for an instant after the waiver. The waiver operates for the period during which the landlord knows the breach is likely to continue — in most cases that will be for a reasonable time after the tenant was warned to desist.[31]

The extent to which a waiver lasts depends on the circumstances, particularly on the nature of the breach. This is shown by *Chinachem Investment Co Ltd v Chung Wah Weaving and Dyeing Factory Ltd* (1978). Chinachem let commercial premises to Chung Wah for three years, subject to a covenant binding Chung Wah not to use certain spaces except to park, load and unload vehicles. Chung Wah started to install machines in the spaces, informed Chinachem's representative of this and even consulted him about a chimney and tank to help service the machines. The machines were installed and were obvious. Chinachem continued to accept rent. Later, Chinachem sued for breach of covenant. Chung Wah successfully pleaded waiver. The waiver was held to operate up to the end of the tenancy, well beyond the time of acceptance of rent.

The breach in the *Chinachem* case was clearly a continuing one, yet the waiver was held to operate not just for a reasonable time into the future but right to the end of the lease. This has been explained on the basis that there is an exception to the rule that there can be no waiver of a continuing breach where the breach is of such magnitude that the act must be regarded as a waiver once and for all.[32] A better explanation is that the rule is that a continuing breach may be waived for the period during which the landlord knows the breach will continue; and in appropriate circumstances where the landlord knows that the breach cannot reasonably be remedied before the expiry of the lease, the waiver will operate so as to prevent the landlord suing successfully before the end of the lease. The

*Chinachem* case is an example, although an extreme one because of the type and extent of the breach, of the general rule. Another way of putting this is to say that the landlord has waived not just the breach but the whole covenant.

Apart from the extent and obviousness of the breach, another special feature of *Chinachem* was the landlord's encouragement of the tenant's acts. In the normal case of waiver, the acceptance of rent or whatever by the landlord suggests that the lease is continuing. Chinachem's representative did more than that: his conduct suggested that the landlord not just acquiesced in, but welcomed, the breach. In cases like this, waiver spills over into estoppel.

## *Estoppel*

This is known by other names as well (acquiescence, ratification, approbation) but the notion is much the same whatever the name: where one person unambiguously represents to another by words or acts that a certain fact is true, intending that the other will act on the basis that that fact is true, and the other, induced by the representation and in reliance on it, does so act to his detriment, the person cannot later deny the truth of the fact represented. As a result of his conduct, he is estopped from denying the fact represented, even though the fact may be untrue.

In the context of an action for forfeiture, the representator will usually be the landlord whose conduct has misled the tenant into thinking that he approves a breach of covenant. The landlord must have intended that the tenant should believe this (in practice this is not as difficult to establish as it sounds, since intention is judged according to what a reasonable man would understand the other party's conduct to mean) and the tenant must actually believe it. The tenant must, as a result, alter his position to his detriment; the best example of this would be the tenant spending money as a result of the representation.

Suppose that a tenant wishes to alter the premises, but his lease contains a covenant forbidding alterations. The tenant approaches the landlord for permission to alter the premises and the landlord grants it. The tenant then spends tens of thousands of dollars on the work. Later, the landlord, looking for an excuse to retake possession, seizes on the alterations as a breach of covenant giving rise to forfeiture. The landlord would be estopped from presenting evidence contradicting his earlier approval of the alterations. It would be the same even if the landlord's subsequent disapproval were genuine because, perhaps, he disliked the result. He would be held to his earlier approval.

Estoppel is really a rule of evidence by which the court refuses to listen to some of a party's evidence (even true evidence) because of that party's earlier conduct. It is based on equitable ideas and, although the classical approach has been that five elements (representation, intention, inducement, reliance, detriment) must be shown, more recently the courts have found estoppel even where one or more element is missing or doubtful, so long as equity demands it.

Estoppel has something in common with waiver. As we have seen, a waiver requires a representation by the landlord's conduct that the lease continues despite a past breach of covenant and therefore that breach will not be relied upon in forfeiture proceedings. The element of intention (objectively assessed) will also usually be present. To establish waiver, there is, however, no need for the party



to have been induced to act to his detriment in reliance on the representation. As a result of these additional requirements, estoppel is a more potent defence. Unlike waiver, it will always prevent a landlord relying on a continuing breach of covenant. The correct explanation of the *Chinachem* decision (above) may indeed be that the landlord was estopped from adducing evidence of the breach because his agent had encouraged the tenant to install the machines in the spaces in breach of covenant. The elements of inducement, reliance and detriment were accordingly present.

