CHAPTER 1

INTRODUCTION

"... *a barren island*"

— Lord Palmerston, Foreign Secretary, 1841

1. HISTORICAL BACKGROUND

1.1 For centuries, before Hong Kong became a British colony, there had been Chinese settlements on Hong Kong Island, quite apart from a long history of occupation of Kowloon and the New Territories. Archaeological studies indicate that a Neolithic culture existed as long ago as 3000 BC. The first enduring European presence in the region was the establishment of Macau as a Portuguese colony in 1557. The application of English common law principles to the ownership of land in Hong Kong commenced nearly three centuries later with the colonization of Hong Kong by Great Britain.[1]

1.2 During the 18th and early 19th centuries trade between China and Europe grew. Opium became an important element of that trade. Political and economic tensions increased after 1799 when China declared the opium trade illegal. These tensions led to the First Anglo-Chinese Opium War 1840-42. Hostilities were temporarily halted on 20 January 1841 by the Convention of Chuenpi. Under the Convention, Hong Kong Island was proposed to be ceded to Great Britain.

1.3 The Convention of Chuenpi was never ratified. However, under the apparent authority of the Convention, the Royal Navy landed on Hong Kong Island on 26 January 1841 and raised the British flag at Possession Point. The British Government considered that the action taken by Captain Elliot, the British plenipotentiary, purporting to claim Hong Kong as a British colony was premature. The reaction of Lord Palmerston, the Foreign Secretary was to recall Captain Elliot. Palmerston declared that Hong Kong Island was an inadequate

1 G B Endacott, *A History of Hong Kong* (2nd Edn, 1974, China: Oxford University Press), pages 2–13; see also *Hong Kong Yearbook 1986*, pages 1, 275, 277, 282. In particular, 'Stories of Our Land' (2009) is a televised documentary produced by Radio Television Hong Kong (RTHK) covering the period from 1855, featuring valuable historical land information including documents ranging from Government departments to surveyors, historians and general public records (broadcast on TVB Pearl).

settlement of British claims, doubtful of its trading potential, and not satisfied the Convention had ceded full sovereignty to Great Britain.

1.4 The Opium War ended on 29 August 1842 under the Treaty of Nanking, formally ratified by an exchange of documents in Hong Kong on 26 June 1843. On the same day, Hong Kong was proclaimed a British colony and Sir Henry Pottinger appointed the first Governor. During the Second Anglo–Chinese War (1856–58), the British Consul in Guangzhou secured from the Chinese Viceroy the perpetual lease of the Kowloon peninsula as far inland as Boundary Street together with Stonecutter's Island. The Convention of Peking in 1860 ceded outright to Great Britain the Kowloon peninsula and Stonecutter's Island.[2]

1.5 The New Territories was principally leased because of British concern over the increased activities of other European powers in the region. On 9 June 1898, by a second Convention of Peking, the area north of Boundary Street up to the Shum Chun River together with 235 islands was leased from China for 99 years from 1 July 1898. On 20 October 1898, Great Britain, by Order-in-Council provided for the British administration of the New Territories.[3]

1.6 Hong Kong Island, Kowloon and the New Territories were hence successively ceded in three stages and in different forms. Hong Kong Island was ceded outright; the initial cession of Kowloon by way of perpetual lease was soon extended to outright cession; the New Territories were ceded by way of 99-year lease.

1.7 The occupation of these areas at the date of cession varied. The principal Chinese settlements on Hong Kong Island included fishing villages at Aberdeen, Shau Kei Wan and Stanley. The remainder of the Island was largely uninhabited. The British Government did not recognize any existing ownership of land but issued new leases in terms of its own laws. There was increased but relatively limited Chinese settlement on the Kowloon peninsula south of Boundary Street. Negotiations were carried out with occupiers who claimed ownership of land south of Boundary Street. They were offered either compensation or new leases from the Government.

1.8 On the lease of the New Territories in 1898, the Government had to face a rather different problem, for large parts of the New Territories were occupied and had been farmed for centuries. The principal urban settlement, known as the Walled City, was expressly excluded from the lease and remained subject

2 G B Endacott, *A History of Hong Kong* (2nd Edn, 1974, China: Oxford University Press), chapter IV, page 19 onwards. See also James Hayes, *The Great Difference: Hong Kong's New Territories and Its People 1898-2004* (2012, Hong Kong: Hong Kong University Press).

3 Peter Wesley-Smith, *Unequal Treaty 1898–1997* (1998, Hong Kong: Oxford University Press). The constitutional position of the New Territories has been considered by the courts. The first principal occasion was in *Poon Wai-ting v Attorney General* (1925) 20 HKLR 22. The same question has been considered successively by the High Court, Court of Appeal and Privy Council in *Winfat Enterprises (HK) Co Ltd v Attorney General* [1983] HKLR 211, [1984] HKLR 32 (CA); [1988] HKLR 5, [1985] AC 733 (PC). See the case-note in Wesley Smith (1983) 13 HKLJ 405.

to Chinese sovereignty. The major form of occupation of land within the New Territories before 1898 was under common tenure. Then the principal form of ownership of agricultural land throughout China. Common tenure land was held by successive family members in perpetuity from the Emperor subject to the payment of land tax and performance of labour services. In many parts of China, particularly in the south, performance of labour services had fallen into disuse and been replaced by additional land tax.

1.9 The majority of the common tenure land remained for long periods under the same family ownership. There were three main methods of acquisition: an owner might succeed to land by inheritance; purchase land from an existing owner; or become owner by use and cultivation of unoccupied or waste land. Under Chinese law a cultivator of unoccupied or waste land could obtain a registered legal title. In common law terms, this resembled a form of possessory title. Owners of land under common tenure, apart from selling the land, could create lesser interests while retaining a superior residual interest. Common tenure was not subject to limitations on use. The rate of tax on the land was the same irrespective of use. Nor did the tax increase if buildings were erected. The actual use of the land was overwhelmingly agricultural.[4]

2. Land Grants After 1840

(a) *Hong Kong Island*

1.10 Initially, settlers took possession of unoccupied land while others purported to purchase land from existing Chinese occupiers. One of the first problems Captain Elliot had to face, even before Hong Kong formally became a British colony, was the disposal of land to settlers. On his own initiative, he authorized the sale by auction of leasehold interests in suitable land. At the same time he gave the assurance that, subject to the approval of the British Government, an opportunity would later be given for purchasers to apply to convert their leasehold interests into freehold estates. The conditions of the original leasehold land grants were announced in May 1841. Leases were to be sold at public auction to the highest bidder for the payment of an annual rent. On 12 June 1841, the first auction took place when marine, town, suburban and country lots were sold. Later, direct leasehold grants were made without auctions.

1.11 The steps Captain Elliot took at this early stage to grant land in a reasonably orderly manner and with a degree of fairness, were essential to the early development of the colony. However, they earned the displeasure of the British Government. Immediately after the Treaty of Nanking in 1843, the new Governor was instructed not to be grant leases in perpetuity or for any greater length of time than was necessary to induce tenants to erect substantial buildings. Leases

4 *Winfat Enterprises (HK) Co Ltd v Attorney General* [1983] HKLR 211. The High Court judgment deals in greater detail with common tenure than the subsequent appellate judgments. See also D M Emrys Evans, 'Aliens on British Soil: A problem of landholding in early Hong Kong' (1978) 8 HKLJ 205, which is of related historical interest.

for building land were to be for 75 years and other land for 21 years. Renewals were to be at the discretion of the Governor. A few leases were granted for 999 years in Central and Quarry Bay. No freehold estates were to be granted.[5] At this early stage the principle of leasehold land tenure was firmly established. The long term consequences were unlikely to have been fully appreciated. The leasehold principle gave the Government far reaching direct control over development. It also provided a growing source of revenue from premia for new leases and modification fees for the waiver or variation of lease user covenants.

(b) Kowloon

1.12 After the Convention of Peking in 1860, the Governor set up a Land Commission to determine the compensation payable to dispossessed Chinese land owners in Kowloon and to consider applications for Government leases by Chinese owners remaining in possession. The compensation claims were finally settled in 1864 by the payment of $29,290 to the Chinese owners. New leases including up to 999 years were granted to owners remaining in possession, at the same rent, as they had formerly paid to the Chinese authorities. New leases to other persons were only to be of sufficient length to induce them to erect substantial buildings.[6]

1.13 In 1898, the British Government instructed the Governor to cease granting 999-year leases, observing that such long grants were equivalent to freehold ownership. The new land policy required leases to be for only 75 years duration. This predictably resulted in major protests by Government lessees. The new policy was quickly modified. A compromise was reached whereby all new leases were to be for 75 years with a right of renewal for a further 75 years.[7]

(c) New Territories

1.14 When the Convention of Peking of 1898 was ratified, the Governor for the first time had to deal with the ownership of a large area of land formerly held by the Chinese owners in common tenure under Chinese law. The lease of the land known as the New Territories was for 99 years from 1 July 1898 expiring on 30 June 1997. The Hong Kong Government granted leases[8] to existing owners for those 99 years less the last 3 days.[9] Rumours spread that the British would seize all privately-owned land. The uncertainty caused some Chinese owners to sell their land to Chinese purchasers far below market value. In 1899 the Governor

5 G B Endacott, *A History of Hong Kong* (2nd Edn, 1974, China: Oxford University Press), pages 28, 29, 44, 83; J W Norton Kyshe, *The History of the Laws and Courts of Hong Kong* (1971, Hong Kong: Vetch and Lee) Volume 1, pages 7–9, 13, 14, 71, 72, 178, 268, 280, 438 and also Volume II at pages 65, 246, 390, 456, 543, 544.

6 *A History of Hong Kong*, pages 110, 111.

7 *A History of the Laws and Courts of Hong Kong*, Volume 11, pages 543, 544.

8 The Hong Kong Government leases under the 99 year lease from China were strictly sub-leases but never so described.

9 This 3 days shorter period is believed to have recognised the future uncertainty of the sovereignty of New Territories on the expiration of the lease to Government on the then far distant 30 June 1997.

was obliged to tour the New Territories to reassure land owners that land would not be confiscated and existing ownership fully recognized. Early in 1900, the Governor set up a Land Court for the New Territories to deal with disputed land claims. Indian Government surveyors were brought to Hong Kong to survey all occupied parts of the New Territories.[10] This included the responsibility to record the names of the occupiers and the purpose for which their land was being used.[11]

(d) New Territories Land Court and Block Leases

1.15 The work of the Land Court was complicated including by competing claims and long existing informal arrangements on ownership or occupation. This extended to the non-registration of various interests and indirect payment or non-payment of land tax. After enquiry, the Land Court granted new Government leases to the persons entitled, for 99 years from 1 July 1898 less the last three days.

1.16 The Land Court had an immense task to perform. The grant of new Government leases was preceded by a new survey dividing the New Territories into Demarcation Districts. A Demarcation District was in turn divided into Blocks. Each Block contained a number of properties under Chinese ownership. Instead of issuing separate deeds of lease to each owner, one lease for each Block was issued. The Block leases were in common form and included a schedule. listing the several lots in each Block and recorded against each lot the name of the owner, the use to which the lot was put at the date of the survey and the Government rent payable for a particular lot. Hence was born the Hong Kong conveyancing phenomenon of the Block lease.[12] The schedule became particularly important and the practical basis of the Government lessee's title.

1.17 At the turn of the century when the Block leases were granted, they adequately and expeditiously met the problem of identifying and recording existing ownership of land over an area much larger than the remainder of the Colony. Since Hong Kong Island and Kowloon, when ceded, were in various degrees relatively uninhabited, a problem of this kind and magnitude had not earlier arisen. After the completion of the survey and the subsequent sittings of the Land Court, rights to leases involving over 354,000 lots were granted. The title to large areas of unclaimed New Territories land remained in the name of the Crown unalienated.[13]

1.18 The Block leases, while a useful expedient which served a very real need at the time, inevitably created problems in succeeding years. These problems have

10 One consequence was the naming of some New Territories rivers after others in India, eg the Beas River and the Indus River.

11 See generally James Hayes, *The Great Difference: Hong Kong's New Territories and Its People 1898-2004* (2012, Hong Kong: Hong Kong University Press).

12 An exception to the common practice of Block leases including in the schedule the names of each owner of a separate lot occurred for land in Cheung Chau Island.

13 Peter Wesley Smith, *Unequal Treaty 1898–1997* (1998, Hong Kong: Oxford University Press), pages 92–100.

increased during the past 100 or more years as a result of the rapid development of the New Territories. One problem related to user restrictions. For a time there were conflicting views whether the permitted user under a Block lease was limited only by restrictive covenants in the lease, or whether it was further restricted by the express user, particularized in the schedule. Doubts on this issue were only removed when the Court of Appeal in *Attorney General v Melhado Investment Ltd*[14] held that the use of the land referred to in the schedule, is not a restrictive user provision but merely descriptive of the actual historical use at the time of the original survey.

1.19 The development of the New Territories also increasingly revealed the varying accuracy of the original survey on which the Block leases were based. There has never been a complete re-survey in relation to the boundaries shown in the Block leases. Initial errors tend to remain uncorrected. Efforts were made in the 1950s and 1960s to check some of these boundaries. Independent plans have also been compiled for smaller town lots but without relating them to the boundaries shown in the Demarcation District maps. Yet a further complicating factor was that for many years land transactions were often handled by the parties themselves, without legal advice or assistance. Until 1982 land transactions in the New Territories were registered at New Territories District Offices and not at Land Offices. Later the Registrar General's jurisdiction was extended to land registration in the New Territories. Under a phased program eight new Land Offices were opened in the principal towns of the New Territories, taking over the land registration task of the District Offices. These changes enabled one common system of land registration to exist for the whole of Hong Kong.

1.20 Rapid increases in land values and growing awareness by owners and other persons having interests in land have led to parties to land transactions increasingly seeking legal assistance. Old errors are now more likely to be found and corrected. Difficulties can still occur and the time is overdue for a major resurvey of the New Territories. Special legislation would be necessary to enable consequential rectification of boundaries and title. Some of these difficulties are referred to in *Man Kam-tong v Man Lin-ai*,[15] where suggestions for relating subsequent town lot plans to the original Demarcation District maps were advanced. The loss of title documents and other public records during the Second World War, in part compounded by decentralised New Territories district land registries, is another problem which can become a significant compensation factor as in *Niceboard Development Ltd v China Light & Power Co Ltd*.[16]

14 [1983] HKLR 327.
15 [1984] HKLR 181.
16 [1994] HKDCLR 69, [1995] HKDCLR 27.

3. Land Tenure

(a) Government freehold and leased land

(i) Contractual

1.21 Government land from 1841 was generally leased for periods from 75 years with rights of renewal and a lesser number for 999 years. The exception was the New Territories where grants of lease from 1 July 1898 expired 3 days before 30 June 1997.[17] The resumption of sovereignty by China on 1 July 1997 included the conveyancing challenge of dealing with expiring New Territories and some other leases in Hong Kong Island and Kowloon also expiring in 1997.[18] The Basic Law, in terms of the Joint Declaration, provided for the extension of those leases to 30 June 2047.[19] Other Government leases, in either Hong Kong Island or Kowloon, which contractually extend beyond 1997, continue to exist to their later contractual expiration date. Where Government land is not subject to a Government lease or similar grant, it is described as 'unleased' land.

