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香港
中區政府合署東座
5 樓 530 室
庫務局

傳真及專遞文件
圖文傳真號碼：2868 5279
頁數：13

（經辦人：庫務局
首席助理局長（收入）
謝雲珍小姐）

謝小姐：

《1999 年收入條例草案》

貴局曾於 1999 年 5 月擬備一份文件（立法會 CB(1)1377/98-99(02)號文件），載列政府當局對議員在 1999 年 5 月 13 日會議上表示關注的事項的回應。該份文件的附件 A 提供理據，說明爲何規定法人團體在申請延期繳付可予徵收印花稅的住宅物業買賣協議的印花稅時，必須提供一項銀行承諾書。

第 9 及 10 段

2. 文件第 10 段列明，在物業轉名並簽署一份依循第 3 份協議的轉易契時，如該第 3 份協議已加蓋印花，則根據第 29D(2)(a)條的規定，該轉易契只須繳付定額印花稅 100 元。承辦該轉易契的律師無需確定所有 3 份協議均加蓋適當印花後，才可爲轉易契加蓋定額印花。請解釋爲何當局在考慮就轉售協議提出的延期繳付印花稅申請時，採取不同的政策。根據條例草案第 18 條擬議的新條文第 29C(12)條，在沒有向署長提出證據並令他信納該售賣人取得該不動產中的權利或權益或所有權所依據的文書均已加蓋適當印花的情況下，須向署長提出一項保證。

3. 如某份協議已獲署長根據新的第 29C(13)條簽註並正於土地註冊處辦理註冊手續，對於在此段期間發生的轉售事件，政府當局所採取的政策爲何？由於新的第 29C(11)條訂明，協議的加蓋印花期限爲不遲於該指明事件發生後 7 天，政府當局會否根據該條例第 9 條所指的逾期加蓋印花施加罰款？在涉及法人團體的個案中，由於已提供銀行承諾作爲保證，當局會否採取不同的政策？政府當局有否考慮在條例草案中訂立明訂條文？

4. 政府當局認爲，承辦轉易契的律師是沒有直接的責任確保在物業轉名前其他所有協議均已加蓋印花。在某程度上，可予徵收印花稅的文書沒有加蓋印花並不會影響業權的說法，或許可以成立。然而，由於售賣人未必能以未加蓋印花的文件來證明其物業具有妥善的業權，因此這是關乎物業能否轉名的事宜。現隨信附上 ***Town Bright Industries Ltd*** *v* ***Bermuda Trust (Hong Kong) Ltd & Another***[1998]2 HKC 445 的判決，請參看第 456 至 458 頁有關印花稅的部分。本人相信，律師在辦理轉易契時，一直以來慣常的做法是必定要求其客戶在用以證明物業業權的協議上加蓋印花。

第 11 段

5. 政府當局認爲，物業買賣協議本身並非物業業權的契據。在 ***Chen & Another*** *v* ***Lord Energy Ltd***[1999]1 HKLRD 205 一案（有關摘要載於附件）中，香港終審法院判定，倘一份可予妥爲註冊的文書已對某物業作出註冊，而查冊結果顯然沒有指出該份文件對有關物業終止有效，則該份文件表面上應被視爲售賣人應向購買人提供的業權契據的一部分。法院強調，根據該項方針，有關問題可透過查閱文件解決。因此，購買人有權要求出示買賣協議以證明業權，並可藉此至少確定在該協議下有否設定任何在買賣完成後仍然存在的權益、權利或義務。

6. 本人曾於 1999 年 4 月 16 日就《1999 年公共收入保障（收入）令》致函閣下，其後閣下於該月內作出回覆（立法會 CB(1)1196/98-99(03)號文件），現謹藉此機會表達本人對該回覆內容的意見。