Estoppel would assist the tenant where he has repeatedly broken a covenant and the landlord has tolerated those breaches. For instance, if the tenant persistently pays rent after the due date and the landlord does not object, an estoppel may arise from the landlord's conduct to prevent him from forfeiting solely for one further late payment: he should first give the tenant notice that late payment will not be acceptable in the future.

## *Effect of forfeiture*

The consequences of a forfeiture is that the lease ends from the date that the landlord initiates proceedings for repossession (or actually re-enters the premises); this is of course subject to the court's power to grant relief against forfeiture. The landlord may obtain damages (mesne profits) for the tenant's occupation during the period between termination and delivery of possession.

Until the court makes its decision as to whether there has been a breach by the tenant giving rise to forfeiture (and if there has been a breach, whether to grant relief) and until the tenant complies or not with any conditions which the court imposes, there is uncertainty as to whether the lease has ended or not. During this period the lease hangs in suspense or limbo, enduring a shadowy existence. The lease has been terminated by the landlord's exercise of his power of forfeiture, which usually occurs upon service of the writ seeking possession, but is potentially to be restored by the order of the court. If relief is granted and the terms of that grant are satisfied, the effect is that the lease is re-established and continues as if there has been no forfeiture. But if there is no relief or the tenant fails or chooses not to comply with the terms of relief, the effect is that the forfeiture relates back to the time of the exercise of the power.[33]

This uncertainty is somewhat unsatisfactory. During this shadow period, one cannot say for sure whether the lease is dead or alive. It seems that as far as the landlord is concerned, the lease is ended. In consequence, after forfeiting the lease by suing for possession the landlord may not validly perform an act which is dependent upon continuation of the lease, such as distraining for rent or serving notice to quit.[34] Yet, as far as the tenant is concerned, the lease survives.

## *Future of forfeiture*

It has been well observed by the Law Commission in England that the law of forfeiture is complex, lacks coherence and can lead to injustice.[35] The complexity arises from the interaction of the common law of contract, equitable principles and statutory rules. Basic contract law favours the landlord, who usually writes

the contract and does so in a way which enables forfeiture of the lease for the slightest breach. Equity however intervenes on the side of the tenant with waiver and estoppel and the power to relieve against forfeiture. These have been overlaid by statutory intervention regulating the exercise of the landlord's power to forfeit and the court's power to grant relief. The statutory reforms have been specific and limited, however. The scope for exploitation of the law and procedure by calculating landlords and manipulative tenants still remains. The whole area of forfeiture requires a thorough overhaul to simplify, clarify and modernise it.

The root of the difficulty with forfeiture is that the termination of the tenancy is a unilateral act of the landlord. Prior to that act there need not be any discussion or even contact between the parties except to the extent the landlord is required to give written notice of the breach and of intention to forfeit the lease if the breach is not remedied (and in cases of non-payment of rent, not even that is required). The notice need not be the precursor of attempts to negotiate a solution. Termination may be a response which is out of proportion to the tenant's breach or its consequences, and may even be groundless.

Proposals for change in England are aimed at reducing technicalities and increasing transparency in the forfeiture process, building on the reforms of civil procedure which took place there at the beginning of the century. Under the proposals, a breach of covenant or condition by the tenant becomes 'tenant default'. If the landlord wishes to terminate the tenancy because of the default, a notice must be served on the tenant within a certain period of the default, detailing the breach and any remedial action the landlord requires the tenant to take and by what date. The purpose of the notice is to encourage both remedy of the default and negotiation between the parties. If that fails, the tenancy continues but the landlord may make a termination claim in court. Once satisfied that default has occurred, the court has a range of orders available. One is a termination order by which the tenancy and any interests deriving from it will end on a specified date. Other options are: a remedial order setting out what the tenant must do to put right the default and staying the landlord's claim for a period; an order for sale of the tenancy (appropriate for long leaseholds with substantial time still to run on the term); a transfer order under which the tenancy is transferred to a third party; a new tenancy order, granting the tenant a fresh tenancy of all or part of the demised premises; and a joint tenancy adjustment order, appropriate where there is more than one tenant and not all of them wish to contest the landlord's claim. Waiver would be abolished.