1.22 Early 19th century hopes that the Government might grant freehold land to private owners were never realised. The policy to grant only leasehold interests became firmly established and has continued to the present time with one current exception. In 1847, the Government granted a freehold title to the Church of England for the erection of St John's Cathedral Church.[20] However, the fee simple

17 The lease of the New Territories from China to the United Kingdom expired on 30 June 1997.
18 After 1978, China created several economic zones, including at Shenzhen, resulting in major changes to their regulatory land provisions. These had since 1949 prohibited the private ownership of land. The 1978 reforms included the grant to private persons of land use certificates for personal use analogous to licences rather than to leases. See further Lee Chen, 'Land Registration, Property Rights and Institutional Performance in China: Progress Achieved and Challenges Ahead' (2014) 44 HKLJ 853; and Cruden, *Land Resumption Compensation in Hong Kong After 1997* in G M Erasmus, *Compensation for Expropriation, A Comparative Study* (1990, Oxford), Volume II, p 304.
19 For the extension of Government leases to private owners for the period from 1997 to 2047, see Chapter 24. On the new provisions for owners' payment of Government rent for extended durations to 2047, see Chapter 11 'Government Rent'.
20 The Government granted possession of the land to the Church in 1847 when levelling commenced. The foundation stone was laid on 11 March 1847 and the church opened for divine service on 11 March 1849. No grant of freehold or any other species of title is registered in the Land Office. Section 6(1)(a) of the Church of England Trust Ordinance (Cap 1014) expressly vests the property "in the trustees in fee simple." The first enactment affecting the Church was Ordinance No 2 of 1847 which was concerned with the collection of subscriptions for a new church and the appointment of trustees for its building and management. Section 2 merely provided that upon the appointment of trustees the land belonging to the church "… shall thereupon be conveyed to the said trustees." The Ordinance is silent upon whether there had been any prior conveyance of the land to the church. The statutory history suggests that no such conveyance was ever executed. Section 1 of Ordinance No 3 of 1850 declared that on the enactment of that Ordinance "the fee in the said church … shall be vested in the existing trustees." Section 5 of Ordinance No 11 of 1892 transferred and vested the land in the Church body and refers to a plan of the property deposited in the Land

grant was expressly limited to the land being used for the purpose of a church, in accordance with the rites of the Church of England.[21] The only existing freehold land in Hong Kong is therefore subject to a condition which, if not performed, may result in the land reverting to the Government. An incidental consequence of St John's Cathedral Church being held in fee simple is that strictly it is not liable to be assessed for rates. This follows from the fact that the Rating Ordinance (Cap 116) definition of rateable 'tenement' as the unit of assessment requires the land to be held on Government lease or some lesser interest.[22] Under section 36(d), tenements built for the purpose of public worship and used wholly or mainly for such purpose are exempt from assessment. However, the Commissioner has assessed for rates that part of the freehold land on which church halls are erected. An assessment on this basis was upheld by the Lands Tribunal in *The Trustees of the Church of England v Commissioner of Rating and Valuation* but the freehold status of the land was not raised.[23] The decision would appear to be unsound, for if tenements do not include freehold land, the church halls would not be assessable. Any issue of public worship exemption under section 36, because of the freehold nature of the land, would not arise.

Office on 29 April 1892. It appears that originally the trustees and subsequently the Church body have been content to rely upon the statutory vesting of the property without any separate formal grant of freehold title being deposited in the Land Office. The absence of any separate registered title was probably one reason which led to disputes between the Church and the Government over public access over the land, including Battery Path, between the Church property and the Murray Parade Ground on which the adjacent car park building and former Hilton Hotel were later erected. The absence of any Government grant of freehold title is alluded to in G B Endacott & D E She, *The Diocese of Victoria, Hong Kong 1849–1949* at page 60, where referring to a request by the trustees in 1879 for the Government to define their responsibilities more precisely, it is recorded that: "It was also stated by the Trustees that there appeared to be no actual conveyance of the land to them, neither was there any map or plans showing the boundaries of the compound." A plan of the Church and precincts signed by the Director of Public Works was deposited in the Land Office on 29 August 1892 and is referred to in section 5 of the St John's Cathedral Church Ordinance 1892. The Church of England Trust Ordinance No 2 of 1930 for the first time expressly referred to the title being held in fee simple and the vesting provisions of that section refer to the plan of the Church and the precincts thereof deposited in the Land Office on 29 April 1892. Subsequently, a new plan dated 16 August 1955 was deposited in the Land Office. Although the 1930 Ordinance was the first to expressly use the full freehold description 'in fee simple', the 1850 Ordinance, which vested the land in the trustees for the first time, uses the word 'fee' simpliciter. Where that term is used alone it is sufficient to describe a fee simple or freehold estate: *Metcalfe's Case* (1614) 11 Rep 39a. The title vested in the trustees from the beginning was therefore freehold.

21 Section 6(1)(a) of the Church of England Trust Ordinance (Cap 1014) provides that upon the church ceasing to be used for those religious purposes, the Church and the precincts "shall revert to and become the absolute property of the Crown unless the same be sold or otherwise disposed of with the consent in writing of the Governor".

22 *Yiu Lian Machinery Repairing Works Ltd v Commissioner of Rating and Valuation* [1982] HKDCLR 32.

23 [1977] HKLTLR 232.

1.23 The early disappointment that freehold land would not be granted was reinforced by dissatisfaction with the relatively short 75 year leases. Land tenure was a source of constant dispute until at least 1848 when to meet criticisms, the Governor was authorized to extend the 75-year term of existing leases to 999 years. These grants were mainly limited to land in the Central District, Quarry Bay and a few lots in Kowloon fronting the harbour. Although falling short of freehold title they were equivalent to leases in perpetuity. Another major change at the same time was from rents on grant being fixed at auction being replaced by granting leases at a nominal ground rent subject to the payment of a premium. The payment by the successful Government lessee of a capital sum by way of premium has become an established feature of the grant of new leases or the modification of covenants in existing leases. The change resulted in a new and substantial source of capital income for the Government, by way of premia from the grant or modification of Government leases.

1.24 In 1898, the grant of 999 year leases was halted when the British Government instructed the Governor henceforth only to grant new leases for 75 years or in some cases up to a maximum of 99 years. After observing that the grant of 999 year leases was subject to serious objections, the Colonial Secretary, no doubt conscious of the probability of increased land values, was anxious that the Government should share in any increase, declared:[24]

> 2. Leases for 999 years are practically equivalent to a freehold tenure and the grant of such lease deprives the Government of all control over the land of the Colony and of all advantage of any future enhanced value of the land.
>
> 3. Subject therefore to any observations in view of special local considerations which you may have to offer, I consider that future leases should be for periods not exceeding seventy-five, or at the outside ninety-nine years, with suitable provisions to meet the objection raised by the Land Commission of 1886–7, viz that the Crown should not at the expiration of the lease confiscate the whole value of tenant's improvements.

1.25 This change in land policy generated even more criticism than the complaints which, 50 years earlier, had resulted in a change from 75 years to 999 years. The critics this time were less successful. The only change was a new instruction to the Governor to grant a right of renewal for 75 years, in addition to an original 75 year term.[25] The contractual duration of a Government lease may be extended or renewed by agreement or by statute.[26]

24 J W Norton Kyshe, *The History of the Laws and Courts of Hong Kong* (1971, Hong Kong: Vetch and Lee), Volume 11, pages 543, 544.

25 See paragraph 1.24 above.

26 Other enactments for special purposes include the Crown Lease (Pok Fu Lam) Ordinance (Cap 118) following loss of title documents for a Government lease granted on 1 January 1893; also grants of land under the Government Home Ownership Scheme governed by the Housing Ordinance (Cap 283). Owners liable to payment of a premium on resale may appeal to the Lands Tribunal against its calculation by the Director of Housing. See Chapter 12 'Home Ownership Scheme'.

1.26 The Lands Resumption Ordinance (Cap 124) defines a Government lessee as the 'owner' despite only having a lesser leasehold estate or interest in land.[27] The wider definition has led to the practice of leases subsequently granted by the Government lessees, although strictly sub-lessees, being described as leases. Only any subsequent lower third tier leasehold grants are in practice described as sub-leases.

(ii) 1973: Statutory renewal of 75 years leases

1.27 In 1973 a large number of 75 year leases with rights of renewal for a further 75 years were about to expire. The Government avoided the conveyancing exercise of granting separate contractual renewals by simply renewing by statute those leases from 1974 variously to 2049 or 2134. The increase in land values would have substantially affected the renewed rent and any premiums otherwise payable for the grant of a new lease. To meet this problem the Government Leases Ordinance (Cap 40) was enacted in 1973, under which all leases, except for some in the New Territories, were thereafter renewed without payment of premia, at a new Government rent based on 3% of the rateable value.[28] The Ordinance made similar provision for 99 year leases with a right of renewal for a further 99 years.[29]

(iii) 1997: Resumption of sovereignty by China and Government lease durations

1.28 The second occasion when expiring Government leases were continued by statute was on the approach of the 1997 resumption of sovereignty by China. New Territories leases were never nor could be granted for periods longer than 99 years from 1 July 1898. In practice the maximum duration was for those 99 years less the last three days.[30]

27 The Government lessee solely owns the buildings or other structures on the land and pays ground rent to the Government.

28 This was the first use of the 3% rateable value formula later followed in 1988 for New Territories Leases (Extension) Ordinance (Cap 152) and in 1997 for the Government Rent (Assessment and Collection) Ordinance (Cap 515). The post-1997 position was recognised and provided for in the Joint Declaration and subsequently in the Basic Law effective from 1 July 1997. See further Chapters 4 and 24.

29 An earlier problem in relation to title arose for new grants of land already under Government leases. Over the years some had become subject to multi-ownership. Negotiations with a large number of lessees were often difficult and protracted. The problems were reduced in 1970 by the enactment of the Government Rent and Premium (Apportionment) Ordinance (Cap 125). When agreement is not reached the Government may grant a new lease for the land to The Financial Secretary Incorporated with statutory powers to deal with any outstanding matters. The grantee is entitled to request a new Government lease but many are content to rely on the new grant. Many new grants are for land assembled by Government resumptions for redevelopment with detailed building and other requirements specified in detail. Only on completion is a new lease granted.

30 Some New Territories grants were for shorter durations of 75 years with a right of renewal for 24 years less three days. See *Hong Kong Yearbook 1963*, chapter 10, pages 173-175. It may be inferred the reason for the 'last three days' provision was to give the time for the United Kingdom to facilitate the resumption of the land back to China.

1.29 On the resumption of sovereignty by China the duration of Government leases fell into two broad categories. First, where existing contractual durations continued beyond 30 June 1997 they continued unchanged as to duration, Government rent and other covenants until the expiration of their contractual duration. Therefore these were unaffected by the resumption of sovereignty.[31] Secondly, where New Territories and a few other existing leases elsewhere, generally expired 3 days before or on 30 June 1997. They were continued by statutory renewals or extensions to 30 June 2047. For this second category the other difference was that the new Government rent also required to be fixed by statute.[32]

1.30 The Joint Declaration, Annex III provided that all New Territories and such other Government leases which expired before 30 June 1997 and did not contain a right of renewal were to be extended for 50 years up to 30 June 2047 without the payment of any additional premium. The annual rent for the period of extension was based on a formula similar to that which already existed under the now Government Leases Ordinance (Cap 40).[33]

1.31 On 4 April 1990 the Basic Law, primarily based on the Joint Declaration, adopted at the Third Session of the Seventh National People's Congress of the People's Republic of China was promulgated to come into effect on 1 July 1997.[34] Article 6 recognises the right of private ownership of property while under Article 7 the Government of the Hong Kong Special Administrative Region (HKSAR) is responsible for the lease or grant of State land. Article 8 provides that the common law, law of equity, customary law and statutory law previously in force shall, except for any contravention of the Basic Law, be maintained. Article 105 provides that the HKSAR shall, in accordance with the law, protect the right of individuals and legal persons to compensation for lawful deprivation of their property. Articles 120, 121, 122 and 123 incorporate in relation to land, the provisions of Annex III of the Joint Declaration.[35] Under a series of ordinances the duration of relevant Government leases expiring by 30 June 1997 were statutorily

31 This first category included 999 year leases expiring from 2842 to 2897; 99 year leases with 99 year renewals to 2097 to 2183; 75 year leases with 75 year renewals to 2049 to 2134. The second category included 1898 New Territories leases for 99 years less 3 days extended to 30 June 2047 and a small number granted from 27 May 1985 to 30 June 2047, for the latter see Chapter 24 and particularly the Joint Declaration.

32 See Government Rent (Assessment and Collection) Ordinance (Cap 515).

33 Now the Government Leases Ordinance (Cap 40). See paragraph 1.27, footnote 28.

34 The Basic Law generally adopted the land tenure provisions of the Joint Declaration: see further Chapter 24 'Constitutional Law'. The HKSAR Government delegated to the Chief Executive, pursuant to section 32 of the Hong Kong Reunification Ordinance (Cap 2601), on behalf of the Government of the HKSAR to lease or grant land and natural resources within the HKSAR which are Chinese state property.

35 The measure of compensation under Article 105 is 'real value'. The relationship of this constitutional provision to domestic legislation, where generally the measure of compensation for land is 'open market value', is elaborated further in Chapter 24.

extended or renewed to 30 June 2047. The option of creating new leases from 1 July 1997 was not adopted. The procedure was largely based on the 1973 statutory renewable intervention.[36]

1.32 In those instances leases on the contractual expiry date were statutorily continued. The decision to achieve continuity by statutory renewal of existing contractual leases was significant. They were not replaced by statutory leases. One important consequence was that any existing periods of adverse possession by a squatter against the Government lessee, did not cease nor was interrupted.[37]

1.33 Historical Government leases for longer periods beyond 2047 including 999 year leases, so contractually beyond 2047 continue to their future expiration dates. They are unaffected by the resumption of sovereignty 2047 provisions.

1.34 As the approach of 2047 is becoming closer public concern and speculation has increased on post-2047 tenure. The Government has yet to make any definitive statements. However, during September 2016 it made an important tenure announcement in respect of two special purposes leases. The lease to the Hong Kong Jockey Club for Shatin racecourse was extended for 50 years to 2066. Ten hectares of the lease to the Hong Kong Airport Authority at the Chek Lap Kok airport has also been extended for 50 years to 2066 for a retail, dining and entertainment destination.[38] This positive action may be indicative of a degree of optimism, for future further extensions or grants for existing leases expiring in 2047.

(b) Other grants of Government leases

1.35 There are a number of Ordinances enacted for the grant of Government leases in, particular specified limited circumstances. These include the Government Lease (Pok Fu Lam) Ordinance (Cap 118) enacted following loss of title documents for a Government lease granted on 1 January 1893. There are also Government leases granted under the Government Home Ownership Scheme governed by the Housing Ordinance (Cap 283). These are purchased on beneficial terms mainly including land value. In the event of a purchaser reselling, there is liability to pay a premium based on the then market value of the land.[39]

36 See Government Leases Ordinance (Cap 40); New Territories Leases (Extension) Ordinance (Cap 150); New Territories (Renewable Government Leases) Ordinance (Cap 152). See also New Territories Ordinance (Cap 97).

