

# TABLE OF CONTENTS

<i>Prefaces to the Eighth Edition</i> .....	v
<i>About the Authors</i> .....	ix
<i>Table of Cases</i> .....	xxxi
<i>Table of Legislation</i> .....	cxxi

## CHAPTER 1 LAND TENURE IN HONG KONG

*Judith Sihombing*

1. Early Hong Kong Land .....	1
1.1 Early days .....	1
1.2 The first land sales .....	2
1.3 The forms of leases .....	3
1.4 Land Registration Ordinance .....	4
1.5 Leasehold terms .....	5
2. Sources of Hong Kong Land Law .....	6
2.1 The sources of land law in Hong Kong .....	6
2.2 Alienation of land .....	12
3. Land Law in the New Territories .....	13
3.1 Before and after 1898 .....	13
3.2 The Land Court 1900 .....	14
3.3 Block Government leases .....	16
3.4 The Block Government lease, the New Territories Ordinance and the user provisions in the lease .....	17
3.5 Part II of the New Territories Ordinance .....	22
3.6 Intestate succession .....	25
3.7 Chinese customary 'trusts' over land .....	27
3.8 Letters A and Letters B .....	46
3.9 Adverse possession .....	47
3.10 The Joint Declaration .....	55
3.11 Land titles .....	56

## CHAPTER 2 SYSTEM OF LAND HOLDING IN HONG KONG

*Michael Wilkinson*

1. Vesting and Disposal of Government Land .....	57
2. Meaning of 'Land' .....	59
2.1 Common law definition of land .....	59
2.2 Statutory definition of land .....	59
2.3 Chattels, fixtures and land .....	60
3. Things Growing in the Land .....	62
4. Land Surveys and Land Boundaries .....	62
4.1 Government and private land surveys .....	62
4.2 Land Survey Ordinance .....	63
4.3 Copy of land boundary plans to be deposited with Land Survey Authority .....	65
4.4 Ascertainment of land boundaries by court .....	65
5. Demarcation of Land and Land Records .....	66
5.1 Division of lots .....	67
6. Sectioning of Land .....	67
7. Subdivision of Land .....	67

8.	Land Grants by Government: Introduction.....	68
8.1	Leasehold rather than freehold estates granted.....	68
8.2	Method of granting land.....	68
8.3	Occupation of unleased land.....	70
9.	Government Leases.....	71
9.1	Grantee's interest.....	71
9.2	Standard express terms.....	71
9.3	Duration of the grant.....	72
9.4	Effect of Joint Declaration and Basic Law on existing leases, renewal of renewable leases and grant of new leases.....	73
9.5	Premium.....	78
9.6	Government rent.....	79
10.	User Restrictions in Government Leases and Conditions of Grant.....	80
10.1	Types of user restrictions.....	80
10.2	Restriction on building covenant; the 'Watford' restrictive covenant prohibiting building on land delineated as agricultural or garden land.....	81
10.3	Description in the schedule to the Block Government lease of the use of the land when first demised: The decision in <i>Melhado</i> .....	81
10.4	Offensive trades clause in Block Government leases.....	82
10.5	Construction of user restrictions in Government leases and Conditions of Grant.....	83
10.6	Offensive (or noxious) trades clause.....	94
10.7	Restrictive covenant requiring consent to design, disposition and height of building (a 'DDH clause').....	97
10.8	Will the covenants in Government leases (and deemed issued Government leases) and the terms in conditions of grant run with the land and bind the successors in title to the covenantor or, having once been complied with, will they be 'spent'?.....	97
10.9	Waiver/acquiescence by Government in respect of restrictive covenants in Government leases/Conditions of Grant.....	99
10.10	Waiver ceases to have effect if conditions subject to which waiver granted are breached.....	101
11.	Terms Implied into Government Leases.....	105
11.1	Obligations of Government under Government leases/Conditions of Grant.....	106
11.2	Implied covenant for quiet enjoyment.....	106
11.3	Duty not to derogate from grant.....	108
12.	Variation of Terms of Government Lease.....	110
12.1	Method of variation.....	110
12.2	No duty upon Government to act reasonably in determining whether to grant variation or modification.....	111
12.3	Right of Government to demand payment of premium in return for consent to vary or modify terms of Government lease.....	111
13.	Conditions of Sale, Exchange, Grant, Regrant and Extension.....	112
13.1	Different types of Conditions of Grant.....	112
13.2	Binding nature of Conditions.....	113
13.3	Interest of lessee under Conditions of Grant.....	113
13.4	General and special Conditions.....	114
13.5	Modification of Conditions of Grant.....	116
13.6	Conversion of equitable interest into legal estate.....	116
13.7	Certificate of compliance.....	119
13.8	The deemed issued Government lease.....	120

14. Government's Remedies for Breach of Government	
Lease/Conditions of Grant .....	120
14.1 Re-entry.....	120
14.2 Civil action.....	120
14.3 Criminal sanction .....	121
14.4 Demolition.....	121
15. Small House Policy in the New Territories.....	121
15.1 Eligibility of villagers for construction of small houses in New Territories .....	121
15.2 Application procedure .....	121
15.3 Where applicant owns his own land – Free Building Licence .....	123
15.4 Where applicant owns no land – application for Private Treaty Grant .....	123
15.5 Nature of small house to be constructed.....	124
15.6 Certificate of exemption and certificate of compliance.....	124
15.7 Restrictions upon alienation after construction.....	125
15.8 Passing on good title to purchaser.....	127
15.9 Abuse of the small house policy and the consequences for those involved .....	128
16. Licenses Granted by Government.....	133
16.1 Illegal occupation of Government land.....	133
17. Termination of Government Leases and Conditions of Grant .....	134
17.1 Expiry of term granted .....	134
17.2 Surrender.....	134
17.3 Re-entry by Government.....	134
17.4 Resumption under Lands Resumption Ordinance.....	138
17.5 Assessment of compensation on extinguishment or relocation basis.....	146
17.6 Provisional payment pending determination of compensation .....	154
17.7 Eviction of owners following resumption of their land .....	155
18. Partitioning of Land Held in Co-ownership.....	155
18.1 Sale of land instead of partitioning .....	157