第 7(c)項　政府當局表示，在“一般情況”下，當局會接納有效期不少於 1 年的承諾書，“一般情況”所指爲何？在其他情況下，可予接納的有效期爲何？

第 7(e)項　政府當局會否考慮在條例草案中指明(a)署長處理有關申請需時若干，以及(b)署長有責任在決定通知書內列明拒絕申請的理由？

第 7(f)項　即使已超逾法定付款期限，署長在發出拒絕延期通知信後仍給予申請人 7 日時間繳付印花稅，在此情況下，署長是否行使《印花稅條例》第 9(2)條賦予他減免全部或部分罰款的權力？政府當局會否考慮修訂第 9 條，以便就申請延期繳付印花稅的個案的減免罰款安排作出規定？

請於 1999 年 6 月 5 日或該日前作覆，以便法案委員會在 1999 年 6 月 8 日的下次會議席上討論此事項。

助理法律顧問

（黃思敏）

連附件

副本致：律政司（經辦人：高級助理法律草擬專員陳子敏女士）
法律顧問
總主任(1)1

1999 年 5 月 29 日

a claim for immediate judgment of $13m which has so little merit to recommend itself.

Unfortunately, it seems to me that the law on this subject had developed in a way too heavily in favour of the employee with the result that no coherent principle can be properly deduced from the authorities and so much depends on the uncertain or capricious application by a particular court of a flexible principle to the particular facts of a case. The result of this unfortunate state of the law is that not infrequently, it is the employer who seeks to disown the agreement contending that the restraint is unreasonable or too wide. The uncertain application of a flexible principle often results in depriving the employee of the very benefit the employee seeks to obtain by a restraint which was considered objectively by both parties to be reasonable and acceptable. The absurdity I have in mind can be simply illustrated by a reversal of the present situation. If the day after this agreement was signed by the parties, the plaintiff reneged and refused to pay the $5m with the allegation that the agreement, cl 3 and cl 5 are in unreasonable restraint of trade, would the court not try to lean against such meritless contention. It seems to me that the just solution to this whole area of the law is for the Hong Kong court to re-examine the legal principle in the light of the modern conditions prevailing in Hong Kong where employees are no longer in a weak position (compared to a lowly apprentice in England 150 years ago) and where the parties can be left (generally speaking) to be the best judge of what is a reasonable restraint or a fair bargain for a non boiler-plate restraint.

For all the reasons stated above, in my judgment the summons of the defendant must be dismissed with costs to the plaintiff in any event. I direct that the parties apply to me within 14 days of this judgment for directions as to the further conduct of this action.

Reported by Wendy Lee

TOWN BRIGHT INDUSTRIES LTD v BERMUDA TRUST (HONG KONG) LTD & ANOR

COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO 3269 OF 1997
HARTMANN J
7, 30 APRIL 1998

Trusts – Disposition of interests under trust – Equitable interest in property donated to corporate successor by organisation registered under Societies Ordinance – Successor not incorporated at time of disposition – Whether trustee could hold equitable title for beneficiary not yet formed – Whether donation ultra vires – Whether valid disposition of equitable interest – Conveyancing and Property Ordinance (Cap 219) s 5 – Societies Ordinance (Cap 151)

Gifts – Gift by organisation registered under Societies Ordinance – Gift to successor upon dissolution – Whether ultra vires – Intention of donor unambiguous – Societies Ordinance (Cap 151)

Land – Sale of land – Disposition of equitable interest – Whether s 5 required only one written document of transfer – Whether interconnected documents could be read together to evidence valid transfer – Conveyancing and Property Ordinance (Cap 219) s 5

Land – Sale of land – Time for completion – Neither party performed on completion – Notice to complete failed to specify substitute date – Whether contract terminated – Whether purchaser entitled to rescind

Evidence – Unstamped instrument – Whether instrument could be used outside court to prove good title to property – Admissible as evidence in court upon proper undertakings – Stamp Duty Ordinance (Cap 117) s 15

信托－信托權益的處置－根據《社團條例》註冊的組織把物業中的衡平法權益捐贈給法團繼承人－在處置權益時繼承人尚未成立為法團－受托人可否為尚未成立的受益人持有衡平法業權－捐贈是否屬越權－衡平法權益是否已被有效處置－《物業轉易及財產條例》(第219章)第5條－《社團條例》(第151章)