37 *Chung Ping-kwan v Lam Island Development Co Ltd* [1996] 2 HKLRD 315 (PC) and Chapter 6 (below).

38 The 10 hectares is adjacent to the recently resumed land for the customs and immigration control facility for the Hong Kong-Zhuhai-Macau Highway Bridge over the Pearl River estuary. See further Chapter 20 for the Roads (Works, Use and Compensation) Ordinance (Cap 370) and also Chapter 4 for the Lands Resumption Ordinance, as well as Chapter 24 'Constitutional Law'. For another major infrastructure project ie the Guangzhou-Shenzhen-Hong Kong Express Rail Link (XRL), see Chapter 16 'Railways'.

39 Under the Home Ownership Scheme owners liable to payment of a premium on resale may appeal to the Lands Tribunal against its calculation by the Director of Housing. See Chapter 12 'Home Ownership Scheme'.

1.36 During the grant of Government Block leases for the New Territories, a different procedure was adopted for most of the land of Cheung Chau Island. This occurred in 1905 when a Government lease was granted direct to the Tong which thereunder granted sub-leases to persons who had immediately before 1 July 1898 been owners of separate lots. A relatively low ground rent payable by the former owners was to cover Tong administration expenses and incidental costs. The system continued for nearly a century until controversy arose when Government commenced resumption of some of the lots. In *Suen Sun-yau v Director of Buildings and Lands*[40] the Tong abandoned its compensation claim which was wholly paid to the sub-tenants. Before the Lands Tribunal the Government reduced valuation of the interest of the Tong was from $1,406,138.50 to $1. The Tribunal observed that although the Tong was the Government lessee, in practice, it was little more than the ground rent collection agent.

1.37 Increasing dissatisfaction with the complex leasehold position resulted in statutory intervention, to deal with the respective compensation rights of the Tong and the sub-lessees. In 1995 the Tribunal's holdings became the basis of the Government Lease (Cheung Chau) Ordinance (Cap 488) which terminated the Block Government lease to the Tong. Thereafter all sub-lessees were deemed to hold their land directly from the Government as Government lessees. The Tong was provided with a statutory right to compensation which was settled by agreement.

1.38 In *Wong Wan Leung v Secretary for Transport*,[41] the Tong claimed compensation for some of the earlier sub-leased land. The claim was brought on the ground that before the statutory termination, it had commenced forfeiture proceedings against a particular sub-lessee for breach of a maintenance covenant. The Court of Final Appeal adopted the Lands Tribunal analysis of historical Cheung Chau land tenure set out in *Suen Sun-yau v Director of Buildings and Lands*. The Court in upholding the appeal[42] rejected the Government submission that the Ordinance had resolved long standing disputes between the Tong and sub-lessees. It was held that the Ordinance termination provisions had also preserved some of their respective rights.[43] Any delay until conflicts were resolved would not make the Ordinance unworkable. The rights were suspended but remained indeterminate until a High Court judgment. If the forfeiture claim were successful, then under the doctrine of relation back, the Tong would be entitled to compensation. Otherwise the sub-lessee would be entitled to the compensation.[44]

40 [1991] HKDCLR 33.

41 (2001) 4 HKCFAR 69, [2001] 2 HKC 257.

42 Reversing the Court of Appeal decision of *Wong Wan Leung v Secretary for Transport* [2000] 1 HKLRD 562.

43 Section 4(1) of the Block (Crown Lease) Cheung Chau Ordinance (Cap 488) preserves sub-lessees rights and section 6(1) those of the Tong.

44 *Wong Wan Leung & Ors as managers of Wong Wai Tsak Tong v Fu Sau Pan* [2000] HKCU 405 (CACV 107/2000, 13 June 2000, unreported) concerned the Tong's application in the District Court to strike out the sub-lessee's defence to a claim for possession based on non-payment of rent. The application was mainly sought to meet a Government request that such a judgment was required before it would consider an application for compensation by the Tong. The Court of Appeal in dismissing the

Chapter 7

Compulsory Sale of Land for Private Redevelopment

1. General

7.1 The enactment of the Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545) in 1999 effected a radical change to Hong Kong compulsory land acquisition law. For the first time statutory machinery was introduced for private owners of a majority of shares in a multi-owned building to compulsorily purchase the remaining privately owned shares for the purpose of redevelopment.[1] The majority owners were initially required to hold not less than 90% of the undivided shares of the property. On 1 April 2010 this was reduced to 80%.[2] The reduction

1 The Ordinance was enacted on 7 April 1998. The purpose of the Ordinance is to empower a majority of the owners to compulsorily purchase the shares of the minority owners. Article 6 of the Basic Law protects the right of ownership of private property in accordance with law and Article 105 requires compensation to be paid to persons lawfully deprived of their property. The title appears to be inappropriate for the purpose of the Ordinance is to provide majority owners with the compulsory power to purchase the shares of minority owners. See 'Slow justice system costs minority owner millions', *South China Morning Post* (25 May 2011); Betty Cheung, 'Redevelopment Rules Redefined', (1998) Hong Kong Lawyer, September, page 14. The Ordinance to an extent balanced the novel power of private redevelopment with some protection for minority owners. The Estate Agents Authority recognized that existing owners' position became subject to pressure by some estate agents and potential purchasers. In an attempt to curb such behavior, it issued 21 restrictive rules to be complied with by estate agents. In 2010 an informal group was formed to monitor redevelopment cases before the Lands Tribunal: *South China Morning Post* (19 June 2010).

2 Section 3(1) of the Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545) as enacted an application was limited to owners of not less than 90% but sub-section (5) provided for a lower percentage to be specified by the Chief Executive in Council by notice in the Hong Kong Government Gazette. This was the procedure used to reduce in 2010 the percentage to 80% on 1 April 2010. published in the Gazette as the Land (Compulsory Sale for Redevelopment) (Specification of Lower Percentage) Notice (LN 6 of 2010). The reduction became a controversial issue which divided the Legislative Council and led to public protests which contrasted with support from the Hong Kong Institute of Surveyors and some others: *South*

was the culmination of long voiced complaints by developers. One major obstacle to private redevelopment of multi-owned buildings was frequently claimed to be the difficulty of assembling 90% of owners to support a compulsory sale. Redevelopment could be frustrated by dissenting minority owners.[3] This was a highly controversial issue and raised fundamental issues of the extent to which, in the interest of desirable private redevelopment, the law should permit inroads to be made into the right of private ownership of property.[4] The Secretary for Planning, Environment and Lands, during the enactment of the 80% amendment declared that it was important to strike a balance between facilitating urban redevelopment and protecting the individual rights of owners.[5] Issues relating to the commencement of the reduced threshold also led to disputes before the Lands Tribunal and the Court of Appeal.[6]

China Morning Post (23 June 2009, 24 June 2009, 22 January 2010, 18 February 2010, 7 March 2010, 22 March 2010, 29 March 2010 and 29 April 2009, 18 March 2011, 9 March 2010 respectively). For a report on the first application under the 80% threshold see *South China Morning Post* (2 May 2010).

3 Where the majority owner and all the minority owners agree to a sale it can, of course, proceed contractually without recourse to the Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545).

4 The proposal to lower the required 90% to 80% minima resulted in wide and publicly expressed opposition. If there were future proposals further to lower the 80% threshold the earlier criticism is likely to be increased. See 'Cut threshold for forced sale', *South China Morning Post* (29 April 2009); 'New forced sale plan', *The Hong Kong Standard* (17 June 2009); 'Plan for acquiring properties unfair, Group tackles lowering as unfair citing Article 23 law for property', *South China Morning Post* (23 June 2009); 'Legco divided over help for developers', *South China Morning Post* (25 June 2009); 'Building scheme set for April start', *South China Morning Post* (22 January 2010); 'New development law must safeguard owners', *South China Morning Post* (18 February 2010); 'Riding roughshod over property rights', *South China Morning Post* (7 March 2010); 'Home wreckers – The Government appears to be siding yet again with big developers against the small owner', *South China Morning Post* (9 March 2010); 'Henderson stands to gain most', *South China Morning Post* (19 March 2010); 'A law that could come to haunt this government', *South China Morning Post* (21 March 2010); 'Compulsory sale law unites worried owners', *South China Morning Post* (29 March 2010); 'Rowse slams 80pc rule for old buildings', *South China Morning Post* (16 June 2010); 'A worrying law on buying up old flats', 'Owners face eviction as law on forced sales bites', *South China Morning Post* (31 March 2011); 'Slow justice system costs minority owner millions', *South China Morning Post* (25 May 2011); 'New forced sale plan', *The Hong Kong Standard* (17 June 2009).

5 This comment drew the critical response from Provisional Legislative Councillor Mr Edward Ho Sing-tin, representing the Architectural, Surveying and Planning Sector, that the Ordinance prevented urban planning and only enhanced redevelopment of individual blocks: *South China Morning Post* (8 April 1998). The Secretary for Development has replaced the former designation as Secretary for Planning, Environment and Lands.

6 The proper construction of the Land (Compulsory Sale for Redevelopment) (Specification of Lower Percentage) Notice (Cap 545A) was determined by the Court of Appeal in *Lead Traders Ltd v Luck Land Enterprise Ltd* [2012] 4 HKLRD 612, [2012] 5 HKC 133. Before 19 March 2010, the respondent, Lead Traders (LT)

(a) *Rights of private ownership*

(i) Domestic law

7.2 The power creating the right of majority private owners compulsorily to purchase the shares of unwilling minority private owners raises important issues. The statutory power went considerably beyond previous Hong Kong compulsory acquisition legislation and the position in other similar jurisdictions.

7.3 Where the Government or a statutory body resumes land it is required to be for a 'public purpose'. Where Government development projects require the acquisition of private land, in the absence of agreement, the land may only be acquired under the public purpose provisions of the Lands Resumption Ordinance (Cap 124).[7] The same limitations apply to Urban Renewal Authority developments. Before the new Ordinance was enacted, where a private developer sought to acquire land for development, the consent of all the owners and an agreed price were required.

7.4 The proposal caused a number of concerns to be widely and publicly raised. These included the power of a majority of owners to compulsorily purchase minority interests from unwilling owners. An environment and planning complaint was that majority owners were generally dealing only with a single building. They

owned 83.33% of the undivided shares of the lot. The appellant, Luck Land Enterprise (LLE) owned 16.7% of the shares. On 19 March 2010, LLE subdivided its lot into 2 units approved by the Building Authority on 25 March 2010. The two units, each holding 8.33 shares, entered into a new sub-Deed of Mutual Covenant, registered in the Land Registry on 21 March 2010. The majority owners successfully applied to the Lands Tribunal for an order for sale with a summons to amend the application by adding the ground that the subdivision was not valid for the purposes of the section 4 notice. Fok JA held that the Presiding Officer's acceptance of the Majority Owners' construction arguments in the present case was an exercise of the type deprecated by Lord Millett NPJ in *China Field v Appeal Tribunal (Buildings) (No 2)* (2009) 12 HKCFAR 342 at paragraph 36 that "Purposive construction means only that statutory provisions are to be interpreted to give effect to the intention of the legislature, and that intention must be ascertained by a proper application of the interpretative process. This does not permit the Court to attribute to a statutory provision a meaning which the language of the statute, understood in the light of its context and the statutory purpose, is incapable of bearing." The Notice, properly construed, does permit the court to ignore the sub-division of the 3/F Unit with the result that Units A and B on the 3/F of the Building are to be regarded as two separate units so that the Building is not a lot in which each of the units on the lot represent more than 10% of all the undivided shares in the lot. There would not appear to be any basis for saying that the Minority Owners did not intend the instruments by which the sub-division of the 3/F Unit of the Building was effected to have the legal rights and obligations which those instruments gave the appearance of creating. On appeal it was held the majority owners only held 83.33% of shares at the relevant date and not the then required 90% of shares. The Court of Appeal answered the question of law posed in the Minority Owners' summonses in the positive, allowed the appeals and acceded to their applications to strike out the Majority Owners' application for sale in [2011] HKCU 1525 (LDCS 11000/2011, 3 August 2011, unreported).

7 Sections 5 and 29 of the Urban Renewal Authority Ordinance (Cap 563).

were not required to participate in a wider comprehensive development plan. The purpose of exercising the majority power was for private profit.

7.5 As the Ordinance evolved a number of new and complicated legal issues had to be resolved. A developer, who owns a majority of sites for a proposed comprehensive development, may need to purchase the interest of an objecting minority owner of an existing multi-owned building. One issue was whether the developer may simplify the proposal by making one application for sale including both the minority unit and adjacent units. The Court of Appeal in *Bond Star Development Ltd v Capital Well Ltd*[8] considered an application comprising 6 units, of which 5 were owned by the applicant and a sixth unit by a minority owner. The Court held there was only power to consider the application affecting the minority owner.[9] The remainder of the application extending to the majority owners was dismissed.[10]

7.6 The Court of Final Appeal[11] upheld the Court of Appeal's decision but expressed concern on whether the Ordinance only allowed an order for sale to be limited to a minority owner. If the power were so confined the Ordinance objectives may be undermined. A minority owner might be able to bid for the single lot at a highly inflated price thereby exercising 'ransom power'.[12] If the minority owner or a third party became the owner, the proposed redevelopment might face lengthy delays or have to be abandoned. On the other hand, if the majority owner were able to put up all lots in a single sale, the auction could be expected to attract only genuine developers.[13] Whoever the purchaser, the

8 [2004] 2 HKLRD 855.

9 On enactment sub-section (1) specified a required majority of not less than now 80% of the undivided shares in the lot; sub-section (5) provides that the Chief Executive in Council by notice in the Hong Kong Government Gazette may specify a lower percentage. This power was exercised on 1 April 2010 as the Land (Compulsory Sale for Redevelopment) (Specification of Lower Percentage) Notice (No 6 of 2010), where notice was given that the required number of majority owners was lowered to 80%.

10 An earlier Court of Appeal decision in *Golden Bay Investment Ltd v Chou Hung* [1994] 2 HKC 197 ordered a single sale of a jointly owned property instead of partition. Bokhary JA referred to a majority being forced to buy a minority share at an inflated price. For partition, see the Partition Ordinance (Cap 352).

11 *Capital Well Ltd v Bond Star Development Ltd* (2005) 8 HKCFAR 578, [2005] 4 HKLRD 363.

12 The line between a minority owner exercising legal rights and actions amounting to a 'ransom power' may be difficult to draw.

13 The Court of Final Appeal's concern over, other than a majority owner, successfully bidding, does not appear to be reflected in practice. On an auction for only a minority interest, bidding by that owner or a third party appears to be unattractive. At Ordinance auctions generally only the majority owner bids and purchases at the Tribunal fixed reserve price. The auctions are not necessarily more effective in establishing market value than the valuation by the Tribunal upon which the reserve price is based. To that extent an auction causes unnecessary delay, commission charges and other costs. Compensation determinations for resumption, often for larger sums, are solely determined by the Tribunal on expert evidence. The auction practice which has evolved to satisfy the Ordinance, occurs with only the majority owners being the sole bidder, is generally little more than a sham. The only provision to protect the

development could proceed without impediment. The Court left the issue open for possible future consideration.[14] The Court concluded that the best course may be for them to be addressed by the legislature with a view to ensuring that the objectives of the Ordinance are not frustrated.