These proposals have much to commend them. They would give the law flexibility. They would eliminate the 'shadow period' during which the lease is in suspense and it is uncertain whether the tenancy has been ended or not. They would ameliorate the injustice arising from forfeiture for minor or inconsequential breaches of the agreement. They would also remove the uncertainties surrounding waiver. However, there is no indication that the Law Reform Commission in Hong Kong is interested in a similar inquiry into the law of forfeiture in this jurisdiction.



## Repudiation and Acceptance

For a long time it was thought that the ordinary principles of repudiatory breach did not apply to leases. However, the better view, which is now firmly accepted in Hong Kong, is that a tenant's repudiation (or renunciation) of the lease during its term may be accepted by the landlord. The effect of such an acceptance is that the lease ends immediately and the landlord loses the right to sue for rent but may sue for damages instead.[36]

The recognition of this method of termination was realistic. Under the traditional approach, a landlord who was faced with a tenant determined to abandon the premises either accepted the situation (in which case there would probably be a surrender of the tenancy) or stoically refused to compromise and insisted on the continued payment of rent. Often, for fear that compromise might be construed as consent to abandonment, the landlord would refuse to accept back the keys or to try to re-let the premises. The traditional view was based on the idea that the only remedies could be property law remedies (essentially an action for arrears of rent), so the lease had to be seen to continue. This meant the landlord was entitled to all the rent or to nothing. This view was reasserted by the Court of Appeal in England in 1972, and even in 2007 that court was not prepared to accept that the principle no longer applied, although the attitude has recently been more receptive.[37]

However, the Supreme Court of Canada came to a different conclusion. In *Highway Properties Ltd v Kelly, Douglas & Co Ltd* (1971) it held that a landlord who had elected to treat a lease as terminated by repudiation was not prevented from seeking damages for the breach. This has been followed in Hong Kong decisions.[38] Therefore, a 'halfway-house' solution is available: the landlord can make it clear that he does not approve of the tenant's abandonment of the premises and failure to pay rent, accept the breach as a repudiation of the tenancy agreement and attempt to find a substitute tenant. The attempt to re-let is not a sign of weakness or consent to the tenant's acts; it is merely a discharge of the landlord's obligation to mitigate his loss. The landlord cannot sue for arrears of rent, since the lease is dead, but he is entitled to damages which will usually be the difference between the old rent paid by the tenant and the new rent (if lower) paid by the substitute. The landlord is now able to accommodate the tenant's wishes without prejudicing his own rights.

Difficulty lies not in the applicability of repudiation but in identifying an act of repudiation. Not all breaches of contract amount to a repudiation. The question is whether the tenant has demonstrated unwillingness to continue to be bound by the lease. For example, failure to pay one instalment of rent, if not accompanied by a quitting of the premises, would not normally be sufficiently serious to constitute repudiation. In one case, a failure to pay twice was held not to be repudiatory although it was in the context of 24 previous punctual payments, no abandonment of the premises, no breach of other covenants and the outstanding rent being covered by a deposit.[39] The unilateral return of the keys to the property and vacation of the premises by the tenant, if not justified by the landlord's conduct, would be repudiatory. So would persistent late payment of rent and other charges, followed by unjustified non-payment and conduct such as attempts to delay the

landlord's action for rent and failure to offer a realistic portion of the arrears, which suggests that the tenant was unable or unwilling to perform his obligations under the lease.[40]

Similarly, a really serious failure to carry out repairing obligations might be repudiatory. If the obligations were those of the landlord, this would entitle the tenant to terminate the lease. So would a grievous derogation from grant, such as failure to hand over possession of the premises at the beginning of the term, or prolonged disturbance to quiet enjoyment.[41]

The fact that the breach gives rise to forfeiture carries little weight in deciding whether it is repudiatory. In most tenancy agreements, all breaches, no matter how trivial, give rise to forfeiture. Even a term in the lease stipulating that failure to pay rent (or any other isolated breach) shall be deemed a repudiation does not necessarily make it so. The breach (or breaches) and associated conduct must be sufficiently grave to indicate the tenant's intention to renounce his obligations or to prove that he is unable to perform a covenant which goes to the root of the tenancy agreement.[42]