禮物－根據《社團條例》註冊的組織所送贈的禮物－在解散時送贈禮物予繼承人－是否屬越權－捐贈者的意向明確－《社團條例》(第151章)

土地－售賣土地－衡平法權益的處置－第5條是否要求只能有一份轉讓文件－互相關連的文件可否一併考慮以證明轉讓有效－《物業轉易及財產條例》(第219章)第5條

土地 - 售賣土地 - 成交時間 - 雙方在成交日均無履行合約 - 成交通知書並未表明成交改期至何日 - 合約是否終止 - 買方可否撤銷合約

證據 - 未加蓋印花的文件 - 文件可否在法庭以外用作證明物業的業權屬妥善 - 在提供捨當的承諾的情況下，文件可被法庭接納為證據 - 《印花稅條例》(第 117 章)第 15 條

The first defendant held a real property (the property) as trustee for the Chartered Institute of Bankers Hong Kong Centre (the centre). In 1994, the centre resolved to dissolve itself and to be replaced by the second defendant to be established later. At a meeting of the executive committee, it was resolved that upon the dissolution of the centre, all assets were to be transferred to the second defendant. The chief executive officer of the centre subsequently sent a copy of the minutes to the first defendant together with his letter of direction. The first defendant replied confirming that it would regard the second defendant as the beneficial owner of the property. In August 1995 the second defendant was incorporated. In October 1995 a joint meeting was held between the centre and the second defendant. The minutes of the joint meeting recorded that the motion to transfer all assets to the second defendant was carried through. In 1997, the first defendant and the plaintiff entered into an agreement for the sale and purchase of the property. The plaintiff raised requisitions in respect of the transfer and was not satisfied that the defendants had proved good title. Both parties agreed to postpone the completion to 24 September 1997. Completion did not take place. On the following day, the defendants' solicitors gave notice to complete without specifying a date. Although the defendants' solicitors continued to answer the plaintiff's requisitions, the plaintiff rescinded the agreement on 29 September 1997 and asked for the return of the deposit. The plaintiff took out the present summons for a declaration that it was entitled to rescind the agreement as good title had not shown, contending that:

(1) The centre had no power under its Royal Charter to dispose of the property by way of donation to a third party. The act was ultra vires.

(2) There was no valid disposition of the centre's equitable interest in the property.

(3) No document which effected the transfer was identifiable.

(4) Even if relevant documents existed, they were not stamped. This affected title to the property. Further, pursuant to s 15 of the Stamp Duty Ordinance (Cap 117), unstamped documents could not be used to prove title.

Held, dismissing the summons:

(1) According to its Royal Charter, the centre had the power generally to 'dispose of' or 'otherwise deal with' property. This must include the power to donate if such donation was in furtherance of the object of the centre. The act of donation was within the constitutional powers of the centre and was not ultra vires. In any event, the subsequent joint meeting of the centre and the second defendant specifically ratified the action of the executive committee to donate the property to its effective successor (at 450I-451A, 451F, H).

(2) Where the legal estate was vested in a trustee and the donor had only an equitable interest in the property, it was not necessary for the donor to procure a

conveyance of the property. It was sufficient for the donor to direct the trustee to hold the equitable interest for the benefit of the donee. A deed was not necessary, though it was essential for the disposition to be in writing. In the present case, it was sufficient when the centre passed a resolution, which was lawful in terms of its constitution, effecting the disposition and that it had instructed the first defendant to hold the equitable interest for the benefit of the second defendant (at 451I-452D).

(3) A trustee might hold equitable title for a beneficiary not yet formed. Even if the first defendant appeared to have regarded the second defendant as beneficiary of the property before its incorporation, such unilateral mistake would not vitiate the disposition. The intention regarding the transfer was unambiguous. There could be no conceptual or evidential uncertainty as to the beneficiary. In any event when the second defendant was incorporated, the effect of any mistake on the part of the trustee fell away (at 454C, H-I).