### CHAPTER 3 PLANNING CONSIDERATIONS

*Michael Wilkinson*

1. Planning and Role of Solicitor.....	163
1.1 Client wishing to purchase flat for residential use .....	163
1.2 Developer client wishing to purchase land for development .....	163
1.3 Relationship between solicitor and authorised person.....	164
2. Hierarchy and Role of Plans in Hong Kong .....	165
2.1 Hong Kong planning standards and guidelines and territorial development strategy.....	165
2.2 Sub-regional planning strategies .....	165
2.3 District plans .....	165
2.4 Challenges to the statutory procedure for making Zoning Plans .....	167
3. Present System of Planning Control in Hong Kong .....	171
3.1 Introduction .....	171
4. Planning Control through the Town Planning Ordinance .....	171
4.1 Designation of land use in Outline Zoning Plans.....	172
4.2 Accompanying Notes, specified permitted activities and planning permission.....	172
4.3 Construction of designated user specified in notes accompanying Outline Zoning Plans .....	173
4.4 Applications for planning permission to Town Planning Board, review of its decisions and appeals to Town Planning Appeal Board.....	176
4.5 Judicial review of exercise of discretion whether to grant planning permission.....	177

4.6	Judicial review of decisions by Town Planning Board as to appropriate zoning.....	179
4.7	Challenges to decisions of the Town Planning Board by way of judicial review on the ground of procedural impropriety .....	181
4.8	Plot ratios, density zoning and the problem of down-zoning.....	183
4.9	Judicial review of restrictions imposed in outline zoning plans .....	184
4.10	Enforcement of designated use .....	187
4.11	Might severe planning restrictions constitute a deprivation of landowner's property entitling him to compensation under Basic Law?.....	189
4.12	Planning control in rural areas of New Territories .....	191
5.	Urban Renewal: Roles of Land Development Corporation and Urban Renewal Authority.....	194
5.1	Land Development Corporation.....	194
5.2	Urban Renewal Authority.....	195
6.	Protection of the Harbour Ordinance (Cap 531).....	199
7.	Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545).....	201
8.	Planning Control by Way of the Terms of the Government Lease/Conditions of Grant.....	207
8.1	Relationship between town planning provisions and user restrictions in Government leases/Conditions of Grant .....	207
8.2	Common restrictive user clauses in Government leases and Conditions of Grant .....	208
9.	Planning Control through Building Legislation.....	208
9.1	Purpose and application of Buildings Ordinance (Cap 123) .....	208
9.2	Certificates of exemption .....	208
9.3	Buildings and exempted buildings.....	209
9.4	Building works and exempted building works.....	209
9.5	Approval of building plans.....	211
9.6	Significance of ascertaining date on which building plans are to be considered for approval or rejection.....	221
9.7	Consent required for commencement of building works.....	224
9.8	Is consent required to demolish (or reinstate) unauthorised building works in order to comply with a demolition (or reinstatement) order from the Building Authority? .....	224
9.9	Criminal offences.....	226
9.10	Grant of occupation permit .....	226
10.	Can Retrospective Approval be given to Building Works Commenced without Approval?.....	228
11.	Interrelationship of Buildings Ordinance and Provisions in Government Leases.....	228
12.	Control over Density of Population – Site Classification, Site Coverage and Plot Ratio .....	229
12.1	What land constitutes the site for classification purposes? .....	229
12.2	Classification of the site .....	232
12.3	Calculating site coverage and plot ratio .....	234
12.4	Other building controls .....	240
13.	Enforcement of the Buildings Ordinance and Regulations.....	240
13.1	Power of access and inspection.....	241
13.2	Power to order cessation of work.....	241
13.3	Powers in respect of dangerous buildings and slopes .....	241
13.4	Power to order closure of a building .....	242
13.5	Power to order demolition, removal or alteration of building or building works where they are unauthorised structures.....	243

13.6	Warning notices; notice for demolition or alteration of building or building works .....	245
13.7	The approach of the Building Authority to enforcement .....	246
13.8	Criminal offences .....	247
13.9	Appeals from decisions of the Building Authority to Building Appeal Tribunal, composition of tribunal and right of appeal .....	247
13.10	Procedure for making and hearing an appeal .....	247
14.	Indirect Planning Control through Restrictions in Deed of Mutual Covenant .....	249
15.	Environmental Impact Assessment Ordinance (Cap 499) .....	249
15.1	Scope and purpose of the Ordinance .....	249
15.2	Environmental impact assessment .....	249
15.3	Environmental permits .....	251
15.4	Appeal to Appeal Board .....	251
15.5	Enforcement of Environmental Impact Assessment Ordinance .....	252
15.6	Judicial intervention by way of judicial review .....	252
16.	Planning Control Through Other Legislation .....	256