7.7 In some applications majority owners may before the Tribunal hearing, have entered into a conditional agreement to sell to a developer. The agreement and consideration are generally not known to the Tribunal or the minority owners. They tend to increase the negotiating power of the majority owner. The Ordinance allows a majority owner during the course of an application to sell that interest to a developer, who then becomes the applicant.[15] The sale agreements are typically subject to the grant of a sale order. When the Ordinance was enacted, the Secretary of Planning, Environment and Lands[16] declared that it was important to strike a balance between facilitating urban redevelopment and protecting the rights of individual owners. There are a variety of provisions which may be to the benefit of majority and also minority owners. However, overall the statutory provisions, often reinforced by judicial decision-making, have strengthened the position of majority owners rather than that of minority owners.

(ii) Basic Law of Hong Kong

7.8 Article 105 of the Basic Law provides the right to compensation for lawful deprivation of property that must correspond to the real value of the property. Article 29 of the Basic Law provides that the homes and other premises of Hong Kong residents shall be inviolable. In *Intelligent House Ltd v Chan Tung Shing*,[17] at the substantive hearing the first issue was whether the statutory order for sale infringed Articles 29 and 105 of the Basic Law.[18] The Lands Tribunal rejected the applicant's submission on both articles. The Article 29 holding was unsurprising. However, the Tribunal's Article 105 ruling is more interesting.

7.9 The Tribunal held on two grounds that Article 105 did not apply. First, Article 105 only applies to where the Government takes away private property from an individual. The Tribunal held that under the Ordinance the transfer of the property was from one private person to another private person. Yet Article 105 does not refer to the Government or limit application to compulsory takings by the Government. The Tribunal referred in support of its first holding to *Harvest Good Development Ltd v Secretary of Justice*.[19] In that case a squatter

minority owners is the reserve price fixed by the Lands Tribunal. Although strictly not required, fortunately the Tribunal only fixes a reserve price after considering expert valuation evidence.

14 On the exercise of the Lands Tribunal discretion to give directions under section 4(6)(a) of the Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545), see *Golden Bay Investment Ltd v Chou Hung* [1994] 2 HKC 197 at 200-202.

15 See Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545), section 2 definition of 'majority owner', subsection (b).

16 The equivalent position is now the Secretary for the Environment.

17 [2008] 4 HKC 421.

18 For the Basic Law and these articles, see Chapter 24 'Constitutional Law'.

19 [2007] 4 HKC 442.

acquired a possessory title by occupying the property adverse to the owner during the Limitation Ordinance specified period. The Court of Appeal upholding the judgment mainly dealt with delay in raising the point and the desirability of there being finality in litigation.

2. The Scheme of the Ordinance

(a) General

7.10 The scheme of the Ordinance commences with an application by majority owners to the Lands Tribunal. If agreement is not reached a hearing proceeds which determines whether an order for sale of the minority shares should be made. Where an order is made relevant conditions are imposed. These generally include sale by public auction subject to a Tribunal imposed reserve price.[20] Upon the sale being completed the proceeds are apportioned and paid to the entitled minority owners.[21]

(b) Definitions

7.11 Section 2 of the Ordinance defines a number of relevant terms including:[22]

'auction' in relation to a lot, means the auction of the lot pursuant to section 5(1)(a).

'building' means a building within the meaning of the Buildings Ordinance (Cap 123).

'lot'

(a) means
  (i) Any piece or parcel of ground the subject of a Government lease;
  (ii) A section which by virtue of section 8(3) or 27(2) of the Government Rent and Premium (Apportionment) Ordinance (Cap 125) is deemed to be a lot for the purposes of that Ordinance;
(b) includes a section and subsection of a lot.

'majority owner' in relation to a lot-
(a) means the person or persons who has or have made an application under section 3(1) in respect of the lot;[23] and

20 Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545), section 5(1) and Schedule 2, paragraph 2.

21 Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545), sections 10 and 11.

22 Several of the original definitions were substantially amended in 2002: Ordinance 14 of 2002, section 3.

23 The section 2 definition of 'majority owners' does not directly prescribe the number of owner shares constituting a majority. This requires reference to section 3(1) and (5) of the Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545). Section 4(1) specifies three classes of lot for the purpose of section 3 including: (a) a lot with each of the units on the lot representing more than 10% of all the individual shares in the lot. Section 4(2)(a) of the notice provided a unit in a

(b) includes any person who becomes a successor in title to any such person or persons at any time before a purchaser of the lot becomes the owner of the lot where the lot is subject of an order for sale.

'minority owner'[24] in relation to a lot which is subject to an application under section 3(1) –

(a) means the person or persons who –
  (i) owns or own undivided shares in the lot otherwise than as a mortgagee; but
  (ii) is or are not the person or persons who has or have made the application; and
(b) includes any person who becomes a successor in title to any such person or persons at any time before a purchaser of the lot becomes the owner of the lot where the lot is the subject of an order for sale.

'purchaser' in relation to a lot the subject of an order for sale means for sale the purchaser of the lot at an auction (or, where section 5(1)(b) is applicable, the purchase of the lot by the other means referred to in that section).

'redevelopment' in relation to a lot, means the replacement of a building on or formerly on the lot.

7.12 The Ordinance does not define 'existing development.' The Court of Final Appeal in *Capital Well Ltd v Bond Star Development Ltd*[25] held that an existing development under section 4(2)(a)(i) of the Ordinance contrasted with the existence of the original building. The position where an existing building had already been demolished is provided for in the section 2 definition of redevelopment as "the replacement of a building on (or formerly on a lot)." The statutory objective is supportive of needed urban renewal.[26] This applied equally to a building in a state of disrepair as to a cleared site which should not be left to lie fallow. The Court

building is subdivided into 2 or more units on or after 1 April 2010; and (b) the subdivision does not involve (i) any alteration to the size of the common area of the building; or (ii) any change in a person's liability to the common areas and facilities of the building under the common law or any enactment those units are regarded as a single unit.

24 The Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545) to an extent balanced the novel compulsory power of a majority of private owners to apply for purchasing the shares of minority owners. The matters the Tribunal has to take into account before determining whether to grant an order for sale include section 4(1) (right of a minority owner to dispute the value of the property in the application for sale); and section 4(2) which requires the majority owners to justify the development due to age, state of repair of the existing development and that the owners are capable of undertaking the redevelopment. The 80% reduction resulted in wide opposition: see footnote 4 of this chapter.

25 (2005) 8 HKCFAR 578.

26 The words 'facilitating needed urban renewal' accords with the statutory purpose of the Urban Renewal Authority: Urban Renewal Authority Ordinance (Cap 563), section 5.

preferred the term 'a cleared site' to the appellant's 'vacant lot' description.[27] The common practice reflected in judgments is to use the abbreviations 'EUV' for existing use value and 'RDV' for redevelopment value.

3. Compulsory Sale by the Owner

(a) Application

7.13 An application for compulsory sale by the majority owners against the minority owners, requires them to own not less than 80% of the undivided shares in a lot.[28] The application must be supported by a valuation report of the market value of the lot with vacant possession but excluding redevelopment value.[29] A copy must be served on the minority owner, registered under the Land Registration Ordinance (Cap 128), affixed on the building or buildings and published in the prescribed newspapers.[30] If a minority owner cannot be found the majority owner must apply to the Tribunal to dispense with service. If dispensation is granted the Tribunal may give directions for substituted service upon that minority owner.

7.14 The Valuation Report lodged with the application must assess the market value with vacant possession not taking into account redevelopment potential.[31]

27 *Capital Well Ltd v Bond Star Development Ltd* (2005) 8 HKFCAR 578, [2005] 4 HKLRD 363 at 370B to 371B.

28 Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545), section 3(1). After the lowering of the majority owners required shares to 80%, the Government introduced a subsidised pilot mediation system for a trial period of 12 months as an alternative to proceeding to the Lands Tribunal. The system is now permanently established: see the Direction issued by the President of the Lands Tribunal: Mediation for Compulsory Sale Cases Under the Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545) LTPD: CS No 1/2011.

29 The contents of the Valuation Report are prescribed in Schedule 1, Part 1. This statutory requirement and the usual filing of valuation reports by minority owners in response enables the Lands Tribunal to assess a majority owner's offer on the basis of expert valuation evidence together with its own valuation expertise.

30 For the service requirements see Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545) section 3(3) and for dispensation section 3(4). In *Hero Progress Ltd v Estate of Ting Chi Tung* [2011] HKCU 1444 (LDCS 13000/2010, 25 July 2011, unreported), the owner of the only flat for whom no notice of opposition had been filed had died shortly before the application was commenced. No grant of probate or letters of administration had been obtained. The Tribunal appointed a relative, Ting Ping Kwan Billy, as 1st respondent to represent the Estate. He agreed to the order sought by the majority owner. Orders for sale against all 6 respondents were made in those terms.

31 Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545), section 3(1) and Part I of Schedule 1.

This contrasts with the different basis for fixing the auction reserve price which takes into account potential redevelopment value.[32]

(b) Determination of compensation

7.15 The Ordinance provides two different methods for the assessment of compensation. First, where a minority owner disputes the majority owner's lodged statutory valuation report, the Lands Tribunal determines, after a hearing the value of the minority owned property. The evidence will include the statutory lodged valuation report of the majority owner. There may also be valuations of the minority owner. Both parties valuation experts normally give evidence at the hearing, are subject to cross-examination and to questions from the Tribunal. There may also be a site inspection. This is important and a procedure which should generally be followed.[33]

7.16 Secondly, where a minority owner cannot be found, the majority owner's valuation report will not have been disputed except possibly by other minority owners. The position of the unfound owner is protected by the majority owner having to satisfy the Tribunal that the valuation is (a) not less than fair and reasonable; (b) not less than fair and reasonable when compared with the value of the majority owner's property as assessed in the application.[34]

7.17 After the hearing is concluded, the Tribunal will either make or refuse to make, an order for sale.[35] Where an order for sale is made, the Tribunal appoints satisfactory trustees nominated by the majority owner, to discharge their statutory duties for the sale.[36]

32 Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545), section 5(1) and paragraph 2 of Schedule 2.

33 Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545), section 4(1).

34 Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545), section 4(1)(a)(ii).

35 Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545), section 4(1)(b). The Tribunal in determining an application must not take into account any provision in the Landlord and Tenant (Consolidated) Ordinance (Cap 7) relating to tenancy rights terminated by a sale order. The Ordinance has now expired or been repealed. When effective it reflected the lack of a tenant's locus standi or right to compensation. The lack of tenant's rights on an application for sale order remains.

36 Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545), section 4(1)(c). On an order for sale being made, the successful majority owner must cause notice to be given to the minority owner, the Director of Lands and published as prescribed: section 4(4). Where any copies of the order are unable to be served the Lands Tribunal may grant dispensation: section 4(5). There is also provision for release of compensation: section 4(7); for where compensation is not released after 3 years: section 4(8); for the trustees to apply for directions on matters for which there is no provision: section 4(9); for the appointment of new trustees: section 4(10); for trustees' remuneration: section 4(11); for a majority owner who assigns the interest to another to apply to withdraw: section 4(12); where an order for sale is not made the majority owner must cause the registration of the application under the Land Registration Ordinance (Cap 128) to be vacated: section 4(13).

(c) Modes of sale

(i) Public auction

7.18 The Lands Tribunal, where it makes an order for sale, is obliged to order it to be by public auction. In that event it fixes a reserve price. This sale mode thereafter proceeds in accordance with the statutory conditions and other provisions.[37]

(ii) Agreement

7.19 The Ordinance does not provide for the parties to reach an independent agreement. Where prior agreement has been reached an application for an order for sale is unnecessary. If after an application is made and all minority owners are found who reach agreement, the parties may either seek a consent order in terms of the agreement or relying on the agreement discontinue the application. Where a minority owner cannot be found the application for an order sale must proceed to determination.[38]

(d) Majority owners

7.20 A majority owner either alone or jointly with other owners comprising 80% of the undivided shares of the property has the statutory right to purchase the minority owners' shares subject to complying with conditions imposed by the Ordinance.[39] An application may be in respect of: (a) 2 or more lots where the majority owner owns not less than 80% of the undivided shares, or alternatively; (b) 2 or more lots on which one building is connected to another by a staircase intended for the common use of the occupiers of the buildings. This is subject to the average of: (i) the percentage of the undivided shares owned by the majority owner in the lot or lots on which one of the buildings stands; and (ii) the percentage of the undivided shares owned by the owner of the majority owner in the lot or lots on which the other building stands not being less than 80%.[40]

(e) Minority owners

7.21 Where a minority owner decides to dispute the application for sale it is necessary to file a Notice of Opposition. The dispute then becomes determinable

37 Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545), sections 4(7), 5(1)(a). See also Schedule 2 on auction conditions.

38 Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545), section 4(1)(a)(ii)(B).

39 Where the Urban Renewal Authority becomes a majority owner it may exercise the Ordinance power to acquire for development the minority shares: Urban Renewal Authority, Urban Renewal Strategy (February 2011), page 9, paragraph 18. This would be an alternative to proceeding by way of resumption under the Lands Resumption Ordinance (Cap 124). If exercised it could potentially be a fast track procedure but still provide the opportunity for offering ex-gratia payments and other inducements to arrive at an earlier agreed settlement.

40 Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545), section 3(1).

by the Lands Tribunal.[41] Where a minority owner cannot be found, the majority owner to obtain a sale order must satisfy the Tribunal that the value of the property in the lodged valuation report is: (a) not less than fair and reasonable; and (b) not less than fair and reasonable when compared with the value of the majority owner's property as assessed in the application.[42]

(f) Tenants

(i) Termination of tenancies

7.22 A majority owner must give written notice to any tenants of the application for sale. Where an order for sale is made of a property subject to a tenancy it is immediately statutorily terminated. The tenant is required upon the expiration of 6 months from the date of the sale order to deliver up vacant possession.[43] A tenant may not oppose an application for sale. A tenant's rights of possession are limited to remaining for the period of the 6 months' notice. This statutory period prevails over any longer contractual duration.[44]

(ii) Compensation for tenants

7.23 The Tribunal may award compensation to a tenant.[45] The compensation is payable by the majority and minority owners to their respective tenants.[46] The Tribunal may give directions on compensation, including ordering the owner to pay part of the proceeds to specified persons or into the Tribunal.[47]

41 Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545), section 4(1(a)(i).

42 Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545), section 4(1)(a)(ii). Where a minority owner opposes a sale there is no statutory 'fair and reasonable' requirement. However the courts have generally applied the same or a similar 'fair and reasonable' requirement.

43 Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545), sections 5(3) and 8(1)(b).The majority owner's statutory notice to occupiers, including tenants, is provided in Schedule 1, Part 2. There is no provision for tenants of minority owners to be joined to an application: see *Pacific Crown Enterprises v Man Yu On* [2013] 2 HKC 65 (Lands Tribunal); [2013] 4 HKC 544, [2013] CPR 267 (CA). A tenant is limited to applying to the Tribunal for compensation.