(4) Section 5 of the Conveyancing and Property Ordinance (Cap 219) was not to be interpreted narrowly to mean that there could only be one written instrument for the disposition of an equitable interest in land. If more than one document was capable of meeting the requirements of the section, the test must be whether those documents were sufficiently interconnected. The minutes of the executive committee and the letter from the chief executive officer were inextricably linked and had to be read together. As the power of disposition rested only with the executive committee, the minutes were sufficient in any event for the purpose of s 5. *Re Danish Bacon Co Ltd Staff Pension Fund* [1971] 1 WLR 248 and *Re Strathblaine Estates Ltd* [1948] 1 Ch 228 followed (at 455F-G, 456C-E/F).

(5) A failure to stamp an instrument chargeable with stamp duty was a matter of conveyance and did not go to title. Section 15 of the Stamp Duty Ordinance (Cap 117) empowered the court to receive unstamped instruments subject to suitable undertakings. It followed that the unstamped instruments effecting the transfer of the equitable title from the centre to the second defendant could be used to prove good title subject to undertakings to ensure that the statutory obligation to stamp would be observed and that the plaintiff purchaser would be protected from possible liability. Dicta of Lord Wilberforce in *Lap Shun Textiles Insustrial Co Ltd v Collector of Stamp Revenue* [1976] AC 530 followed (at 457H/I, 458F-H).

(6) Neither party attempted to complete the sale and purchase agreement on 24 September 1997. Where both parties to a contract were at fault, the contract continued with the substitution of a reasonable time for the failed express condition that completion was to be on a specified date. The plaintiff was therefore not entitled to rescind the agreement without serving a notice to complete within a reasonable time. The plaintiff's recission amounted to a breach of the agreement. Dicta of Hunter JA in *Canberra Investment Ltd v Chan Wai Tak* [1989] 1 HKLR 568 and *Chong Kai Tai & Anor v Lee Gee Kee & Anor* [1997] 1 HKC 359 followed. *Douglas Ltd v Ji Shan International Investment Ltd & Anor* [1998] 2 HKC 165 and *A-Mayson Development Co Ltd v Betterfit Ltd* [1992] 2 HKC 533 considered (at 459D-F, 460E, 461A-B).

Obiter

Service of a notice to complete would not be necessary if there was a fundamental defect in the title, or some other fundamental breach of contract by the vendor, in

which case the purchaser might call off the contract at once without waiting to see whether the vendor could succeed in proving title on or before completion. However, where proof of title was insufficient, but the title was not necessarily defective, the purchaser was bound in the ordinary way to give the vendor a proper opportunity of establishing the title. *Douglas Ltd v Ji Shan International Investment Ltd & Anor* [1988] 2 HKC 165 and *A-Mayson Development Co Ltd v Betterfit Ltd* [1992] 2 HKC 533 considered (at 460F-I).

Cases referred to

A-Mayson Development Co Ltd v Betterfit Ltd [1992] 2 HKC 533
Camberra Investment Ltd v Chan Wai Tak [1989] 1 HKLR 568, [1986-88] CPR 470
Chong Kai Tai & Anor v Lee Gee Kee & Anor [1997] 1 HKC 359
Danish Bacon Co Ltd Staff Pension Fund, Re [1971] 1 All ER 486, [1971] 1 WLR 248
Douglas Ltd v Ji Shan International Investment Ltd & Anor [1998] 2 HKC 165
Lap Shun Textiles Industrial Co Ltd v Collector of Stamp Revenue [1976] AC 530, [1976] 1 All ER 833, [1976] 2 WLR 817
Strathblaine Estates Ltd, Re [1948] 1 Ch 228, [1948] 1 All ER 162, [1948] LJR 905

Legislation referred to

Conveyancing and Property Ordinance (Cap 219) s 5
Companies Ordinance (Cap 32)
Societies Ordinance (Cap 151)
Stamp Duty Ordinance (Cap 117) s 15
Law of Property Act 1925 [Eng] s 53(1)(c)

Other sources referred to

Willoughby, PG '*Professional Conduct and Stamp Objections*' (1981) 11 HKLJ 361
Snell *Equity* (29th Ed) pp 107, 123

Summons

This was a summons taken out by the plaintiff purchaser for declaration that it had lawfully rescinded the sale and purchase agreement entered into with the first defendant, thereby entitled to the return of the deposit. The facts appear sufficiently in the following judgment.