## CHAPTER 4 CO-OWNERSHIP OF MULTI-STOREY BUILDINGS

*Judith Sihombing*

1.	Introduction .....	257
2.	Background to the System now in Force in Hong Kong .....	259
3.	System of Co-ownership of Multi-storey Buildings ('MSBs') .....	263
3.1	Elements of the system .....	263
4.	Consent and Non-consent Schemes .....	279
4.1	Consent scheme .....	279
4.2	Non-consent scheme .....	280
4.3	Residential Properties (First-hand Sales) Ordinance (Cap 298) .....	280
5.	Deed of Mutual Covenant (DMC) .....	281
5.1	Introduction .....	281
5.2	Terms of a typical DMC .....	282
5.3	Schedule 7 to building maintenance ordinance and DMC .....	283
5.4	Manager's contract .....	284
5.5	Types and allocation of shares .....	285
5.6	Fees, expenses and charges provided for in DMC .....	287
5.7	Building Management Ordinance and financial matters .....	290
5.8	Settlement of disputes: arbitration or court? .....	292
5.9	Other activities .....	293
5.10	Owner's obligations under DMC .....	293
5.11	Powers and duties of the manager .....	299
5.12	Recovery of unpaid fees and charges .....	299
6.	Effect of DMC on those who are not Parties to it .....	304
6.1	Introduction .....	304
7.	DMC and Traditional Rules for Passing of Benefit and Burden of Covenants .....	320
7.1	Introduction .....	320
7.2	Application of rules to DMC .....	322
7.3	Registration of DMC .....	322
7.4	Annexation .....	323
7.5	Assignment .....	325
7.6	Mutual benefit and mutual burden .....	327
7.7	By operation of rule in <i>Tulk v Moxhay</i> .....	328
7.8	Building scheme .....	329
7.9	Joint venture .....	330
8.	Management of Building under the Terms of DMC: Various Remedies .....	331
8.1	Introduction .....	331
8.2	Complaints against the DMC manager .....	334

8.3	Illegal structures: Effect on Government lease and DMC .....	339
8.4	Actions by manager against owners .....	346
9.	Termination, Variation, or Change in Effect, of DMC .....	351
9.1	Introduction .....	351
9.2	Change in neighbourhood .....	351
9.3	Termination of Government lease .....	353
9.4	Winding up of owners' incorporation .....	354

## CHAPTER 5 NATURE OF THE TITLE TO BE GIVEN

*Michael Wilkinson*

1.	Introduction.....	357
2.	What Constitutes Good Title?.....	357
3.	When a Vendor Agrees to Sell Property without Expressly Stating that He Is Selling the Legal Estate, Does He Impliedly Agree to Convey the Legal Estate? .....	359
4.	Duty of Vendor to Give Good Title.....	361
4.1	Sale and purchase agreement may specifically provide that vendor shall give good title .....	361
4.2	Sale and purchase agreement may be silent as to title .....	362
4.3	Sale and purchase agreement might expressly exclude or limit vendor's obligations in relation to giving of title .....	362
4.4	Position where parties are already bound by preliminary sale and purchase agreement.....	363
4.5	Construction of excluding or limiting provisions .....	364
4.6	Common limiting provisions.....	370
4.7	Significance of vendor's knowledge of defect in his title .....	373
5.	Waiver by Purchaser of Objections to Defective Title .....	375
5.1	The doctrine of waiver .....	375
5.2	Waiver in context of unauthorised building works.....	377
6.	Factors which May Affect Good Title: Defects in Title.....	381
6.1	Defective titles; difference between encumbered and defeasible titles.....	381
6.2	Title must be in vendor.....	382
6.3	Vendor must be able to convey property unencumbered by third party interests.....	383
6.4	Exceptions to principle that vendor must convey title free from all encumbrances .....	383
6.5	Latent defects of which purchaser is aware where vendor agrees to give good title .....	388
6.6	Vendor must be entitled to convey property without any necessary consent of third person.....	389
7.	Illustrations of Encumbrances.....	390
7.1	Introduction .....	390
7.2	Mortgages and charges.....	391
7.3	Occupiers' (and non-occupiers') rights.....	397
7.4	Contractual licences .....	413
7.5	Tenants .....	415
7.6	Is interest of occupier overridden by purchaser? .....	416
7.7	Nominations .....	421
7.8	Liability under notice or order from Government or other competent authority .....	423
7.9	Potential liability of owner of unit in multi-storey building by reason of action commenced against owner or against incorporated owners .....	426
7.10	Liability to pay or contribute towards building repairs or management fees.....	430

8.	Title Must Not Be Defeasible by Reason of Government's Right of Re-Entry or by Virtue of Substantial Enforcement Action by Building Authority or Other Competent Authority .....	433
8.1	Breach of Government lease/Conditions of Grant .....	433
8.2	Breaches of Buildings Ordinance or Building Regulations where compliance with these statutory provisions is made a requirement of Government lease/Conditions of Grant .....	435
8.3	Real risk of substantial enforcement action by building authority in respect of breach of provisions of Buildings Ordinance or Regulations made thereunder .....	436
8.4	Proof of compliance with the Buildings Ordinance .....	450
8.5	Offer by vendor to remove unauthorised structure prior to completion .....	451
8.6	Material change in user .....	456
8.7	Title defeasible by reason of breach of deed of mutual covenant .....	456
8.8	Title defeasible because extent of property unclear or boundaries do not correspond with plan .....	458
8.9	Title defeasible because of encroachment into the common parts of the building .....	459
8.10	Other examples of defeasible titles .....	460
9.	Matters of Mere Conveyance .....	461
10.	Other Titles .....	463
11.	Good Holding (or Possessory) Title .....	463
11.1	Nature of a good holding title .....	463
11.2	Constitutional challenge to title by adverse possession .....	464
11.3	Relevant limitation period .....	469
11.4	Elements of adverse possession .....	469
11.5	Period of adverse possession must be continuous .....	477
11.6	Paper title owner granting tenancy to a third party before or after squatter in possession .....	480
11.7	Whether Incorporated Owners of multi-storey building can acquire title by adverse possession against the co-owners .....	481
11.8	Whether one co-owner of land held by way of a joint tenancy or tenancy in common can obtain title by adverse possession against the other co-owner .....	482
11.9	Adverse possession taken by squatters jointly .....	483
11.10	Doctrine of encroachment .....	484
11.11	Effect of return of New Territories to the Government of the PRC in 1997 on title of squatter having established or being in the process of establishing 60 years of adverse possession against the British Colonial Government (prior to 1 July 1997) or the HKSAR Government (post-1 July 1997) .....	486
11.12	Effect of reversion of sovereignty over Hong Kong Island and Kowloon to the PRC on the title of a squatter who is still in the process of acquiring title by way of adverse possession against the HKSAR Government .....	490
11.13	Effect of deemed issue of new Government lease under s 4 of New Territories (Renewable Government Leases) Ordinance upon rights acquired or in process of being acquired by squatters against Government lessees and their successors in title .....	492
11.14	Effect on squatters (other than against the Government) of extension of New Territories leases by the New Territories Leases (Extension) Ordinance .....	494