44 This is an example of the generally strong position of a majority owner. The statutory termination extending to contractual tenancies longer than 6 months, will usually adversely affect a tenant from fully benefitting with the contractual terms. A tenant's compensation rights, contrast to Government resumptions where tenants in addition to statutory rights to compensation are usually eligible to receive substantial additional ex-gratia payments. A majority owner therefore has lesser compensation obligations to a tenant than Government or more generous payments by the Urban Renewal Authority.

45 Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545), section 4(6).

46 Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545), section 8(30(a) (i), (ii).The (iii) reference to the provisions of the Landlord and Tenant (Consolidation) Ordinance (Cap 7) are no long applicable having been repealed or expired.

47 Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545), section 4(6), (7) and section 11.

7.24 In assessing compensation the Tribunal may take into account: (a) representations of the tenant whether compensation should be payable and, if, so the amount; (b) the benefit, if any, afforded the tenant of the statutory right to remain in possession for a period of 6 months.[48] The Tribunal may also give such directions on the termination of tenancies of any tenants of any property on the lot.[49]

7.25 In the absence of any statutory provision for the basis of assessment for compensation, common law principles are applicable. Hence compensation could include for the loss of any unexpired duration of the contractual tenancy, disturbance, other losses and costs.

7.26 No compensation is payable to the tenant if the tenancy were entered into on or after the date of the order for sale.[50]

4. Composite Sites and Other Developments

7.27 Applications for sale are for a defined 'lot' and may extend to composite developments of 2 or more lots.[51] Among issues which have arisen are; (a) whether an application for an order for sale can include both majority and minority shares; and (b) whether an application can be made for two lots joined by a common staircase.[52]

(a) Application by a majority owner limited to the sale of minority owned properties

7.28 The practice had developed of a majority owner including the majority interest in an application. This had a practical advantage, if a sale order was granted, of processing an approved composite development of all of the lots.

7.29 The facts before the Court of Final Appeal in *Capital Well Ltd v Bond Star Development*[53] were that the applicant was the sole owner of Lots 24, 26, 30 and 32 for a proposed redevelopment extending to a differently owned Lot 28. The applicant owned all but one flat in Lot 28 but the owner of that Lot 28 flat would

48 Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545), section 8(4). Any benefit to the tenant of the statutory 6 months right to remain in occupation might arise if the existing tenancy was for a shorter duration than 6 months.

49 Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545), section 4(6).

50 Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545), section 8(5),

51 See Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545), section 2 definition that a lot includes a section and subsection of a lot and section 3(2)(a) and (b).

52 Similar issues may also exist where only one lot is to be developed. Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545), section 3 allows an application to be made in the plural by 'the persons or persons' who are the owners, but goes on to refer only to one 'lot'.

53 (2005) 8 HKCFAR 578.

not agree to a sale.[54] The Court of Final Appeal, upholding the Court of Appeal affirmed the statutory coercive power to order a compulsory sale was confined to lots held by a minority owner. However, it was concerned a minority owner or a third party purchasing at auction, could exercise a 'ransom' power. This might cause the redevelopment to be abandoned or face lengthy delays and uncertainties of negotiations with a new owner.[55] It was concerned that if the power was so confined, the policy objectives of the Ordinance might be undermined. After speculating on a possible existing statutory remedy concluded the better course was for it to be addressed by the legislature with a view to ensuring that the objectives of the Ordinance were not frustrated.

(b) Application by a majority owner for two or more lots connected by a common use staircase

7.30 A majority owner of two or more lots each with one building but connected to the other by a staircase intended for common use by the occupiers of both buildings may apply for an order of sale. The right is subject to the average of the percentage of the undivided shares owned by the majority owner in the total buildings being not less than 80% of the undivided shares.

7.31 This position arose in *Gilmerton v Polywin Holdings Ltd*[56] for the sale of 4 lots, namely: (1) No 4 Castle Steps, Subsection 2 of Section L Inland Lot No 577, (2) No 4A Castle Steps, Remaining Portion of Lot L of Inland Lot No 577; (3) No 6 Castle Steps, Subsection 1 of Section L of Inland Lot No 577; and (4) No 6A Castle Steps, Subsection 3 of Section L of Inland Lot No 577. Gilmerton and eleven other applicants, holding specified undivided shares as tenants-in-common of the properties, sought an order for the compulsory sale of all the undivided shares in the four lots and the exclusive right to occupy the second floor of that property. The other two respondents could not be found. The issues were narrowed when immediately before the hearing Polywin sold its interest in No 6 Castle Steps to International Trader Ltd, another tenant-in-common being the 11th

54 The Lands Tribunal granted the application for all five lots on the ground the applicant was the majority owner of those lots but reserved its position on Lot 28. The Court of Appeal held the other lots could not be included because they were 100% owned by the applicant. Compensation for Lot 28 was referred back to the Tribunal.

55 The Court of Final Appeal's concern over a third party buying at auction does not appear to be reflected by at least more recent auction practice. The reality is that bidding by a third party is unattractive, for if successful the purchaser becomes only a minority and relatively powerless owner. The Lands Tribunal later in *Supergoal Investment Ltd v Five F Ming House Ltd* [2014] 1 HKLRD 286 surprisingly referred to the Court of Appeal in *Bond Star Development Ltd v Capital Well Ltd* [2004] 2 HKLRD 855, despite being reversed by the Court of Final Appeal. The latter court's cited comments were limited to only possible future legislative changes. There are no material differences between the two appellate court judgments. This confusion possibly renders the *Supergoal* judgment per incuriam.

56 [2005] HKCU 59 (LDCS 2000/2004, 17 January 2005, unreported).

applicant.[57] The Tribunal therefore did not need to determine Polywin's grounds of opposition. These had included that the applicant could not include the share it already owned in an attempt to satisfy the 90% ownership requirement. At the hearing, Polywin's sale was still to be completed. Accepting the equitable interest of International Trader Ltd as purchaser, the Tribunal held that the applicant owned the required percentage of No 6 Castle Steps.[58]

7.32 The Lands Tribunal further found that the applicants owned 92.5%, 100%, 80% and 100% respectively of the four lots. The Tribunal referred to section 3(2)(b), that where an applicant owned 100% of a lot and the building was connected by a staircase to another building intended for the common use of occupiers of the buildings, an average majority ownership of not less than the then higher 90% of all the relevant buildings was required to meet the 90% threshold. The Tribunal found that staircases connected the four buildings and were all intended for common use. The applicants combined shares averaged 93.125% which met the then threshold.[59]

5. Justification of Redevelopment

7.33 The majority owner's burden is to establish that redevelopment is justified and that it is capable of undertaking the redevelopment.[60] The relevant date for determining whether the redevelopment is justified is the date of the hearing.[61]

7.34 In addition twofold justification grounds must be established: (1) the age or state of repair of the existing development; (2) the majority owner has taken reasonable steps to acquire the minority share.

(a) The age or state of repair of the existing development

7.35 The age or state of repair of the existing development is often a principal issue.[62] In *Fineway Properties Ltd v Sin Ho Yuen Victor*,[63] the Court of Appeal

57 The equitable assignment enabled the required percentage, excluding the majority shares, to be met thereby avoiding the *Capital Well* obstacle of not being able to include an applicant's own majority shares to achieve the then 90%.

58 The issue of the whether the Lands Tribunal was bound by the Court of Appeal judgment in *Capital Well* was revisited before a differently constituted Lands Tribunal in *Day Bright Development Ltd v Choi Pak Ling* [2014] 4 HKC 364. If bound, then an applicant for a sale order could not include lots which were 100% owned. In *Day Bright* the Lands Tribunal held that the Tribunal was bound by the *Capital Well*.

59 The Court of Appeal judgment was upheld by the Court of Final Appeal (2005) 8 HKCFAR 78, [2004] 2 HKLRD 363.

60 Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545), section 4(2). 'Capable' includes redevelopment ability and the financial resources.

61 *Fully HK Investments Ltd v Poon Vai Ching* [2007] HKCU 336 (LDCS 3000/2005, 26 February 2007, unreported).

62 Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545), section 4(2)(a)(i).

63 [2010] 4 HKLRD 1.

considered a number of issues including the justification of the sale. The respondent did not challenge the finding on age or state of repair.[64] The Court critically referred to the Lands Tribunal tests in *Intelligent House Ltd v Chan Tung Shing*.[65] Those included the test of 'economic lifespan.' It observed that *Intelligent House* had been applied by the Tribunal in subsequent cases and that the respondent perceived it was an error of law which needed to be put right.[66] The Court noted that the Ordinance was silent on the meaning of 'age' and 'state of repair'.

7.36 The tests formulated by the Lands Tribunal in *Intelligent House* to the concern of the Court of Appeal considerably expanded on the meaning of the statutory words. In summary:

(1) On the ground of age, the Tribunal is entitled to look at:
   (a) Whether the old building has reached the end of its physical life.
   (b) Whether the old building has reached the end of its economic lifespan. The economic lifespan comes to an end when the cleared site value of the lot significantly exceeds the existing use value of the building, provided that it can be demonstrated that the building has so come to the end of the economic lifespan because of its age as reflected by features of obsolescence.

(2) On the ground of state of repair, the Tribunal is entitled to look at:
   (a) The state of repair of the old building is such that it has rendered the building a danger to the residents or the public at large.
   (b) The state of repair of the old building is such that it has rendered the building coming to the end of its economic lifespan, in that it has become economically unworthy to repair. This includes situation where (a) the costs of repair exceeds the existing use value of the building, or (b) the costs repair significantly exceeds the enhancement value arising from or attributable to the repairs.
   (c) Moreover, for the purpose of determining whether it is economically worthy to do so, the Tribunal is entitled to look at repairs which would render the building to a tenantable condition fit for the enjoyment of its tenants and visitors, which is reasonable in the present day circumstances for the type of building in question.

64 The Lands Tribunal hearing commenced on July 2007 when a reserve price of $122 million was agreed, but because of a dispute over valuations for the EUV, it was adjourned part-heard to 8 December 2008 when the reserve price based on the then determined RDV was fixed at $70.5 million which resulted in reducing the reserve to $70.5 million: [2009] HKCU 414 (LDCS 5000/2007, 20 March 2009, unreported). The respondent unsuccessfully appealed: [2010] 4 HKLRD 1 (CA). The respondent then appealed to the Court of Final Appeal which was settled by a confidential memorandum but with strong criticism of the Tribunal delays and questioning on costs order against the respondent: (2011) 14 HKCFAR 497 (CFA).

65 [2008] 4 HKC 421.

66 The Court of Appeal understood *Intelligent House* had not been considered by a higher court and would have to await consideration on another occasion. It was limited to expressing considerable reservations as to its correctness.

(3) On the grounds of both the 'age' and 'state of repair' of the old building, the Tribunal is entitled to look at all of the above factors or tests collectively to see if that justifies redevelopment, even though when each of them is considered alone, it is insufficient to do so.[67]

7.37 On both requirements the Tribunal was entitled to look at all of the above factors or tests if collectively they justify redevelopment, even if each of them alone would be insufficient.[68]

7.38 The Court of Appeal was concerned with the 'economic lifespan' test. Le Pichon JA observed in *Fineway Properties Ltd* that:

> …it would not be inappropriate to highlight the fact that the concept of 'economic lifespan' does not feature in the Ordinance. It is a concept that might have currency with economists. Be that as it may, it found favour with the tribunal in *Intelligent House* to the extent that the tribunal considered it to be one aspect of the meaning of 'age' and 'state of repair' for the purposes of section 4(2)(b) of the Ordinance. Whether that interpretation is sustainable in a higher court remains to be seen. As to

67 [2008] 4 HKC 421 at para 165.

68 The Tribunal in *Intelligent House Ltd v Chan Tung Shing* [2008] 5 HKC 390 found that the parties had accepted the economic lifespan test and also referred to an earlier decision of *Good Trader Ltd v Hinking Investments Ltd* [2007] 3 HKC 219 approving it was a permissible test. However, the observation in the earlier decision was obiter and expressed only as a 'view'. The Tribunal in *Good Trader Ltd* dismissed the application for sale concluding in these terms at para 47: 'We totally reject these arguments. Commercial decision is never a ground for redevelopment under section 4(2)(a)(i)… we find that the Applicant has failed to satisfy the Tribunal that the intended redevelopment is justified due to the age or state of repair of the building and hence we shall not make an order for sale…' Tribunal decisions post-*Fineway Properties* which have referred to *Intelligent House* include: *Gentway Limited v Li King Fong* [2011] HKCU 817 (LDCS 1000/2010, 28 April 2011, unreported) (after referring to the Court of Appeal judgment, the Tribunal, without applying those tests, was able to find the age and state of repair justified redevelopment); *Vennex Ltd v Leung Chung Ching* [2011] HKCU 516 (LDCS 6000/2009, 11 March 2011, unreported). The Court of Appeal in *Good Faith Properties Ltd v Cibean Development Co Ltd* [2014] 5 HKC 611 refrained from dealing with the tests as it was not an issue; similarly *Day Bright Development Ltd v Man Shui Investment Co Ltd* [2013] HKCU 746 (LDCS 15000/2012, 3 April 2013, unreported), which referred to *Charmlink Ltd v Lee Tong Hing* [2011] HKCU 2306 (LDCS 16000/2010, 29 November 2011, unreported); *Hero Progress Ltd v Estate of Ting Chi Tung* [2011] HKCU 1444 (LDCS 13000/2010, 25 July 2011, unreported) found without considering the tests that redevelopment was justified. The Tribunal now appears to avoid applying *Intelligent House*. Other cases on age and state of repair include *Gilmerton v Polywin Holdings Ltd* [2005] HKCU 59 (LDCS 2000/2004, 17 January 2005, unreported); *Titano Ltd v Cheung So & Ors* [2009] CPR 186; *Mass Ventures International Ltd v All Lucky Development Ltd* [2012] HKCU 87 (LDCS 20000/2010, 10 January 2012, unreported); *Super Fortune Investment Ltd v Keynote Enterprises Ltd* [2014] 2 HKC 7; *Wish Concept Ltd v Wen Pao Van* [2014] HKCU 1016 (LDCS 57000/2012, 25 April 2014, unreported).

> the meaning of that concept in the context of 'age'…suffice it to say that meaning and scope of the proviso appear to be far from clear.
>
> Another matter that deserves attention is that the expert reports filed on behalf of the applicant in the present case are replete with references to the works of economists/writers opining on property investment and redevelopment but from the perspective of an economist…How these economic theories and concepts are relevant to the proper construction of the Ordinance is not readily apparent.
>
> For my part, until they have the *imprimatur* of a higher court the tests formulated in *Intelligent House* should be approached with a degree of circumspection and should not be applied as if they were part of the Ordinance.[69]

7.39 The practice of the Lands Tribunal since *Fineway Properties* has been to apply pre-*Intelligent House* criteria.[70]

(b) The majority owner has taken reasonable steps to acquire all the undivided shares in the lot by negotiating on terms that are fair and reasonable

7.40 These mandatory requirements reflect the legislative intent that the compulsory sale of an unwilling minority owner's share, should only occur after fair and reasonable attempts by the majority owner to purchase by agreement have failed.[71]

7.41 Whether this requirement is satisfied depends on the decision of the Lands Tribunal based on the evidence of both parties.

