

CHAPTER 2

REQUISITION ON TITLE IN SALE OF PROPERTY

1. INTRODUCTION

[2-1] Ever since the great work of *Williams on Title* was published, there seems to be no end to disputes regarding title to land. This is often the case when the property market is increasingly becoming a bubble, or more often, when it collapses. The spectrum for requisitions to be raised is wide ranging, from purely the examination of title documents such as due execution to on-site investigation. There may be some possibility of certainty surrounding such disputes when the Registration of Title Bill passes the Legislative Council. However, even if the Bill is passed there will be a plethora of different issues or new issues.

[2-2] This chapter examines current topical issues.

2. GENERAL LAW

[2-3] A vendor has a duty to prove a good title before completion and he has to show beyond reasonable doubt that the purchaser will not be at risk of a successful assertion against him of an encumbrance affecting the property concerned.¹ This is a very high standard of proof and the vendor will have to put forward strong and compelling evidence. The rationale is that the court will not force a doubtful title on a purchaser.

[2-4] In addition, a vendor is also under a duty to satisfactorily answer requisitions raised by the purchaser and show a good title within a reasonable time and before the date of completion.

[2-5] The above two duties are treated as an implied term in an agreement for sale and purchase of property.²

1 See *MEPC Ltd v Christian-Edwards* [1981] AC 205 at 220C-D; *Kan Wing Yau v Hong Kong Housing Society* [1987] 2 HKLR 187 at 193H, [1986-88] CPR 525 (CA); and, more recently, *Gigabillion Asia Pacific Ltd v Sino Dynamic International Ltd* [2015] 2 HKLRD 100, [2015] 2 HKC 384 at para 18 (CA).

2 For example, see *Join Union Investment Ltd v China Tree Investment Ltd* [2016] 2 HKLRD 901, [2016] HKCU 775.

[2-6] However, a ‘good’ title does not mean a ‘perfect’ title.³ On the other hand, a good title is a superior title to a good holding title or a good marketable title.⁴

[2-7] The purchaser is always entitled to proof of all matters of fact which are part of or affect the title.⁵ In *Fry on Specific Performance*⁶ at paragraph 889 (which was approved by the House of Lords in *MEPC Ltd v Christian-Edwards*),⁷ there appears the following statement:-

889. The doubt which may prevent the Court from compelling the purchaser to accept a title may be a doubt either of law or of fact; ... and as to fact, it may be in reference to facts appearing on the title, or to facts extrinsic to it. Again, it may be about a matter of fact which admits of proof, but has not been satisfactorily proved or about such a matter as from its nature admits of no satisfactory proof, as the negative proposition that there was no creditor of the vendor capable of taking advantage of an act of bankruptcy.

[2-8] In *Active Keen Industries Ltd v Fok Chi Keong*,⁸ Litton JA said (at 405):

The question: ‘how is good title shown?’ is not capable of an answer in the abstract. It depends upon the matter at hand.

[2-9] In *To Yung Sing Herman v Szeto Chak Mei*⁹ the Court of First Instance stated two general principles:

- (1) The court will not force a doubtful title on a purchaser.
- (2) A doubtful title includes a title on which the court entertains a favourable opinion but may yet be reasonably and fairly questioned by other competent persons.

3 See *Mexon Holdings Ltd v Silver Bay International Ltd* (2000) 3 HKCFAR 109, [2000] 2 HKC 1.

4 *Kan Wing Yau v Hong Kong Housing Society* [1987] 2 HKLR 187, [1986-88] CPR 525 at para 26. The distinction of ‘good holding title’ and ‘good marketable title’ was made in *MEPC Ltd v Christian-Edwards* [1978] Ch 281 at 288 per Goff LJ, quoting Luxmoore J in *Re Spollon and Long’s Contract* [1936] Ch 713 at 718:

The purchaser having bought on an open contract, was entitled to have a good marketable title, which, as I understand it, is a title which will enable him to sell the property without the necessity of making special conditions of sale restrictive of the purchaser’s rights.

See also *Jovian Corporate Communications Ltd v Link Wide International Investment (Hong Kong) Ltd* [2016] 2 HKLRD 1287, [2016] HKCU 814 at para 12.

5 *Williams on Vendor and Purchaser* (4th Edn, 1936, London: Sweet & Maxwell) Vol 1, p 190.

6 6th Edn, 1921, London: Stevens and Sons.

7 [1981] AC 205 at 220 A-B.

8 [1994] 1 HKLR 396, [1994] 2 HKC 67.

9 [2018] 3 HKLRD 370, [2018] HKCU 2238, [2018] HKCFI 1506. See also *In re Stirrup’s Contract* [1961] 1 WLR 449, per Wilberforce J at 454; *MEPC Ltd v Christian-Edwards* [1981] AC 205, HL, per Lord Russell at 220C-D; *Kan Wing-yau v Hong Kong Housing Society* [1988] 2 HKLR 187, [1988] HKCU 375 (CA); *Jumbo Gold Investment Ltd v Yuen Cheong Leung* (2000) 3 HKCFAR 52, [2000] 1 HKC 539, per Bokhary PJ at 601-61B; and *De Monsa Investments Limited v Whole Win Management Fund Ltd* (2013) 16 HKCFAR 419, [2013] 5 HKC 350, per Litton NPJ at 109.