11.15 Possessory title destroyed by surrender to and regrant from Government.....	496
11.16 Squatter bound by land covenants and easements but original Government lessee remains bound by covenants in Government lease .....	496
11.17 Sale of good holding titles.....	497
12. Title Resting upon Doctrine of Proprietary Estoppel.....	497

## CHAPTER 6 PROOF OF TITLE

*Michael Wilkinson*

1. Interrelationship of Duties of ‘Giving’ and ‘Showing’ Title .....	501
1.1 Duty to ‘give’ good title .....	501
1.2 Duty to show title .....	501
1.3 Duty to show title includes duty to answer requisitions reasonably raised .....	502
1.4 Vendor’s duty to show title distinct from duty to give title .....	503
2. Extent of Vendor’s Duty to Show Title .....	504
2.1 Variation of statutory period by contractual provision.....	506
3. Ultimate Root, Intermediate Root and Chain of Title.....	507
3.1 Ultimate root of title – Government lease/Conditions of Grant.....	507
3.2 Secondary evidence of Government lease/Conditions of Grant acceptable.....	509
3.3 Illegible Government leases .....	510
3.4 Not necessary to produce counterpart of Government lease.....	510
3.5 Government lease includes any letter of modification, deed of surrender and certain other documents .....	511
3.6 Plans (including car park layout plans) referred to in the Government lease/Conditions of Grant.....	512
3.7 Intermediate root of title .....	512
3.8 Documents referred to in intermediate root document creating interest or obligation subject to which land is disposed of .....	514
3.9 Chain of title .....	514
3.10 Secondary evidence of documents in chain of title acceptable.....	515
3.11 Illustrations of how to deal with significant links in the chain of title.....	516
4. Production of any Power of Attorney under which any Document has been Executed within Last 15 Years .....	540
5. Need to Ensure that Certain Title Documents Provided by Way of Proof of Title Are Registered.....	542
6. Pre-intermediate Root Defects.....	543
6.1 Duty to answer requisitions as to pre-intermediate root defects discovered by purchaser <i>aliunde</i> .....	544
7. Additional Documents of Title that Should be Produced.....	546
8. Certain Important Title Documents .....	547
8.1 Deeds of mutual covenant and sub-deeds of mutual covenant .....	547
8.2 Certificates of compliance.....	548
8.3 Occupation permits .....	550
8.4 Certificates of exemption .....	552
8.5 Sale and purchase agreements.....	554
8.6 Consent to assign where flat owned under home ownership scheme and other required consents .....	555
9. Proof of Change of Name .....	555
10. Production of Title Deeds .....	556



10.1	Duty to provide original or certified copies of title deeds by way of showing title under s 13(2) of Conveyancing and Property Ordinance.....	556
10.2	Duty by way of giving title to provide original title deeds which relate exclusively to property being assigned or to provide sufficient explanation for their absence .....	558
11.	Use of Recitals in Proving Title .....	567
11.1	Recitals as to pre-intermediate root documents .....	567
11.2	Recitals of fact in title documents executed more than 15 years before present contract of sale.....	569
12.	Missing Title Documents .....	571
12.1	Obtaining certified copies from the Land Registry .....	571
12.2	Missing title documents: Proof of title by secondary evidence: The rule in <i>Re Halifax</i> .....	571
12.3	Establish that missing title document has been lost or destroyed .....	573
12.4	Adduce secondary evidence as to contents .....	574
12.5	Proof of due execution of the missing document .....	575
13.	Proof of Due Execution of Title Documents.....	575
13.1	Presumption of capacity .....	575
13.2	Execution of deeds by individuals .....	576
13.3	Execution of deeds by companies .....	581
13.4	Application of the statutory presumptions .....	591
13.5	Section 23A of Conveyancing and Property Ordinance .....	601
13.6	Articles of association must still be produced.....	603
13.7	Meaning of ‘source of authority or the means by which such authority was purportedly conferred’ .....	604
13.8	Application of s 23A of Ordinance .....	604
13.9	Other situations where articles require execution in particular manner that has not been adopted .....	606
13.10	Conclusive presumption that deeds executed by companies valid if more than 15 years old.....	607
13.11	Deeds executed by companies must also be delivered .....	607
13.12	Mode of execution of deeds by companies after 2nd March 2014 ie under the ‘new regime’ .....	609
13.13	Requirements of due execution by attorney for company .....	612
13.14	Requirements of due execution by company acting as attorney .....	612
13.15	Manner of execution by company; attestation or verification of signatures by solicitor .....	612
13.16	Execution of deeds by foreign companies.....	613
13.17	Documents executed in Hong Kong for use overseas .....	616
13.18	Execution of deed under power of attorney .....	617
14.	Proof of Due Execution of Documents Executed under Powers of Attorney .....	618
14.1	Documents executed not less than 15 years before present sale and purchase agreement.....	618
14.2	Documents executed less than 15 years before present sale and purchase agreement.....	620
14.3	Protection of person dealing with donee.....	628
14.4	Protection of subsequent purchasers .....	628
14.5	Making statutory declaration.....	629
14.6	When must statutory declaration be made?.....	629