6. Valuation for Sale Price

7.42 Section 4(1)(a) of the Ordinance provides for the Tribunal to determine the sale price in two different circumstances:

(i) If any minority owner disputes the value of the property for sale price purposes, as assessed in the application, it shall be determined by the Tribunal.

69 [2010] 4 HKLRD 1 at para 35-37.

70 *Intelligent House* was further disapproved in *Good Faith Properties Ltd v Cibean Development Co Ltd* [2014] 5 HKC 611 (CA) where costs against a minority owner were overruled by the Court of Appeal.

71 The Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545), section 4(2)(b) fair and reasonable requirements correspond with section 15(4)(c) of the former Land Development Corporation Ordinance (Cap 15). The Corporation was required to satisfy the Secretary for Planning, Environment and Lands on the reasonableness of unsuccessful steps taken. Under section 4, the task of determining the reasonableness of attempts to complete a voluntary purchase is instead to be judicially determined by the Lands Tribunal.

(ii) Where a minority owner cannot be found, the majority owner is required to satisfy the Tribunal that the value assessed in the application is not less than fair and reasonable and not less than fair and reasonable when compared with majority owners assessment.

7.43 Where the sale price is disputed in addition to the application valuation, the Tribunal will often have valuation reports from the minority owner with the parties' valuers giving expert evidence. There is no express requirement for the determination to be fair and reasonable but this will usually follow from the contested expert evidence. The express requirement in the different position where a minority owner cannot be found is protective of that owner's position.

(a) Assessment of value where sale price disputed

7.44 In the absence of statutory criteria, the Ordinance allows the sale price to be determined in accordance with established valuation principles and the common law. The land value assessment principle is open market value. This is the requirement for other compulsorily purchase ordinances [72] and for Government rent and rating purposes. The statutory open market value basis is strongly reinforced by the common law. The primary approach is for the valuation to be assessed under the comparable method.[73]

(b) Assessment of value where minority owner cannot be found

7.45 Where a minority owner cannot be found, the majority owner is required to satisfy the Lands Tribunal that; (1) the value assessed in the application is not less than fair and reasonable and (2) not less than fair and reasonable when compared with value of the majority owner's own property as assessed in the application. This is a more challenging role of the Tribunal than determining a sale price at a disputed hearing where each of parties generally call their own valuer to give expert evidence. The overwhelming advantage of determinations being made after hearing both parties expert evidence is well established.[74]

7.46 The Ordinance for uncontested applications requires the Tribunal to consider twofold relevant matters. On occasion some assistance may be provided where other opposing minority owners appear and call valuation experts.

72 The relevance of the other compulsory acquisition ordinances is that their compensation provisions share common characteristics to the sale price received by a minority owner.

73 In *Top Sail International Ltd v Wong Lai Wai* [2011] HKCU 2356 (LDCS 19000/2010, 25 November 2011, unreported), the reserve price was assessed on a redevelopment potential basis for a proposed hotel under the residual method of valuation.

74 See Chapter 23 'Valuation', including Civil Justice Reform with the introduction of a statutory Code of Conduct for expert witnesses.

7.47 Whether an unfound minority owner on sale receives fair and reasonable compensation, to a large extent depends on the quality of the sales evidence adduced by the majority owner. A similar position arises, if a minority owner is found and appears but does not adduce any valuation evidence. The Lands Tribunal has recognized a like common law responsibility. In *Mass Ventures International Ltd v All Lucky Development Ltd*,[75] the Tribunal held such a minority owner is entitled to receive fair and reasonable compensation based on market value:

> In order to achieve this objective, we have to set a reserve price for the public auction. It is our duty to ensure that the valuation put forward by the Applicant reflects the market value of the Lot including its redevelopment value, even, as in the present case, when the 4th Respondent calls no expert to challenge the valuation of the Applicant's expert.

7.48 In those circumstances the Tribunal accepted its duty is to ensure the majority owner's valuation reflects market value. This better wider assessment approach was also indicated in *Top Sail International Ltd v Wong Lai Wei*.[76] The majority owner submission in *Mass Ventures* was that it should be 80% of the RDV not was the RDV dispute limited to the known parties valuations of $48.80 million and $116.01 million. Although that evidence may be relevant the determination was for the Tribunal.[77]

(c) Redevelopment value

7.49 Redevelopment value is generally based on evidence of comparables. Depending on the facts, other methods may be more appropriate. In *Day Bright Development Ltd v Man Shiu Investment Co Ltd*,[78] the Tribunal in the absence of suitable comparables adopted the residual method of valuation to assess a redevelopment value of $156 million.[79]

75 [2012] HKCU 87 (LDCS 20000/2010, 10 January 2012, unreported).

76 [2011] HKCU 2356 (LDCS 19000/2010, 6 December 2011, unreported).

77 On reserve price redevelopment value see *Top Sail* (above); *Super Fortune Investment Ltd v Key-Note Enterprises Ltd* [2014] 2 HKC 7. Where the reserve price is fixed for a composite development see the heading in this chapter titled 'Composite Sites and Other Developments' at paragraph 7.27.

78 [2013] HKCU 746 (LDCS 15000/2012, 3 April 2013, unreported).

79 The comparable method of valuation is generally the best method of valuation and widely used under the Ordinance to determine the sale price. However, for some applications, particularly for major composite redevelopment, alternatives such as the more complex residual method may be more appropriate. The residual method includes more variable elements and can generate substantial differences between similarly competent and experienced valuers. See Chapter 23, paragraphs 23.55 to 23.71. The contents and quality of a valuer's report requires close examination. *Top Sail International Ltd v Wong Lai Wei* [2011] HKCU 2356 (LDCS 19000/2010, 25 November 2011, unreported), is an example of a summons by the applicant going further by applying to rule inadmissible parts of an expert's report. The summons was dismissed.

CHAPTER 18

RECLAMATIONS, FORESHORES, SEA-BED AND VICTORIA HARBOUR

1. GENERAL

(a) Reclamations, foreshores and sea-bed

18.1 Compensation is payable by the Government under the Foreshore and Sea-bed (Reclamations) Ordinance (Cap 127) to any person whose interest, right or easement in or over foreshores or sea-bed is injuriously affected by a reclamation. Since the 19th century, reclamations have played an important part in Hong Kong development and land policy.[1] The first reclamations occurred as early as 1841, when lessees of marine lots in Central illegally carried out small

1 See *Hong Kong Yearbook 1985* where the two inside pages of the back cover contain maps showing the extent of completed reclamations during the following periods: up to 1887, 1888–1924, 1925–1945, 1945–1967, 1968–1976 and 1977–1984. More recent reclamations include the Hong Kong Island Central Reclamation from Sheung Wan to Causeway Bay. The Sheung Wan to Central sector included reclaiming the land where the outlying islands ferry piers were located. The Government contracted with the Mass Transit Railway Corporation to carry out this reclamation. The contract included re-providing ferry piers in the reclamation area. The Hong Kong and Yaumati Ferry Co Ltd entered into negotiations with the Government to develop four of the re-provided ferry piers and a forecourt for commercial purposes. The company claimed this development was essential to the financial viability of the relocated ferry piers. Approximately $175 million was paid under an indemnity agreement but after long negotiations agreement was not reached for additional pier costs incurred in anticipation of the proposed commercial development. The dispute continued when the Government in *Secretary for Justice v The Hong Kong Yaumati Ferry Co Ltd and Hong Kong Ferry (Holdings) Co Ltd* [2004] HKCU 415 (HCA 15329/1999, 22 December 2006, unreported) substantially prevailed. On appeal the Court of Appeal was not satisfied that the evidence supported some of the amounts awarded to the Government which later provided over 300 pages of supporting documents. The Court of Appeal adjourned the hearing to give the parties an opportunity to submit an agreed draft order failing which the appeal hearing was to be restored: *Secretary for Justice v The Hong Kong Yaumati Ferry Co Ltd and Hong Kong Ferry (Holdings) Co Ltd* [2008] HKCU 390 (CACV 22/2007, 12 March 2008, unreported).

private reclamations to extend their lots into the sea. In 1843, partly because of this problem, the Governor set up a Land Committee to investigate claims and title to existing lots, when all private reclamations were prohibited. The first official reclamation commenced in 1852 and was carried out at Bonham Strand. The cost was paid for by the owners of marine lots adjoining the reclamation over which they were given rights to the extended foreshore.

18.2 The present Ordinance enacted in 1985 replaced two earlier Ordinances. These were the Public Reclamations and Works Ordinance (Cap 113) and the Foreshore and Sea-bed (Reclamations) Ordinance (Cap 127). The former Ordinance provided for compensation arising from reclamations or other works of a public nature over the foreshore or sea-bed. The latter Ordinance was passed in 1901 to validate then existing Government leases of foreshore and sea-bed and to provide statutory machinery for the grant of new leases.[2] Both Ordinances contained provisions for payment of compensation to persons whose land was injuriously affected by the grant of new leases.[3]

18.3 More limited ordinances were at times enacted to provide for particular reclamations. The Harbour of Refuge Ordinance (No 31 of 1909) authorized the creation of a harbour and typhoon shelter at Yaumati. This resulted in the first reported Hong Kong judgment on reclamation compensation.[4] The judgment

2 There were no reported cases under the former Foreshores and Sea-bed Ordinance but reference has been made to the sea-bed in other cases. In *Yiu Lian Machinery Repairing Works Ltd v Commissioner of Rating and Valuation* [1982] HKDCLR 32, reference was made to various sea-bed leases from the Government. The appellants, while successfully appealing that the floating docks were not rateable, conceded that the sea-bed leases constituted tenements and were rateable. The Cross Harbour Tunnel Ordinance (Cap 203) grants the right to the Cross Harbour Tunnel Co Ltd to use the sea-bed for the purpose of the Cross Harbour Tunnel. Section 9, in particular, grants a wayleave through the tunnel area in payment of an annual rent. The tunnel area is liable for rates and its rateable value was considered in *Cross Harbour Tunnel Co Ltd v Commissioner of Rating and Valuation* [1978] HKLTLR 144.

3 Subsequent statutory powers for construction of tunnels under the harbor were later enacted under the Eastern Harbour Crossing Ordinance (Cap 215) and the Western Harbour Crossing Ordinance (Cap 436). The power to construct and maintain a cross harbour tunnel was granted to the Mass Transit Railway Corporation under the Mass Transit Railway Corporation Ordinance (Cap 270). Section 10 of the Mass Transit Railway (Land Resumption and Related Provisions) Ordinance (Cap 276) empowers the Chief Executive to reclaim Crown foreshore and sea-bed for the railway and for such purpose, to extinguish, modify or alter public and private rights. Compensation is assessable in accordance with Item 1 of Part I of the First Schedule of the latter Ordinance and not under the Foreshore and Sea-bed (Reclamations) Ordinance (Cap 127). Claimants are limited to persons in whom the private right was vested at the date of extinguishment, modification or restriction. Compensation is the amount which might fairly and reasonably be assessed as the primary loss of the claimant.

4 *Re Award of Compensation by His Excellency the Governor to Owners of Kowloon Marine Lots* [1912] HKLR 110. The statutory right to compensation for injurious affection was where a claimant's existing access to the sea was affected by the reclamation. The claims were based on permanent injurious affection resulting from a reclamation interposed between the claimant's property and the new foreshore. The

has been largely overtaken by changes to land compensation law including the abolition of solatium. However, where dealing with injurious affection it remains relevant.

(b) Victoria Harbour

18.4 More recently increased major reclamations in Victoria Harbour led to strong adverse public criticism of their location and extent. This was the catalyst for the enactment in 1997 of the Protection of the Harbour Ordinance (Cap 531). This short but environmentally important legislation quickly proved its effectiveness. Important provisions included that (1) the harbour was to be protected and preserved as a special public asset and a national heritage of Hong Kong people and for that purpose there is a presumption against reclamation; (2) all public officers and public bodies must have regard to those protection and preservation principles in exercise of their powers.

2. Foreshore and Sea-bed (Reclamations) Ordinance (Cap 127)

(a) Plans

18.5 Where a reclamation is proposed in relation to any foreshore and sea-bed the Director of Lands is required to prepare a plan delineating and describing the proposed reclamation. The plan must also indicate those parts of the foreshore and sea-bed which are intended to be affected by the reclamation.[5]

18.6 Section 2 definitions include:

> 'foreshore and sea-bed' means the shore and bed of the sea and of any tidal water within Hong Kong, below the line of the high water mark;
>
> 'reclamation' includes any work over and upon any foreshore and sea-bed.[6]

Chief Justice held that the measure of compensation was the capitalized difference between the rent accruing for the properties at the time of the passing of the Ordinance and after the completion of the reclamation which adversely affected the properties access to the sea. Market value was adopted as the measure of compensation and the comparative method of valuation was applied. The judgment criticized valuers who used the same basic rates for all properties. Each property had to be considered and valued separately. The Chief Justice rejected unit rates and the separation of land from buildings and referred to examples of two owners of marine lots. One was the owner of a slipway and the other a firewood dealer. If both lost their sea access, the loss of the slipway owner would be greater than the loss of the firewood dealer so the former would be entitled to higher compensation. This would be to equate injurious affection with disturbance and assess compensation on a subjective basis.

5 Section 3, Foreshore and Sea-bed (Reclamations) Ordinance (Cap 127).

6 'Foreshore' and 'sea-bed' while geologically and physically distinct are defined under the Foreshore and Sea-bed (Reclamations) Ordinance (Cap 127) as one single statutory term.

(b) Notice

18.7 Notice of the proposed reclamation must be published in one issue of the Hong Kong Government Gazette and in two issues of Chinese and English language newspapers. In addition copies in both the Chinese and English languages must be affixed to prominent positions within or near the affected foreshore and sea-bed.[7] A copy of the plan must also be available for inspection by the public, free of charge, at such Government offices as may be directed during office hours.[8]

18.8 The notice is required:

(a) to describe the foreshore and sea-bed affected and the manner in which it will be affected by the proposed reclamation;
(b) be served by the Director and published either with a copy of the plan to which it relates prepared under section 3, or if modified by the Chief Executive in Council, with a copy of the plan as so modified, or state where and at what times a copy of any such plan may be inspected;
(c) state that any person who considers that he has an interest, right or easement in or over such foreshore and sea-bed that will be injuriously affected by the reclamation may deliver a written claim for compensation under section 12 for the injurious affection to the Director, before the expiry of such time being not less than one year from the date when it is published in the Hong Kong Government Gazette as shall be specified in the notice.[9]

18.9 A notice duly served and published is deemed to be notice to every person who has an interest, right or easement in or over the affected foreshore and sea-bed.[10]

3. Objections

(a) Right to object

18.10 The right to object may be exercised by any person who considers that he has an interest, right or easement in or over the foreshore and sea-bed described in the notice.[11] Objections are limited to the proposed reclamation.[12]

7 Section 5, Foreshore and Sea-bed (Reclamations) Ordinance (Cap 127).
8 Section 4, Foreshore and Sea-bed (Reclamations) Ordinance (Cap 127).
9 Section 9(2), Foreshore and Sea-bed (Reclamations) Ordinance (Cap 127).
10 Section 9(3), Foreshore and Sea-bed (Reclamations) Ordinance (Cap 127).
11 Section 6(1), Foreshore and Sea-bed (Reclamations) Ordinance (Cap 127).
12 In some other resumption ordinances, there is the right to object before a final decision is made on whether the project is to proceed. Under other ordinances there is no statutory right to object to the resumption or dispute whether the resumption is for a public purpose. The more limited right is to apply for compensation.