The relationship between repudiation and forfeiture is still being worked out by the courts. It seems that the landlord may treat as repudiatory any conduct by the tenant which is a breach that has given rise to forfeiture if it is sufficiently grave to be repudiatory. So, the landlord may both forfeit the lease and sue for damages arising from the repudiation. However, as we have seen, where there is a forfeiture the tenant may apply for relief if he wishes to continue in possession; there is a potential conflict between this power of the court to restore the lease and the doctrine of repudiation. This is further complicated by the law that, in actions for non-payment of rent, relief is automatic (on the first occasion) and so need not be applied for.[43]

The relationship between repudiation and surrender is less complicated. A repudiation is unilateral (although it becomes bilateral once accepted), whereas surrender, as we shall see, is consensual. However, whether a particular set of circumstances amounts to a repudiation or surrender is a matter of interpretation.[44]

## Further Reading

Hayes, *Landlord and Tenant, Hong Kong Legal Practice Manual* (Longman, 1992) ch 6

Megarry and Wade, *The Law of Real Property* (Sweet & Maxwell, 8th edn, 2012) paras 18-004 to 18-082 and 18-106 to 18-108

Nield, *Hong Kong Land Law* (Longman, 2nd edn, 1997) ch 11, para 11.6

Merry, *Domestic Tenancies* (Butterworths, 1997) ch 2

*Halsbury's Laws of Hong Kong,* Vol 36, Landlord and Tenant (LexisNexis, 2014 Reissue), **[235.429]–[235.452]**

Bright, *Landlord and Tenant Law in Context* (Hart Publishing, 2007) ch 24



### Notes

1 Landlord and Tenant (Consolidation) Ordinance (Cap 7) ss 117(3) and 126. For the distinction between a covenant and a condition, see *Bashir v Commissioner of Lands* [1960] AC 44 (PC). A provision may be both a covenant and a condition.

2 *Sun Hing Co v Brilliant Investment* [1966] HKLR 310, [1966] HKCU 31.

3 High Court Ordinance (Cap 4) s 21G; District Court Ordinance (Cap 336) s 69A.

4 *Fox v Jolly* [1916] 1 AC 1.

5 *Expert Clothing Service and Sales Ltd v Hillgate House Ltd* [1986] Ch 340, [1985] 2 All ER 998 (CA, Eng); *Bass Holdings Ltd v Morton Music Ltd* [1988] 1 Ch 493 (CA, Eng); *Savva v Houssein* [1996] 2 EGLR 65 (CA, Eng); *Akici v L R Butlin Ltd* [2006] 2 All ER 872, [2006] 1 WLR 201 (CA, Eng).

6 *Expert Clothing Service and Sales Ltd v Hillgate House Ltd* [1986] Ch 340, [1985] 2 All ER 998; *Scala House & District Property Co Ltd v Forbes* [1974] QB 575, [1973] 3 All ER 308; *Ever Score Development Ltd v Hang Heung Foods (Group) Ltd* [2015] HKCU 419 (unreported, LDPE 1146/2014, 24 February 2015); *Bass Holdings Ltd v Morton Music Ltd* [1988] 1 Ch 493, [1987] 1 All ER 389; *Rugby School (Governors) v Tannahill* [1935] 1 KB 87; compare *Glass v Kencakes Ltd* (1966) 1 QB 611.

7 *Silvester v Ostrowska* [1959] 3 All ER 642, [1959] 1 WLR 1060.

8 Lord Templeman in *Billson v Residential Apartments Ltd* [1992] 1 AC 494, [1991] 3 All ER 265.

9 *Ta Sheng Plastic Goods Co Ltd v Green Island Cement Co Ltd* [1966] HKLR 24 at 38; *Cheung So Yin-kay v Cheung Biu* [1970] HKLR 383, [1970] HKCU 33.

10 *Kung Wai-ying v The Attorney General* [1974] HKLR 429, [1974] HKCU 20.

11 District Court Ordinance (Cap 336) s 69; Lands Tribunal Ordinance (Cap 17) s 8(9). Both are preserved by section 58(14) of the Conveyancing and Property Ordinance (Cap 219).

12 *Tindixs Services Ltd v Cheng Wing Chun* [1998] 4 HKC 194 (CA) (power entirely statutory but no reasons given); *Shafford Co Ltd v Golden Marble Ltd* [2002] 2 HKC 640 (highly arguable that equitable doctrine is available in situations not covered by section 21F of the High Court Ordinance (Cap 4)). Section 69B of the District Court Ordinance (Cap 336) endows that court with power to relieve against forfeiture without action for non-payment of rent to the same extent as the High Court, which, since the statutory powers are restricted to actions, suggests that the High Court has power beyond the limits of those powers. Section 21F(7) of the High Court Ordinance (Cap 4) talks of a lessee being (barred from all relief) which implies that there is relief outside the statute.