14.7	Is it open to vendor to prove non-revocation other than by way of s 5(4)?.....	631
14.8	Enduring powers of attorney.....	633
14.9	Registration of powers of attorney.....	634
14.10	Certification of powers of attorney.....	634
15.	Checking Names, Signatures and Identity Numbers for Consistency.....	634
15.1	Duty of solicitors to check names, signatures and identity numbers for consistency.....	634
16.	Construction of Deeds and Discrepancies in Property Description.....	642
16.1	Construction of deeds.....	642
17.	Statutory Declarations.....	644
17.1	Purpose and use of statutory declarations.....	644
17.2	Form of statutory declarations.....	645
17.3	Manner of making statutory declarations.....	645
17.4	Statutory declarations made under s 5(8) of Powers of Attorney Ordinance.....	646
17.5	Registration of statutory declarations.....	646
18.	Time Considerations in Respect of Showing, Investigating and Giving Title.....	646
18.1	Interrelationship of showing, investigating and giving title.....	646
18.2	Duty of solicitor acting for purchaser.....	647
18.3	Duty of solicitor acting for vendor.....	648
18.4	By what date does vendor have duty to give good title?.....	650
19.	Rescission by Purchaser.....	652
19.1	At what point in time may purchaser rescind on grounds that vendor has failed to show and/or give good title?.....	652
20.	Fulfillment of Purchaser's Solicitor's Duty of Care in Investigating Title.....	653
20.1	Duty to investigate.....	653
20.2	Duty to keep client informed.....	657
21.	Prudent Steps to be Taken by Purchaser's Solicitor in Investigating Title: Searches in Land Register etc.....	657
22.	Requisitions on Title.....	660
22.1	Express provision as to time within which requisitions may be raised.....	660
22.2	Time within which requisitions may be raised where no express provision.....	662
22.3	Even where vendor has no duty to answer requisition, vendor still has separate duty to give good title at completion.....	670
22.4	Receipt of title deeds by purchaser just before completion date.....	672
22.5	Waiver by purchaser of right to raise requisitions or object to vendor's title.....	672
22.6	Waiver by vendor of his right to object to purchaser's requisitions on grounds that they have been raised out of time by purporting to answer the requisitions.....	676
22.7	Subject matter and manner of drafting requisitions.....	677
22.8	Duty upon vendor to answer requisitions with candour.....	681
22.9	Response by purchaser to vendor's answer to requisitions.....	685
22.10	Requisitions where parties jointly represented.....	686
23.	Vendors' Rescission Clauses.....	687
23.1	Introduction.....	687
23.2	Vendor's rescission clause will not be implied into sale and purchase agreements.....	687

23.3	Construction of vendors' rescission clauses .....	688
23.4	Situations in which rescission clause cannot be relied upon by vendor.....	689
24.	Vendor's Solicitor's Duty on Discovering Defect in Title.....	690
25.	Evaluating Significance of Defects and Appropriate Action to be Taken.....	691
25.1	Duty to make professional evaluation of seriousness of defect .....	691
25.2	Rectification of the register in the case of non-material documentary defects.....	693
26.	Offer of Payment to Stakeholder or of Indemnity or Undertaking to Remedy Defect After Completion .....	693
27.	Confirmatory (Remedial) Assignments and Vesting Orders .....	695
27.1	Situations where remedial assignment may be required.....	695
27.2	Form of remedial assignment.....	696
27.3	Execution of remedial assignment by Registrar of High Court or District Court or Registrar of Companies .....	697
27.4	Vesting orders .....	699
28.	Vendor and Purchaser Summonses .....	701
28.1	Statutory jurisdiction of court .....	701
28.2	Proper role of vendor and purchaser summonses .....	701
28.3	Application for relief.....	704
29.	Costs of Proving Title .....	705
30.	Retention of Title Deeds Pending Completion .....	705
31.	Ownership of Title Deeds by Assignee After Completion.....	706
31.1	The common law position.....	706
31.2	Statutory intervention.....	707
32.	Proof of Title and Joint Representation .....	708
33.	Avoiding Property Fraud.....	709
33.1	Sale by person fraudulently claiming to be owner of property .....	709
33.2	Sale by director of company acting fraudulently .....	709
33.3	Use of forged title deeds .....	710
33.4	Use of forged identity cards .....	712

## CHAPTER 7 PROPERTY INVESTIGATION

*Michael Wilkinson*

1.	Solicitor's Duty to Carry out Checks on Condition and Enjoyment Potential of Property .....	713
2.	General Principle – Caveat Emptor .....	715
3.	Cases where Caveat Emptor Principle is Inapplicable or is Overridden.....	716
3.1	Action against vendor for breach of express or implied contractual term in respect of condition of property .....	716
4.	Terms Implied into Sale and Purchase Agreements Relating to the Condition of the Property .....	718
5.	Actions for Breach of Collateral Contract (Collateral Warranty) .....	720
6.	Actions in Negligence Against Builder, Building Authority or Architect in Respect of Condition of Property.....	722
6.1	Action against builder .....	722
6.2	Action against building authority .....	725
6.3	Action against architect .....	725
7.	Misdescription and Misrepresentation.....	726
7.1	Interrelationship of misdescription and misrepresentation .....	726
7.2	Misdescription.....	726