(b) Objection procedure

18.11 The notice of the proposed reclamation specifies the time within which objections must be delivered to the Director of Lands.[13] Time expires not less than two months from the publication of the notice.

18.12 A notice of objection must:

(1) object to the reclamation;
(2) be in writing;
(3) describe the interest, right or easement of the objector;
(4) particularise the manner in which the objector alleges the interest, right or easement will be affected by the reclamation.[14]

18.13 The notice of objection must be delivered to the Director of Lands within the specified time limit. Once a notice of objection is delivered, it may, at any time up to the time when the Chief Executive in Council makes his final decision, be amended or withdrawn. An objection which is withdrawn is treated as if it had not been made.[15]

4. Powers of Determination and Authorization

(a) Exercise of powers

18.14 After the time for making objections has expired the Chief Executive in Council may take the following action:

(1) Where a notice of authorization has been issued if no objections have been delivered, or if any made, all have been withdrawn, may authorize the proposed reclamation;[16]
(2) if objections have been delivered after consideration may either:[17]
  (a) decline to authorize the reclamation;
  (b) authorize the reclamation in part only and defer for further consideration at such future time as he must specify, any objection which relates to the remaining part of the reclamation not so authorized; or
  (c) authorize the whole of the reclamation.

13 The Chief Executive in Council under other resumption ordinances has the power to resume private land for a public purpose. In such cases, there is no statutory right either to object to the resumption or to dispute whether the resumption is for a public purpose. The right arises after a resumption order is made and is then limited to applying for compensation.
14 Section 6(1) and (2), Foreshore and Sea-bed (Reclamations) Ordinance (Cap 127).
15 Section 6(3), Foreshore and Sea-bed (Reclamations) Ordinance (Cap 127).
16 Section 7, Foreshore and Sea-bed (Reclamations) Ordinance (Cap 127).
17 Section 8, Foreshore and Sea-bed (Reclamations) Ordinance (Cap 127).

(b) Extinguishment of marine rights

18.15 Upon publication of a notice of authorization in the Hong Kong Government Gazette, all rights in relation to the affected foreshore and sea-bed are extinguished in these terms:[18]

(a) all public and private rights in relation to the foreshore and sea-bed affected thereby shall be extinguished and cease to exist, and

(b) no person shall have any right against the Government or any other person to compel or restrain anything authorized under sections 7, 8(1)(b) or 8(1)(c) of the Foreshore and Sea-bed (Reclamations) Ordinance.[19]

(c) No claim for money except under the Ordinance

18.16 No person shall have any right against the Government or any other person to claim any money in respect of anything authorized under section 7, 8(1)(b) or 8(1)(c) of the Foreshore and Sea-bed (Reclamations) Ordinance except to the extent of the entitlement to claim compensation under section 12.[20]

5. Compensation

18.17 A claimant must have held an interest, right or easement in or over the foreshore or sea-bed affected by the reclamation. The sole compensation remedy for a person adversely affected suffering injurious affection, is to bring a claim for compensation in accordance with these provisions of the Ordinance:[21]

(1) Any person who claims that his interest, right or easement in or over such foreshore and sea-bed will be injuriously affected by the reclamation may deliver to the Director a written claim stating the sum of money which he is willing to accept in full and final settlement of his claim together with such particulars as he may possess to substantiate the claim and shall furnish to the Director such accounts, documents and further particulars as the Director may request him to furnish, in support of the claim.[22]

(2) A claim under subsection (1) shall be made before the expiry of the time specified in the notice served by the Director and published under section 9(1) in respect of the reclamation.

(3) Where any costs or remuneration are reasonably incurred or paid by a claimant in employing persons to act in a professional capacity in connexion with a claim under subsection (1), such claim may include a claim for such costs or remuneration.

18 Section 10(1), Foreshore and Sea-bed (Reclamations) Ordinance (Cap 127). No action shall be brought or continued in respect of the extinguishment under subsection (1), in whole or in part, of any public or private right: section 10(2).

19 Section 10(1)(a) and (b), Foreshore and Sea-bed (Reclamations) Ordinance (Cap 127).

20 Section 11 of the Foreshore and Sea-bed (Reclamations) Ordinance (Cap 127) provides that the sole remedy for affected persons is a claim for compensation under the Ordinance. Hence on the statutory extinguishment of any such public or private rights, an affected person may not resort to any civil remedies such as for an injunction, mandamus, declaration or otherwise in an attempt to preserve any of those rights. Nor may an affected person, upon the extinguishment of those rights, bring an action against the Government for damages.

21 Section 12, Foreshore and Sea-bed (Reclamations) Ordinance (Cap 127).

(a) Claims procedure

18.18 The statutory procedure provides:

(a) Claims must be made in writing before the expiry of the time specified in the published notice of authorization.

(b) The claim should state the sum of money the claimant is willing to accept in full and final settlement of his claim together with such particulars as he may possess to substantiate the claim.

(c) The claimant is required to furnish to the Director such accounts, documents and further particulars in support of the claim as the Director may request.

(d) The claim may include any costs or remuneration reasonably incurred or paid by a claimant in employing persons to act in a professional capacity in connection with the claim.[23]

18.19 The claim is invalid if it fails expressly to quantify the sum of money the claimant will accept in full and final settlement of his claim.[24]

(b) Time limitations

18.20 The Foreshore and Sea-bed (Reclamations) Ordinance contains two time limitation periods within which notice of a claim must respectively be delivered to the Director and any subsequent reference made to the Lands Tribunal.[25]

(c) Notice of claim

18.21 Any person who holds an interest, right or easement over a sea-bed or foreshore, and is injuriously affected by a reclamation may deliver a written claim

22 Section 12(1), Foreshore and Sea-bed (Reclamations) Ordinance (Cap 127). This is the only Hong Kong statutory reference to an 'injurious affection' compensation head of claim. In other common law jurisdictions it is statutorily recognized and widely used as a head of claim for compulsory purchase or resumption of land and consequential loss claims. See Chapter 4 'Compulsory Resumption of Land for Public Purposes' and Chapter 24 'Constitutional Law'.

23 Section 12, Foreshore and Sea-bed (Reclamations) Ordinance (Cap 127).

24 *Tai Tung Industrial Equipment Ltd v Director of Lands* [1995] 2 HKC 705.

25 Sections 12(2) and 13(6) respectively of the Foreshore and Sea-bed (Reclamations) Ordinance (Cap 127).

to the Director. The claim must be made before the expiry of the one year time period specified in the notice served by the Director which in turn must be not less than one year from the date of the notice published in the Hong Kong Government Gazette. In *Tai Tung Industrial Equipment Ltd v Director of Lands*[26] a claim was not lodged within the specified one year period. The Court of Appeal found the claimant failed at the first step by never having lodged a timely claim or any claim. Alternatively, if the letter to the Director was considered to be a claim, then it would also fail as it did not specify the amount of the claim as required by section 12(1) of the Foreshore and Sea-bed (Reclamations) Ordinance (Cap 127). Compliance with the time limitation was imperative. An extension of time was declined.[27]

18.22 A different holding was made by the Lands Tribunal two months later on an application for compensation by unrepresented applicants in *Chan Sik-cheung v Director of Lands*.[28] None of the applicants had served notice of claim on the Director within the one year limitation period. The Tribunal accepted that the Director had no power to extend the Foreshore and Sea-bed (Reclamations) Ordinance section 12(2) time limit. However, it went on to distinguish the Court of Appeal judgment in *Tai Tung Industrial Equipment Ltd*, holding that under section 10(2)(d) of the Lands Tribunal Ordinance (Cap 17), the Tribunal had power for good cause, to enlarge time whether or not that time has already expired, fixed by any Ordinance so enlarge the time during which a claim may be served on the Director.[29] The Lands Tribunal, after on the facts finding the claimants had failed to establish 'good cause', declined to extend time.[30]

26 [1995] 2 HKC 705 (CA).

27 Compare the provision for the time to file an application within 7 months for compensation to the Lands Tribunal, as distinct from earlier notice of claim to the Director 'or within such longer period as the Lands Tribunal may in any case allow, but the total period …shall not exceed 6 years from that date': section 13(6), Lands Tribunal Ordinance (Cap 17).

28 [1995] 3 HKC 199, [1995-96] CPR 394.

29 The Tribunal observed: "Unfortunately, it appears that the Court of Appeal were not referred to the relevant statutory provision dealing with enlargement of time, contained in section 10(2)(d) of the Lands Tribunal Ordinance, (Cap 17)." This wide power, subject to an applicant establishing 'good cause' extends to enlarging the time fixed by any Ordinance for giving any notice: section 10(2)(i). This includes notices required to be given to the Director. The Lands Tribunal also referred to the fact that while the Court of Appeal in *Tai Tung Industrial Equipment Ltd v Director of Lands* [1995] 2 HKC 705 had recognized that the Director had no power to extend section 12(2) time limits, it had not gone on to consider whether the Lands Tribunal had power to extend time for an applicant to apply to the Director. The applicant's appeal against the refusal of the Tribunal to grant an extension of time was dismissed by the Court of Appeal which held that the notice of appeal did not disclose the necessary point of law under section 11(2) of the Lands Tribunal Ordinance: *Chan Cheuk Tong v Director of Lands* [1996] 3 HKC 485.

30 The Tribunal reasons included that the claimants had no registered interest nor had owned any land contiguous to the reclaimed land. They resided in a more distant village and for many years had sailed by boat to the later reclaimed area to carry out oyster farming and fishing. The evidence was that since the Ming Dynasty the local Tong had owned the sea-bed. In earlier years, the claimants had paid the Tong annual

18.23 The judgment in *Chan Sik-cheung* appears to have prompted the earlier unsuccessful appellant before the Court of Appeal in *Tai Tung Industrial Equipment Ltd*[31] to apply to the Tribunal for time for service of notice of claim to be extended. The Director did not question the power of the Tribunal to extend time. The Tribunal held that the claimant had established 'good cause' on both a narrow and general interpretation of that term. Time for delivery of a claim to the Director was extended.

18.24 These decisions establish that the Director has no power to extend time limits. However, this is not necessarily fatal to an intended claimant because the Tribunal has the separate power where 'good cause' is established to enlarge time for service of a notice of claim on the Director.

(d) Settlement procedure

18.25 The Director of Lands is subject to strict time limits whether to admit or reject a claim in whole or in part. Before the expiry of six months from the receipt of a claim, the Director must decide whether the claimant has a compensatable interest: whether he admits the whole claim, rejects the whole claim or admits a specified part and rejects the remainder. Where further particulars are requested by the Director the time limitation is extended to six months from the date when the further particulars are furnished. The Director must serve notice of the decision in writing on the claimant.[32]

(i) Admitted claims

18.26 Where a claim is admitted, in whole or in part, the Director may agree with the claimant on the amount of compensation to be paid in full and final settlement. If there is agreement on compensation and all consequential matters, if any, the claim need not proceed to the Lands Tribunal.[33]

(ii) Rejected claims

18.27 Where a claim is rejected, in whole or in part, the Foreshore and Sea-bed (Reclamations) Ordinance requires that the Director must supply reasons when

sums for the right to farm oysters in the locality. These payments had long been discontinued. Increased pollution had caused oyster farming to be uneconomical. No oyster farming or fishing rights had been granted by the Government which at most had licensed sampans and other craft to use the foreshore. The Tribunal was satisfied that whether the previous discontinued payments to the Tong were in accord with earlier custom or pre-1898 Convention of Peking powers, they did not create legal rights required under section 12(1) of the Foreshore and Sea-bed (Reclamations) Ordinance (Cap 127).

31 *Tai Tung Industrial Equipment Ltd v Director of Lands* [1995] HKCU 225 (LDMR 31/1995, 27 November 1995, unreported); [1995] 2 HKC 705 (CA).

32 Section 13, Foreshore and Sea-bed (Reclamations) Ordinance (Cap 127).

33 A claimant may instead prefer it to be made a consent order by the Lands Tribunal.

giving notice of rejection. The words in section 13(1) are that the Director shall, where he:

> ... rejects the whole claim, or admits a specified part and rejects the remainder, as the case may be, give an adequate statement of his reasons for the rejection.

18.28 Where there is a rejection the claimant may refer the claim to the Lands Tribunal.

6. Determination of Compensation by the Lands Tribunal

(a) Reference to the Lands Tribunal

18.29 Where a claim is not settled by agreement, then after the expiration of the prescribed statutory time limit of seven months, the claimant or the Director may refer a claim to the Lands Tribunal for determination.[34]

(b) Compensation claim to the Lands Tribunal

18.30 The reference to the Lands Tribunal must be made before the expiry of one year from the notice from the Director, admitting or rejecting the claim in whole or in part.[35] The Tribunal is empowered to extend the one-year limitation, provided the total period from the specified date does not exceed six years.[36]

34 Section 13(3), Foreshore and Sea-bed (Reclamations) Ordinance (Cap 127).

35 Section 13(6), Foreshore and Sea-bed (Reclamations) Ordinance (Cap 127). In *Penny's Bay Investment Co Ltd v Director of Lands* (2010) 13 HKCFAR 287, [2010] 4 HKC 69 at paragraph 37 Lord Hoffmann NPJ held this was significant in relation to the method of assessing compensation distinguishing Hong Kong law from English law. Unlike the position in England, the claim under section 12 of the Ordinance must be made within a period which will usually be one year. In many cases the reclamation will not have started by that time. If therefore the owner can claim only for actual loss, the period for making a claim will have expired before it can be made. The Court of Appeal judgment ([2016] HKCU 1149 (CACV 120/2015, 16 May 2016, unreported)), determining the appeal against the Lands Tribunal assessment of compensation at paragraph 72 referred to Lord Hoffmann NPJ holding that as the scheme of the Ordinance requires a claim to be made within one year from the publication of authorization, the injurious affection must be deemed to have accrued on the date of authorization (see further below at footnote 38).

36 The power is discretionary and adequate grounds would have to be established before an extension is granted. There is no material difference between the exercise of the discretion and the separate like discretion under the Tribunal's own Ordinance which expressly requires good cause to be shown: section 10(2)(d), Lands Tribunal Ordinance (Cap 17). The Tribunal power of extension under section 10(2)(d) is consequentially limited to a maximum of 6 years. See also *Tai Tung Industrial Equipment Ltd v Director of Lands* [1995] 2 HKC 705 (CA) and *Chan Sik-cheung v Director of Lands* [1995-96] CPR 394 (LT).