13 Possibly also where the landlord has obtained judgment in default of the tenant defending the action: *Hong Kong Land Property Co Ltd v Sheung World Investment Ltd* [1990] 2 HKC 545.

14 *Tindixs Services Ltd v Cheng Wing Chun* [1998] 4 HKC 194 (CA). In December 2002, the minimum period was reduced from 28 to 7 days.
15 High Court Ordinance (Cap 4) s 21F(7); *Hong Kong Land Property Co Ltd v Shung World Investments Ltd* [1990] 2 HKC 545.
16 *Billson v Residential Apartments Ltd* [1992] 1 AC 494, [1991] 3 All ER 265.
17 *Mui Lai Sze v Hau Chi Fai* [2005] 2 HKC 367.
18 *Huang Pui Ying v Anani Kokuvi Akpenamawn Raymond* [2015] HKCU 1742 (unreported, CACV 165/2015, 30 July 2015); *Sin Sheung Mo v Elthaf Chaudhry Muhammed* [2015] HKCU 1711 (unreported, LDPD 1329/2015 27, July 2015); *Wong Chi Leung v Jubault Bertrand Antoine* [2015] HKCU 2937 (unreported, LDPE 861/2015, 1 December 2015); *Ramadour Industries Ltd v Bullen Christian Anthony* [2015] HKCU 3179 (unreported, LDPD 1912/2015, 21 December 2015).
19 *Super Century Investments Ltd v Advance Ltd* [2005] 1 HKC 480.
20 *Top Talent Development Ltd v Top Systems Investments Ltd* [2008] HKCU 644 (unreported, HCA 2098/2006, 20 March 2008).
21 See Lord Wilberforce in *Shiloh Spinners Ltd v Harding* [1973] AC 691, [1973] 1 All ER 90. Hong Kong cases on the exercise of the power to relieve are: *Shing Yip Co Ltd v Lai Choi Wan* [1979] HKDCLR 9, [1979] HKCU 71; *Sung Hing-chuen v Cheng Tsui* [1978] HKDCLR 67, [1977–1979] HKC 560; *Lo Shiu-chun v Ho Sau-chun* [1979] HKDCLR 17, [1979] HKCU 74; *Lai Kwok Wah v Seto* [1979] HKLR 416, [1977–1979] HKC 144; *Chan Hung Kay v Attorney General* [1981] HKLR 171.
22 District Court Ordinance (Cap 336) s 69B. See also *Billson v Residential Apartments Ltd* [1992] 1 AC 494, [1991] 3 All ER 265.
23 Conveyancing and Property Ordinance (Cap 219), s 58(4). The position of a subtenant whose landlord (the tenant) has failed to pay rent due under the head lease was examined in *Seto v Kowloon Shopping Centre Ltd* [1980] HKLR 717, [1980] HKC 725.
24 *Hongkong Bank Trustee Ltd v Chan Chi Wah* [1982] HKCU 66 (unreported, CACV 107/1982, 4 November 1982) (CA).
25 *Lam Kuen-yuen v Yu Chun* [1964] 3 HKLR 702, [1964] HKCU 86; *David Blackstone Ltd v Burnett's (West End) Ltd* [1973] 3 All ER 782, [1973] 1 WLR 1487; *Central Estates (Belgravia) v Woolgar (No 2)* [1972] 3 All ER 610, [1972] 1 WLR 1048.
26 *Tse Luk Mui v Tung Yuen On Kee* [1952] 36 HKLR 407, [1952] HKCU 49; *Chung Pak Sun v Ng Sek* [1964] 1 HKLR 301 at 305.
27 *Expert Clothing Service and Sales Ltd v Hillgate House Ltd* [1986] Ch 340, [1985] 2 All ER 998.
28 *Tam Man v Tin Kwai Yin* [1949] 33 HKLR 296, [1949] HKCU 31; *Oak Property Co Ltd v Chapman* [1947] KB 886; *Carter v Green* [1950] 2 KB 76; *Chan Sai Man v Ho* [1952] 36 HKLR 166, [1952] HKCU 14; *Great Mace Trading Co Ltd v Liu Ying Wah* [1987] 1 HKC 167. This is now of historical interest only following the expiry of Pts I and II of the Landlord & Tenant (Consolidation) Ordinance (Cap 7).
29 *International Trademart Co Ltd v Club Regency Ltd* [2008] HKCU 1161 (unreported, HCA 1243/2008, 25 July 2008). However, see *Shing Yip Co Ltd v Lai Choi Wan* [1979] HKDCLR 9, [1979] HKCU 71. In *Lui Wai Lim v Lee Yin Shing* [2009] HKCU 739 (unreported, DCCJ 4247/2007, 21 May 2009) a clause stating that acceptance of rent should not be deemed waiver of the landlord's right to proceed was not sufficient to cover waiver by demanding rent. In *Kwok Hon Shing v Happy Team (China) Ltd* [2016] 2 HKC 482 this text was referred to with approval.