7.3	Misrepresentation.....	729
7.4	Remedies for misrepresentation.....	737
7.5	Fraudulent misrepresentation.....	738
7.6	Negligent misstatement/misrepresentation.....	738
7.7	Innocent misrepresentation.....	739
7.8	Misrepresentation may also constitute a bar to an action for specific performance.....	739
7.9	Other changes brought about by Misrepresentation Ordinance.....	739
7.10	Cases where remedy of rescission is lost.....	740
8.	Exclusion of Liability for Misdescription and Misrepresentation.....	740
8.1	Enforceability of exclusion clauses.....	740
8.2	Does representation fall within ambit of the Misrepresentation Ordinance?.....	742
8.3	Requirement of reasonableness.....	742
9.	Construction of Exclusion Clauses.....	745
10.	Investigation of Property Defects.....	745
10.1	Surveys.....	746
10.2	Purchaser relying upon a survey conducted for mortgagee.....	746
10.3	Action against valuer/surveyor.....	746
10.4	Action against mortgagee.....	748
10.5	Inquiries by purchaser and his solicitor.....	748
10.6	Usefulness of inserting express term in sale and purchase agreement dealing with subject matter of inquiries.....	751

## CHAPTER 8 FORMATION OF CONTRACT FOR SALE OF LAND

*Judith Sihombing*

1.	Background Matters.....	753
1.1	Introduction.....	753
1.2	Illegality.....	753
1.3	Contract principles supporting property rights.....	756
1.4	Outline of contractual requirements for the land contract.....	758
2.	Subject Matter of the Contract.....	760
3.	Hong Kong Conveyancing Practice.....	762
4.	Forms of Agreements.....	765
5.	Essentials of Contract for Sale of Land.....	767
5.1	Contract produced by irregular, non-traditional factors.....	768
6.	Implied Terms.....	772
7.	Interpretation.....	777
7.1	Is the contract in writing?.....	777
8.	Gaps and Omissions in Contract.....	781
9.	Good Faith.....	781
9.1	Introduction.....	781
9.2	Tort of inducing breach of contract and good faith.....	782
10.	Promissory Estoppel.....	783
10.1	Developments.....	783
10.2	Estoppel.....	785
10.3	Uses of new estoppel.....	791
11.	Procedure for a Sale and Purchase of Land.....	792
12.	Form.....	794
12.1	Section 3(1) of the CPO.....	795
12.2	Price.....	796
12.3	Signed by party to be charged.....	796

13. Part Performance.....	798
14. Exchange.....	800
14.1 Where there is provisional agreement.....	800
14.2 Where there is no binding PA.....	800
14.3 Exchange in escrow.....	802
15. Stakeholder .....	803
16. Sub-Sales.....	804
17. Option as a Contract.....	804
17.1 Interpretation.....	804
17.2 Pre-emptions .....	806
17.3 Option and pre-emption: interests in land?.....	807
17.4 Price.....	808
17.5 Registration of option under LRO.....	809
17.6 Registration of pre-emption under the LRO.....	810
17.7 Deposit .....	812
17.8 Penalty or liquidated damages?.....	813
17.9 Insurance .....	817

## CHAPTER 9 CONTRACT – VITIATING FACTORS

*Judith Sihombing*

1. Modern Developments in Relation to Vitiating Factors.....	819
1.1 Introduction.....	819
1.2 Equitable developments .....	820
1.3 Frustration or impossibility.....	822
2. Contract of Sale of Land and Vitiating Factors.....	823
2.1 Mistake.....	824
2.2 Misrepresentation.....	836
3. Frustration and Land Contracts.....	847
3.1 Introduction.....	847
3.2 <i>Non est factum</i> .....	851
3.3 Duress.....	852
3.4 Undue influence .....	854

## CHAPTER 10 CONTRACT – CAPACITY, STATUS AND DISABILITIES

*Judith Sihombing*

1. Capacity .....	857
1.1 Introduction.....	857
1.2 Contracts for sale of land .....	858
1.3 Unsoundness of mind.....	859
1.4 <i>Non est factum</i> ('It is not my deed') and unconscionability .....	861
1.5 Minority.....	863
1.6 Personal representatives .....	864
1.7 Agency.....	875
1.8 Estate agents.....	880
1.9 Powers of attorney.....	883
1.10 Solicitors .....	888
1.11 Corporations.....	890
1.12 Nominees – Confirmors .....	891
1.13 Gifts.....	895

2. Trusts.....	896
2.1 Bare trust on entry into valid contract for sale of land.....	896
2.2 Vendor's lien and purchaser's lien.....	899