(c) Preliminary issues

18.31 In some references it may be desirable for preliminary issues to be determined before the substantive hearing. The criteria for holding a trial on preliminary issues is usually limited to points of law. However, if a point of law can only or better be determined in a factual context, it is usually desirable that all of those disputed issues should go direct to trial.[37]

18.32 The proceedings which reached the Court of Final Appeal in *Penny's Bay Investment Co Ltd v Director of Lands*[38] were complicated and delayed including by disputes over preliminary issues. After the Government in 1995 issued an authorisation to carry out the reclamation, agreement was reached on compensation for the adjoining land. However, compensation for the related but separately adversely affected marine rights was disputed. On the marine rights dispute reaching the Lands Tribunal there were from 2003 several interlocutory hearings principally on the form and determination of preliminary issues. Court of Appeal decisions included upholding the owner's appeal that the Government imprecise actions made it imperative that issues of fact and law should be clarified. The Court of Appeal ordered that the proceeding be remitted to the Tribunal for the President to give directions on preliminary issues.[39]

18.33 When the parties could not agree on issues they were fixed by the President. Both parties considered those issues were unsatisfactory. A further appeal by the owner of the then Penny's Bay Investment Company Limited (PBIL) was upheld by a majority of the Court of Appeal. Each of the majority judges arrived at different conclusions some of which were shared by the dissenting judge.[40]

37 There is substantial case law discouraging applications to determine preliminary issues: *Commissioner of Valuation v Agrila* [2001] 2 HKLRD 36; *Re Tai Ping Yeung Motors* [2001] 2 HKC 611; *Penny's Bay Investment Co Ltd v Director of Lands* (2010) 13 HKCFAR 287; *Tilling v Whiteman* [1980] AC 1.

38 (2010) 13 HKCFAR 287, [2010] 4 HKC 69. Lord Hoffmann NPJ delivered the main judgment while Bokhary (presiding), Chan and Ribeiro PJJ were content to express agreement without separate reasons. Litton NPJ, while also concurring delivered a short judgment critical of the nearly 15 years of litigation since the 1995 authorisation at pages 292-294. The continuing litigation now exceeds a period of 20 years.

39 The subsequent complex litigation involved 15 hearings (including interlocutory applications and substantive compensation hearings) before the Lands Tribunal; 11 appeals to the Court of Appeal; and 1 appeal to the Court of Final Appeal.

40 The complexity of the facts and law was also reflected in many of the judgments. The Court of Appeal when granting leave to appeal on the preliminary issues recognised its judgments made it difficult to discern the *ratio decidendi*, observing 'In essence, this Court has come to three different judgments and, in those circumstances, it is undesirable that the Lands Tribunal should be left in too much of a quandary as to how to proceed': [2009] HKCU 692 (CACV 176/2007, 8 January 2009, unreported). Those judgments included the dissent of Yuen JA who agreed with the tortious approach of the President of the Lands Tribunal. Lord Hoffmann NPJ later in the Court of Final Appeal judgment ((2010) 13 HKCFAR 287) at page 299, paragraph 32 observed that: "In the Court of Appeal Yuen JA agreed with the President and was for dismissing the appeal. Cheung JA on the other hand, agreed with the PBIL's submission that compensation was payable for the difference between the value of

The preliminary issues dispute was ultimately determined by the Court of Final Appeal.[41] The wisdom of having preliminary issues was doubted. Apart from delay, an understanding of the factual and practical consequences of applying a legal principle, can sometimes demonstrate it cannot possibly be right.[42] Several of the issues misstated the applicable law. The proceedings were remitted back to the Tribunal with guidance on the principles on which to assess compensation. The Court of Final Appeal also observed that whether liability for statutory compensation had been discharged by an *ex gratia* payment was irrelevant. The jurisdiction of the Lands Tribunal was to determine compensation; not whether that liability had been discharged.[43]

18.34 By judgment handed down on 15 October 2014, the Lands Tribunal made an award in connection with the extinguishment of marine rights pertaining to Lot 22 in DD356, held by PBIL. Both PBIL and the Director of Lands applied to the Tribunal for leave to appeal on multiple grounds. On 16 January 2015 the Tribunal granted leave on certain grounds.[44] Both parties then applied to the Court of Appeal for leave on further grounds. On 15 May 2015 the parties obtained leave from the Court of Appeal on some of the other grounds which the Tribunal had refused. The Court of Appeal substantive judgment is considered below.[45]

(d) Compensation

18.35 Any person who claims an interest, right or easement in or over foreshore and sea-bed, which will be 'injuriously affected' by a reclamation, may claim compensation together with costs.[46] The compensable interest is the holding of such marine rights. The measure of compensation is the extent to which those

the land with and without the marine rights." The final observation was that the view of Rogers VP was "a little difficult to pin down."

41 (2010) 13 HKCFAR 287.

42 (2010) 13 HKCFAR 287 at 299, paragraph 30 per Lord Hoffmann NPJ, who also observed that among the difficulties of applying English principles was that the shorter Hong Kong requirement for an owner to apply for compensation within one year of the authorisation resulted in many reclamations not having started by that time.

43 On ex-gratia payments see generally Chapter 22 'Ex-gratia and Premium Payments'. The Court of Final Appeal after a contested costs hearing directed the Director to pay the respondent's costs of the appeal and of the appeal before the Court of Appeal, including the costs of written submissions on costs, certified fit for three counsel, to be taxed if not agreed: *Penny's Bay Investment Co Ltd v Director of Lands* [2010] HKCU 1835 (FACV 8/2009, 27 August 2010, unreported).

44 [2015] HKCU 124 (LDMR 23/1999, 16 January 2015, unreported). This resulted in CACV 13-15/2015 with the Director of Lands as appellant and CACV 15-16/205 with PBIL as appellant, dated 15 May 2015. For the appeal see the Court of Appeal judgment dated 16 May 2016. See also paragraphs 18.45–18.49 below.

45 That resulted in CACV 115-116/2015 with the Director of Lands as appellant and CACV 119-120/2015 with PBIL as appellant, dated 15 May 2015. For the appeal see the Court of Appeal judgment dated 16 May 2016.

46 Section 12, Foreshore and Sea-bed (Reclamations) Ordinance (Cap 127). These costs up to the date the claim is lodged include remuneration reasonably incurred in

rights will be injuriously affected. This will primarily comprise the loss of access to the sea including reduced access.

(i) Injurious affection

18.36 The sole ground for compensation is injurious affection. It is not defined in the Ordinance nor are there any statutory compensation guidelines.[47] The relevant principles are largely those which have evolved under the common law. At common law injurious affection is the loss in value of property rights caused by the extinguishment of an owner's interest, right or easement or in or over the land. Compensation is payable to persons holding marine rights which will be 'injuriously affected' by the reclamation.[48] Marine rights primarily include access to the sea.

18.37 Lord Hoffmann NPJ in *Penny's Bay Investment Co Ltd v Director of Lands*[49] defined injurious affection as follows:

employing persons to act in a professional capacity in connection with the claim. For costs after the claim is lodged see 'Costs' at paragraph 18.57 (below).

47 However, once injurious affection is established the measure of damages is determined in accordance with the Ordinance.

48 Section 12, Foreshore and Sea-bed (Reclamations) Ordinance (Cap 127).

49 (2010) 13 HKCFAR 287. The factual history commenced in 1994 when the Government proposed building two new container terminals on land to be reclaimed from Penny's Bay, Lantau Island. The Government on 5 May 1995 published in the Hong Kong Government Gazette a notice of reclamation (No GN 1574) authorized under section 9 of the Foreshore and Sea-bed (Reclamations) Ordinance (Cap 127) to reclaim about 1260 hectares of the foreshore and sea-bed at the bay. Penny's Bay Investment Co Ltd (PBIL) under a New Grant and Exchange Agreement had a proprietary right, subject to conditions, to use the foreshore for access between its own Lot 22 in DD356, Penny's Bay and the sea. The Government's proposed reclamation would terminate PBIL access to the sea and close its ship building and repairing business, extinguishing its marine rights pertaining to Lot 22. Compensation for the land was settled but compensation for loss of sea access was disputed for several years before the Lands Tribunal and the appellate courts. On 5 May 1996 PBIL lodged a claim of $2.539 billion. On 2 November 1999 PBIL referred the disputed claim to the Lands Tribunal under section 13(3) of the Ordinance to determine compensation (LDMR 23/1999 and also LDMR 1/2005, 14 September 2005, unreported). Later, the Government abandoned the proposed resumption, publishing in the Gazette a notice of withdrawal (No 15 GN 2230, dated 10 April 2000) of the GN 1574 reclamation authorization. Days later by another notice (No GN 2231, dated 14 April 2000), a new section 9 authorisation was issued for the reclamation of 330 hectares in the same area to provide 290 hectares for a theme park which became the Hong Kong Disneyland complex, water recreation centre, hotels, roads, railways, ferry piers and associated infrastructure. During March 2001, with Disneyland construction imminent, PBIL's tenant surrendered its tenancy and on 3 April 2001 PBIL voluntarily surrendered the Government lease of the land. Government paid PBIL compensation of $1,506,098,750 comprising $22,710,000 for the value of the resumed land without marine rights and a standard rate ex-gratia payment of $1,483,389,000. The payments were without prejudice to PBIL's continuing statutory resumption claim for foreshore and sea-bed compensation. The authorization effectively extinguished the marine rights: section 10, Foreshore

> It means a diminution in the value of the land caused by the works authorised by statute which would otherwise have been tortious.[50]

18.38 The loss of value is generally assessed on the basis of a 'before and after' valuation.[51] The before value is ascertained under the general principle that the value of the property is the price which it would fetch on a sale in the open market between a willing seller and a willing purchaser on the relevant date.[52]

18.39 The Public Reclamation Works Tribunal decision in *Li Ling Shi v The Government of Hong Kong (No 1)*[53] in applying that methodology described the measure of compensation for injurious affection in these terms:

> The difference between what a willing purchaser would pay for the land with the rights which are extinguished and what he would pay for the land without those rights.

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and Sea-bed (Reclamations) Ordinance (Cap 127). For PBIL's 2 November 1999 application to the Lands Tribunal under section 13(3) of the Ordinance to determine compensation it was not in dispute that the 10 April 2000 notice of withdrawal revoking the 1995 Authorisation did not revive PBIL's marine rights and that it had a vested right to compensation by virtue of the 1995 Authorisation. The question for the Tribunal was how compensation which had become payable by virtue of the 1995 Authorisation should be calculated under section 12 of the Ordinance. The proper approach to a valuation was not authoritatively determined until the judgment of the Court of Final Appeal in 2010 and as explained by the Court of Appeal in the 2016 judgment.

50 (2010) 13 HKCFAR 287 at page 300, paragraph 34. In defining injurious affection Lord Hoffmann NPJ cited *Re Penny and South Eastern Railway Co* (1857) 7 E & B 660, 699 for the principle that injurious affection compensation is for the diminution in the value of land caused by works authorized by statute which would otherwise have been tortious. Hence if the entry on the land is not made pursuant to statutory authority and without the consent of the owner, it would be unlawful, creating remedies including in the tort of trespass giving the owner a claim for damages for any loss in value. See also paragraph 35 per Lord Hoffmann NPJ.

51 The expression 'before and after basis' has long been adopted as a convenient short-hand while not precisely defining the requisite exercise. See also the Court of Final Appeal decision on costs ([2010] HKCU 1835 (FACV 8/2009, 27 August 2010, unreported)) at paragraphs 9 and 10 per Ribeiro PJ. On the *Penny's Bay* compensation assessment appeal the Court of Appeal ([2016] HKCU 1149 (CACV 120/2015, 16 May 2016, unreported)) at paragraph 75 pointed out "…that it can be misleading to refer to the 2 market values as Before Value and After Value though for convenience sake (as the Tribunal had adopted the same) we shall continue to adopt these expressions in this judgment)."

52 The Court of Final Appeal in *Penny's Bay Investment Co Ltd v Director of Lands* (2010) 13 HKCFAR 287 set out these principles per Lord Hoffmann NPJ at page 203, paragraph 43 as to the measure of compensation (see further below at footnote 58). On the proper approach to valuation and 'before and after valuation' under section 12 of the Foreshore and Sea-bed (Reclamations) Ordinance (Cap 127), see also the Court of Final Appeal decision on costs ([2010] HKCU 1835 (FACV 8/2009, 27 August 2010, unreported)), paragraphs 9 and 10 per Ribeiro PJ; and the Court of Appeal judgment ([2016] HKCU 1149 (CACV 120/2015, 16 May 2016, unreported)), paragraphs 72 onwards.

53 [1963] HKLR 595 at 605.

18.40 In many cases the land injuriously affected will adjoin or be contiguous to the interest, right or easement affected by the reclamation.[54] However, contiguity is not as a matter of law essential. This was emphasised by the Privy Council in *R v Sisters of Charity of Rockingham*.[55] Whether land is contiguous or at least adjacent will be factually important as an indicator that the claim is a direct consequence of the reclamation, or is too fanciful or remote.[56] In practice awards for compensation are generally for the loss of value to the unresumed land caused by the resumption of either contiguous or adjacent land.[57]

(ii) Relevant date

18.41 The Court of Final Appeal in Penny's Bay Investment Co Ltd v Director of Lands held the relevant date for assessment of compensation is to be ascertained on the assumption that the reclamation took place on the date of the Hong Kong Government Gazette publication of the notice of authorisation.[58] This gives effect to the future tense of Foreshore and Sea-bed (Reclamations) Ordinance section 12 that the land 'will' be injuriously affected and not that it has been or may be affected. Nothing that happened after that date can affect the valuation. This is subject to the qualification that on the hypothetical open market sale date, it is to be assumed that the parties would have expectations about the future which may have influenced the negotiated sale price.[59] This interpretation also overcomes

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54 Under section 10(2)(c) of the Lands Resumption Ordinance (Cap 124), the claimant's land has to be 'contiguous or adjacent' to the resumed land. The *Oxford English Dictionary*, Volume 11 defines 'contiguous' as '(1) touching, in actual contact, next in space, meeting at a common boundary, bordering, adjoining.' However, 'adjacent' includes more remote land, not necessarily sharing a common border with the other land, being defined in the *Oxford English Dictionary* as 'lying near or close'.

55 [1922] 2 AC 315.

56 See generally Frederick Corfield and Robert Carnwath, *Compulsory Acquisition and Compensation* (1978, London: Butterworths) at page 314 onwards and Keith Davies, *Law of Compulsory Purchase and Compensation* (5th Edn, 1994, London: Butterworths).

57 Compensation for injurious affection is generally for the consequential loss to contiguous or adjacent land: *Re Award of Compensation by His Excellency the Governor to Owners of Kowloon Marine Lots* [1912] HKLR 110; *Li Ling Shi v The Government of Hong Kong (No 2)* [1964] HKLR 428; *Re Trustees of the Estate of Tsang Hung-tin, deceased* [1971] HKLR 68; *Tai Tung Industrial Equipment Ltd v Director of Lands* [1995] 2 HKC 705.

58 (2010) 13 HKCFAR 287 at page 203 paragraph 43, per Lord Hoffmann NPJ. This important holding expressly agreed with the preliminary issue judgment of Cheung JA in the Court of Appeal that nothing which happened after that date can affect the valuation. See also the subsequent Court of Appeal judgment (CACV 120/2015, 16 May 2016, unreported) at paragraphs 12, 16, 65(1), 71-74 and below.

59 See 'Prospective loss' at paragraphs 18.50–18.51 below.