[2-10] A purchaser will not therefore be forced to take a title which will expose him to risk or hazard.¹⁰

[2-11] In *Step Billion Investment Ltd v Monte Generoso Ltd*,¹¹ the Court took a strict view of the duty of answering requisition. In that case the requisition was in relation to a power of attorney :

3. The 'Property' of the Donor was not described in detail in the said Power of Attorney. The 'Property' only refer to 'certain' land(s) and/or premises. No specific descriptions of the lands and/or premises were referred to. Accordingly, doubts arise as to whether the Donee ... was empowered to execute Assignment Memorial No. 09110400170100 for and on behalf of the Donor ...

[2-12] The Court held that whilst it is desirable for the avoidance of doubt to list out the full details of the relevant property in the body or the schedule of the power of attorney, the absence of the full details of the property is not necessarily fatal, provided that it is plain from the natural meaning of the language of the power of attorney that it applies to a particular property. The Court then held that the power of attorney was ambiguous as it is not clear from the words 'certain land(s) and/or premises in the New Territories' whether it was intended to cover all the properties in the New Territories that were owned by the Donor, or whether they referred to only some of the properties owned by the Donor.

[2-13] However, evidence could be provided to show that the risk of a challenge is so remote from the standpoint of a willing purchaser and a willing vendor, both possessed reasonably robust common sense. However, the Defendant had never attempted in their answer to the Requisition to provide any of these answers or evidence. It was too late for the Defendant to do so through its Counsel at the hearing.

[2-14] When a doubt is raised on the title but the facts and circumstances presented by the vendor 'are so compelling that, beyond any reasonable doubt, the risk is, for all practical purposes, illusory', then the Court can and should be prepared to ignore it, and accordingly to dismiss any objection to title founded on it. The court can also safely ignore any risk which is a 'purely theoretical and not a practical blot' on the title.¹²

[2-15] In *Mexon Holdings Ltd v Silver Bay International Ltd*,¹³ Litton PJ set out the following guidance:

A good title does not mean a perfect title, free from every possible blemish. Whenever a question like this arises, it must be approached from the stand-point of a willing purchaser and a willing vendor, both possessed of reasonably robust common sense, both intending to see the transaction through to completion in terms of their own bargain.

10 [2018] 3 HKLRD 370, [2018] HKCU 2238, [2018] HKCFI 1506.

11 [2018] HKCU 1399, [2018] HKCFI 743.

12 *Kan Wing Yau v Hong Kong Housing Society* (unreported, HCMP 2436/1987, 1 December 1987) per Godfrey J at para 9. The decision was reversed on appeal (*Kan Wing Yau v Hong Kong Housing Society* [1987] 2 HKLR 187, [1986-88] CPR 525 (CA)) but the approach was confirmed by the Court of Appeal (at 194G).

13 (2000) 3 HKCFAR 109 at 117D-E, [2000] 2 HKC 1.

[2-16] When dealing with a requisition, what Litton JA said in *Active Keen Industries Ltd v Fok Chi Keong*¹⁴ is also highly instructive:

If the matter was self-evident, the purchaser's solicitor cannot insist upon a fuller reply. But the vendor's solicitor must act with total candour, so that the purchaser can be reasonably certain that there are no facts and material relevant to the requisition known to the vendor which have not been disclosed. (at 407)

...

The contractual duty to answer requisitions properly is not an onerous one. All that is required of the vendor is candour and common sense. The purchaser is not an adversary. The parties have already arrived at an agreement and, normally, it is as much in the purchaser's interest as it is in the vendor's that completion should take place. A good title, or a good marketable title, does not mean a perfect title. If there are, or might be, blemishes upon it, these should be faced squarely. The vendor failed to do so in this case and in consequence failed in his contractual duty to deal with the requisition properly. (at 413)

2.1 No general duty to disclose

[2-17] Sometimes parties debate on a duty of a vendor to disclosure. Often easily forgotten is the doctrine of caveat emptor should normally apply.

[2-18] In *Join Union Investment Ltd v China Tree Investment Ltd*,¹⁵ the Court was met with two diametrically opposite arguments. The purchaser argues that a vendor of land is under a general implied obligation to 'make full and frank disclosure to the [purchaser] of any defect in title or incumbrance over title which the [vendor] was aware' (ie, the first implied term contended for). On the other hand, the vendor argues that, in relation to this duty of disclosure, only 'actual knowledge' of the defect or incumbrance on the part of the vendor is relevant. Both submissions assume that the vendor is under a general, stand alone, duty to make disclosure of defects in title. The Court did not accept either is the right way of looking at the vendor's duty in the context of a sale and purchase of land in Hong Kong.¹⁶ The Court instead held that in the context of a simple contract for the sale and purchase of land in Hong Kong, the vendor's duty, in general, is to prove and give a good title. It is not a defence for the vendor to say that he did not have knowledge of any defects in title at the time of the making of the contract. The issue of knowledge becomes relevant, however, when the vendor seeks to rely on a contractual provision limiting the title to be proved or given. In such a case, the proper inquiry is whether, upon the true construction of the limitation provision, it is intended to apply to the relevant defect in title notwithstanding the vendor's knowledge of it at the time of the making of the contract.

14 [1994] 1 HKLR 396, [1994] 2 HKC 67.

15 [2016] 2 HKLRD 901, [2016] HKCU 775.

16 At para 56.