## CHAPTER 11 CONTENTS OF CONTRACT

*Judith Sihombing*

1. Introduction.....	901
1.1 The particulars.....	901
1.2 The conditions.....	902
1.3 The implied terms.....	902
2. Types of Contracts.....	903
2.1 Introduction.....	903
2.2 The formal contract.....	904
2.3 Common clauses in the formal contract.....	905
2.4 Sections 15 to 17 of the CPO.....	906
2.5 The main elements of the contract.....	907
2.6 The open contract.....	909
2.7 Implied terms.....	910
2.8 Special terms.....	911
2.9 Implied terms in the open contract.....	911
3. The Particulars.....	916
3.1 Introduction.....	916
3.2 Caveat emptor.....	920
3.3 Description – physical.....	923
3.4 Description – legal.....	923
3.5 Benefits.....	926
3.6 Burdens.....	927
3.7 Irremovable burdens.....	928
3.8 Removable burdens.....	929
3.9 The Buildings Ordinance.....	929
4. Latent Defects.....	931
5. Patent Defects.....	932
6. Latent/Patent Defects.....	933
7. Misdescription.....	934
8. Conditions.....	938
8.1 Introduction.....	938
8.2 Rents, outgoing and apportionments.....	940
8.3 Insurance.....	940
8.4 Condition of property.....	941
8.5 Easements, rights and liabilities.....	941
8.6 Tenancies.....	942
8.7 Errors, omissions and misstatements.....	943
9. Requisitions.....	943
9.1 Time for raising requisitions.....	944
9.2 Nature of requisitions.....	945
9.3 Matters to be considered in making requisitions.....	946
9.4 Answering requisitions.....	947
9.5 Requisitions as to conveyancing.....	948
9.6 Form of a requisition.....	948
10. Documents of Title.....	950

11. Good Title .....	950
11.1 Types of title .....	950
11.2 Showing good title .....	953
12. Operation of Section 13 .....	954
12.1 Failure of purchaser to complete .....	957
12.2 Failure of vendor to complete .....	957
12.3 Proper assurance .....	958
12.4 Receipt of money .....	958
12.5 Additional conditions .....	959
12.6 Time .....	961
12.7 Vacant possession .....	963
12.8 Payment .....	964

## CHAPTER 12 ASSIGNMENTS

*Michael Wilkinson*

1. Function of Assignments .....	965
2. Form of Assignment .....	965
2.1 Assignment of legal estate in land .....	965
2.2 Effect of use of incorrect formalities when assignment executed under hand: rule in <i>Walsh v Lonsdale</i> .....	968
2.3 Assignment of equitable interest in land .....	968
2.4 Declarations of trust relating to land .....	969
2.5 Interest in land created by parol (orally) or by other methods .....	969
3. Drafting Assignments .....	972
4. Construction of Assignments .....	973
4.1 General principles .....	973
4.2 Admissibility of extrinsic evidence .....	974
4.3 Deeds construed <i>contra proferentem</i> .....	974
5. Doctrine of Merger .....	975
6. Contents of Assignment .....	977
6.1 Commencement .....	977
6.2 Parties to the assignment .....	979
6.3 The recitals .....	985
6.4 Testatum .....	986
6.5 Consideration clause .....	987
6.6 Receipt clause .....	987
6.7 Covenants for title .....	990
6.8 Words of grant .....	1000
6.9 Parcels or property description .....	1000
6.10 Newly created rights .....	1011
7. Easements .....	1011
7.1 Nature of easements .....	1011
7.2 Creation of easements .....	1012
7.3 Dedication of public way .....	1016
7.4 Implied easements .....	1017
7.5 Extent of permitted user of easement .....	1022
7.6 Enforcement of easements .....	1024
7.7 Extinguishment of easements .....	1025
8. Exceptions and Reservations .....	1027
8.1 Distinction between exceptions and reservations .....	1027
8.2 Habendum .....	1028

9.	Covenants.....	1031
9.1	Express covenants .....	1031
10.	Construction of Covenants.....	1032
11.	Enforceability of Covenants.....	1032
11.1	Enforceability of covenants between parties to deed.....	1033
11.2	Non-parties to deed may take benefit under the deed .....	1033
11.3	The statutory regime in Hong Kong: enforcement of benefit and burden of covenants.....	1034
11.4	Enforcement of benefit of covenant by successors in title to covenantee and persons deriving title under or through them.....	1035
11.5	Covenant must be expressed and intended to benefit land of covenantee and his successors in title or persons deriving title to that land under or through him or them .....	1039
11.6	Enforcement of burden of covenants against successors in title to covenantor and persons deriving title under or through them.....	1050
11.7	Effect of statutory provisions in respect of running of burden.....	1051
11.8	Owners not liable for prior breaches of covenant unless continuing breach .....	1053
11.9	Remedies by way of enforcement.....	1057
11.10	Stamp duty .....	1057
12.	Execution, Attestation and Interpretation.....	1058
12.1	Execution.....	1058
12.2	Attestation .....	1058
12.3	Interpretation.....	1058
12.4	Alteration of assignment after execution.....	1059
12.5	Rectification of assignment.....	1059

## CHAPTER 13 SECURITY TRANSACTIONS OVER LAND

*Judith Sihombing*

1.	Introduction.....	1063
1.1	Background .....	1063
1.2	Traditional mortgage.....	1064
1.3	The transaction as a contract .....	1066
1.4	Role of equity and interest .....	1066
1.5	Unconscionable Contracts Ordinance (Cap 458).....	1067
1.6	Equity of redemption.....	1068
1.7	Money Lenders Ordinance (Cap 163).....	1068
2.	Some Real Securities and Some Quasi Securities .....	1071
2.1	Introduction .....	1071
2.2	A real security .....	1072
2.3	Security over land.....	1072
2.4	Drafting the transaction.....	1073
2.5	A quasi-security using primary and secondary trusts.....	1075
2.6	Sale and re-purchase transaction.....	1076
2.7	Charging orders.....	1077
2.8	Floating charge over assets of a company.....	1078
3.	Classification of Mortgage or Charge .....	1078
3.1	Terminology .....	1078
3.2	Nature of charge.....	1079
3.3	Legal charge .....	1080