30 Originally the law was that it did, the covenant being regarded as entire, but this was changed by s 2 of the Law of Property Amendment Ordinance which was replaced by the Conveyancing and Property Ordinance (Cap 219) s 29. The old law was known as 'the rule in *Dumpor*'s case', on which see *The Wing On Co v The Chung Yuen Hotel Co Ltd* [1926] 21 HKLR 8, [1911–1925] HKC 342 and *Tan Hock Keng v Yeung Tat Chiu* (unreported, LDLA 981/1983, 13 February 1984) (Lands Trib). See also *Real Honest Investment Ltd v Attorney General* [1997] 2 HKC 182.
31 *Hongkong Bank Trustee Ltd v Chan Chi Wah* [1982] HKCU 66 (unreported, CACV 107/1982, 4 November 1982) (CA); and *Segal Securities v Thoseby* (1963) 1 QB 887, [1963] 1 All ER 500.
32 By Hooper DJ in *Shing Yip Co Ltd v Lai Choi Wan* [1979] HKDCLR 9, 14, [1979] HKCU 71. Compare *Expressluck Development Ltd v Secretary for Justice* [2007] HKCU 1267 (unreported, HCMP 1432/2005, 26 July 2007).
33 *Wong Wan Leung v Secretary for Transport* [2001] 2 HKC 257; *Olivesburg Ltd v Volstead Travel Service Co Ltd* [1994] 2 HKC 507.
34 *Shui On Centre Co Ltd v BPB (HK) Ltd* [2006] HKCU 1716 (unreported, CACV 246/2006, 13 October 2006); *Far East Consortium Ltd v Full Wealthy International Ltd* [2006] HKCU 880 (unreported, HCA 2089/2005, 2 June 2006).
35 (2004) Law Com CP No 174.
36 The application of the doctrine of repudiation to leases was accepted in a number of lower court decisions and by the Court of Appeal in *Bonny Ace Ltd v Elanby Nominees Ltd* [2001] HKCU 27 (unreported, CACV 285/2000, 9 January 2001) and *Well Century Holdings Ltd v Leung Kam Yu* [2002] HKCU 986 (unreported, CACV 370/2002, 7 March 2003).
37 *Total Oil Great Britain Ltd v Thompson Garages (Biggin Hill) Ltd* [1972] 1 QB 318 at 329; *Reichman v Beveridge* [2006] EWCA Civ 1659, [2007] 1 P & CR 358; *Grange v Quinn* [2013] EWCA Civ 24.
38 *James S Lee & Co (Kowloon) Ltd v Kapok Garments Ltd* [1985] 2 HKC 383; *Chan Annie v Lau Wai Kwong* [1984] HKC 231; *Hop Woo Cheung Enterprises Ltd v Intergroup Industries Ltd* [1982] HKC 436; *Colgan Co Ltd v Ethitrade Ltd* [1983–85] CPR 87; *Silver Source Development Ltd v Time Century Ltd* [1992] 1 HKC 366; *Sichant Investments Ltd v Wong Kam Kei* (unreported, HCA 3430/1994, 19 December 1995) (SCt); *SC Chow v Chow Kit Ming* [1997] 2 HKC 96; *Sano Screen Manufacturers Ltd v J & R Bossini Trading Ltd* [2000] 3 HKC 216; compare *Jumbo Enterprises Co Ltd v Cheung Kan* [2001] 4 HKC 79.
39 *Hop Woo Cheung Enterprises Ltd v Intergroup Industries Ltd* [1982] HKC 436. See also *Jumbo Enterprises Co Ltd v Cheung Kan* [2001] 4 HKC 79.