Benjamin Yu SC (Ng & Fang) for the plaintiff.
Warren Chan SC and Liu Man Kin (KB Chau & Co) for the defendants.

Hartmann J: On 23 July 1997, in terms of a provisional agreement, the first defendant, Bermuda Trust (Hong Kong) Ltd, agreed to sell and the plaintiff, Town Bright Industries Ltd, agreed to purchase certain office premises for a price of HK$21,800,000. As is customary, the initial agreement was replaced by a formal agreement; the latter being dated 8

August 1997. In layman's terms, the property which was the subject of sale may be described as two office units on the second floor of a building in Des Voeux Road, Central, known as the Hing Yip Commercial Centre.

During the course of August and September 1997, in processing the transfer of the property, plaintiff raised certain requisitions. It was not satisfied the answers revealed that the vendor was able to show good title. Accordingly, by letter dated 29 September 1997, plaintiff rescinded the agreement and now, in terms of its summons, seeks a declaration that it has lawfully done so and is entitled to the relief claimed.

A brief history

The first defendant, a professional trust company, had originally been vested with the property as trustee for the Chartered Institute of Bankers Hong Kong Centre (the centre) in terms of a deed of assignment dated 4 May 1989. It is not disputed that at all material times the first defendant (the trustee) has held the legal title in the property. The difficulties in this case are centered rather on equitable title.

Although the centre was an organisation registered in Hong Kong in terms of the Societies Ordinance (Cap 151), and had its own constitution, it was closely allied to the Chartered Institute of Bankers of Great Britain, so much so that the centre's constitution incorporated aspects of the constitution of the British Institute. In light of Hong Kong's change of sovereignty, the centre resolved to dissolve itself and be replaced by an independent corporate body to be called The Hong Kong Institute of Bankers (the institute). This resolution was carried through and on 10 August 1995 the institute was incorporated in terms of the Companies Ordinance (Cap 32).

Quite clearly, it was always intended that the assets of the centre, including its real estate, should, upon dissolution, be transferred by way of donation to its effective successor, the institute. But was such a donation within the powers of the centre and, if so, was there a valid transfer? Plaintiff contends not.

The ultra vires issue

Plaintiff has argued that the centre had no power to dispose of its property by way of donation to a third party, even if that third party was effectively its successor. Its actions were therefore ultra vires.

In this regard, plaintiff's counsel, Mr Benjamin Yu SC, referred to the Royal Charter of the British Institute, art 3 of which sets out the objects of the British Institute in the following terms:

> The object for which the Institute is hereby constituted is the advancement of knowledge of and education in the principles and practice of banking for the benefit of the public.

As to the powers to manage the way in which property may be dealt with, counsel referred to art 5 which begins:

> The income and property of the Institute shall be applied solely towards the promotion of the Object of the Institute and no portion thereof shall be paid or transferred directly or indirectly by way of dividend, bonus or otherwise however by way of profit to the members of the Institute ...

It was argued by Mr Yu that, in terms of the Charter, the property of the British Institute could only be applied towards the promotion of the stated object of that institute and that there was no provision in the Charter which authorised the disposal of property for no consideration. He went on to argue that the constitution of the centre bound it to the provisions of the Royal Charter and accordingly the centre itself had no power to dispose of property to a third party without consideration. In this regard, reference was made to art 37 of the centre's constitution which read as follows:

> Insofar as anything done by the Institute shall be inconsistent with the terms of the Constitution of the Chartered Institute of Bankers, London, it shall be *ultra vires* provided that it shall be *intra vires* the Institute to do anything expressly authorised by or within the terms of this Constitution notwithstanding that the same may be inconsistent with the terms of the Constitution of the Chartered Institute of Bankers, London.