3.4	Equity of redemption.....	1081
3.5	Equitable mortgages and charges.....	1082
4.	Legal Securities.....	1083
4.1	Introduction.....	1083
4.2	A charge effected by management of a MSB.....	1085
4.3	Possession of a charge of land.....	1086
4.4	Right to early redemption.....	1086
5.	Covenants on Part of Mortgagor or Chargor.....	1087
5.1	Introduction.....	1087
5.2	Limitation on the personal covenant to pay.....	1088
5.3	Payable on demand for debt under mortgage.....	1089
5.4	Interest.....	1090
5.5	All monies.....	1094
5.6	Covenants for title.....	1095
5.7	Additional covenants.....	1095
5.8	Covenants on part of mortgagee or chargee.....	1096
6.	Registration and Priority.....	1097
6.1	Registration.....	1097
6.2	Right to tack.....	1098
6.3	Second and subsequent mortgages (as charges).....	1099
6.4	Consolidation.....	1100
6.5	Variation of priority.....	1100
7.	Clogs on Equity of Redemption.....	1102
7.1	Introduction.....	1102
8.	Remedies on Breach.....	1105
8.1	Effect of a charge as a security.....	1105
8.2	Powers of receiver.....	1106
8.3	Foreclosure.....	1108
8.4	Possession of land.....	1110
8.5	Possession of title deeds.....	1111
8.6	Sale.....	1111
8.7	Action for debt.....	1115

## CHAPTER 14 COMPLETION OF CONTRACT FOR SALE OF LAND

*Judith Sihombing*

1.	Introduction.....	1117
2.	Events between Time of Entry into Contract and Completion.....	1117
2.1	Introduction.....	1117
2.2	Risk and the purchaser.....	1118
2.3	Resumption.....	1120
2.4	Death of vendor.....	1123
2.5	Bankruptcy.....	1128
3.	Special Circumstances Affecting Completion.....	1131
3.1	Partition.....	1131
4.	Adverse Possession.....	1132
4.1	Encroachment or adverse possession?.....	1135
5.	Matters Leading up to Completion.....	1135
6.	Completion Date and Time.....	1141
6.1	Introduction.....	1141
7.	Time and Completion.....	1143
7.1	Introduction.....	1143
7.2	Time of the essence.....	1145

7.3	Completion by undertaking.....	1146
7.4	Receipt of money.....	1148
7.5	Form of payment.....	1150
7.6	Separate representation.....	1153
7.7	Injunctions and completion.....	1154
7.8	Fixtures and vacant possession.....	1156
8.	Land Registration Ordinance.....	1156
8.1	Introduction.....	1156
8.2	Nature of Hong Kong's registration system.....	1157
8.3	Provisions of Ordinance.....	1158
8.4	Registration and bona fide purchaser or mortgagee.....	1161
8.5	What is registrable?.....	1165
8.6	Purpose of registration.....	1167
8.7	Options.....	1167
8.8	Leases and licences.....	1172
8.9	Unwritten equities.....	1177

## **CHAPTER 15 REMEDIES FOR BREACH OF CONTRACT FOR SALE OF LAND**

*Judith Sihombing*

1.	Contracts for Sale of Land.....	1183
2.	The Terms of the Contract.....	1186
2.1	Remedies.....	1186
2.2	Range of relief.....	1187
2.3	Certainty of terms and rectification.....	1187
2.4	Relief for the defaulting purchaser.....	1189
3.	Modern Restitution.....	1191
4.	A Valid and Binding Contract.....	1194
4.1	Elements of valid and binding contract.....	1194
4.2	Terms of PA and SPA.....	1195
4.3	Faults in formation.....	1196
4.4	Collateral contracts.....	1196
4.5	The bare trust and the doctrine of conversion.....	1197
5.	Enforcing Remedies.....	1206
5.1	Introduction.....	1206
5.2	Rescission.....	1207
5.3	Repudiation.....	1212
5.4	Time of the essence.....	1213
5.5	Offer of repudiation and its acceptance.....	1219
5.6	Effect of non-acceptance.....	1220
6.	'Ready Willing and Able'.....	1223
6.1	Meaning of phrase.....	1223
6.2	Exceptions to general rule.....	1224
7.	De Minimis Rule.....	1225
7.1	Introduction.....	1225
8.	Injunctive Relief.....	1228
8.1	Introduction.....	1228
8.2	DMCs and injunctions.....	1230
8.3	Injunctions and preservation of property.....	1232
8.4	Purchaser and Mareva injunction/freezing order.....	1233

9.	Foregoing of Remedies by Purchaser .....	1235
10.	Restrictions on the Vendor's Remedies Against the Purchaser .....	1236
11.	One Solicitor Acting for Both Parties .....	1237
12.	Vendor/Purchaser Summons .....	1238
13.	Specific Performance .....	1240
14.	Damages in Equity .....	1254
15.	Common Law Damages .....	1255
	15.1 Introduction .....	1255
	15.2 Types of damages available at common law .....	1259
	15.3 Account of profits as common law damages .....	1260
	15.4 Substantial damages .....	1261
16.	Agreed Sum Clauses: Liquidated Damages or a Penalty? .....	1264
17.	Deposit .....	1270
	17.1 Introduction .....	1270
	17.2 Forfeiture .....	1270
	17.3 If payment is essential, does default cause contract to terminate? .....	1271
18.	Relief Against Forfeiture .....	1271
19.	Liability of Conveyancing Solicitor .....	1273
	19.1 Introduction .....	1273
	19.2 Contract between solicitor and client .....	1277
	19.3 Liability and public policy .....	1279
	19.4 Inducing breach of contract .....	1279
	19.5 Equitable relief .....	1280
	<i>Index</i> .....	1283