Leaving aside the centre's constitution for one moment, I regret I cannot accept Mr Yu's submission concerning the limited powers of the Royal Charter. Article 4 of the Charter sets out the powers of the British Institute to further its objectives and inter alia includes the power:

> (h) to confer, consult, communicate or co-operate with any other professional or educational institution, society, association or body with a view to the pursuit of common objects in banking and related subjects and to represent the banking profession both nationally and internationally;
>
> (i) to enable and encourage all persons engaged in banking to meet and correspond in order to facilitate the exchange of ideas and information on the practice, teaching and use of banking;

As to the management of property (insofar on that may be required in furtherance of its object), art 4 continues:

> (p) so far as the law may from time to time allow, to purchase, take on lease or in exchange, hire or otherwise require any real or personal property and any rights or privileges and to construct, erect, alter, improve and maintain any building which may be required from time to time by the Institute and to manage, provide accommodation and catering facilities in, develop, sell, demise, let, mortgage, dispose of, turn to account or otherwise deal with all or any part of the same.

In my view, the Royal Charter provides not only for the sale and demise of property but also the power generally to 'dispose of' or 'otherwise deal with' property. This must include the power to donate if such donation is

in furtherance of the object and the object, of course, includes co-operation with like-minded professional bodies for the purposes of encouraging the dissemination of banking knowledge.

In my judgment, therefore, not only does the Royal Charter itself allow for the disposition of property that took place in this case but the constitution of the centre, when that constitution was still operative, allowed for it too. In this regard, art 14A of the centre's constitution said that the executive committee:

> ... shall also have power, from time to time, to sell, lease, surrender or otherwise deal with any premises which in their judgment are no longer required for the purposes of the Institute.

Clearly, in anticipation of dissolution, the property was no longer required for the purposes of the centre and, in my view, the executive committee thereby had the power to 'otherwise deal with' the property by way of donating it to the centre's nominated successor.

But even if the executive committee may have been sailing into unchartered seas, art 14C provided the necessary protection:

> Any and all acts and things done by the Executive Committee in good faith in the exercise of the aforesaid powers shall be *intra vires* the Institute and shall be binding on all Members for the time being of the Institute as if they had expressly authorised the doing of the same.

In this regard, in my view, it is noteworthy that the centre in general meeting at a later time specifically ratified the action of the executive committee in donating the property to its effective successor, the institute.

For the sake of completeness I should mention that art 41 of the centre's constitution made provision for the disposal of assets on dissolution in the following terms:

> On the dissolution of the Institute, the funds of the Institute after payment of the liabilities, shall be distributed in such manner as the Executive Committee shall determine prior to such dissolution.

Finally, a reading of art 37 (supra) reveals that, even if the acts of the executive committee of the centre were ultra vires the Royal Charter, provided it was authorised by or was within the terms of the 'local' constitution then such acts were to be considered intra vires.

In all the circumstances, I find no merit in the ultra vires submission. In my judgment, the centre acted within its constitutional powers.

The valid transfer issue

As noted earlier, it was always the intention of the centre to donate its equitable interest in the property to the institute. Was there, however, a valid disposition? The plaintiff has submitted that there was not. I disagree.

In transferring its equitable interest to its successor, no formal conveyance

was necessary. In the case of a direct gift, where the legal estate is vested in a trustee and the donor thereby has only an equitable interest in the property, it is not necessary for the donor to procure a conveyance of the property; it is sufficient for the donor to direct the trustee to hold the equitable interest for the benefit of the donee (see Snell *Equity* (29th Ed) p 123). A deed is not therefore necessary although writing is essential. In this regard s 5 of the Conveyancing and Property Ordinance (Cap 219), reads:

> no equitable interest in land can be created or disposed of except by writing signed by the person creating or disposing of the same, or by his agent thereunto lawfully authorized in writing, or by will, or by operation of law;

As I see it, for the equitable interest to be transferred, what was required on the part of the centre was a resolution which was lawful in terms of its constitution to make that disposition and an instruction to the trustee to hold the equitable interest for the benefit of the donee.

What then of the centre's constitution? Article 14D of the constitution directed that all real estate must be vested in a professional trustee; hence the vesting of the property in the name of first defendant. However, as earlier noted, the power to acquire property and dispose of it lay with the executive committee. In this regard, I repeat art 14A which said that the executive committee:

> ... shall also have power, from time to time, to sell, lease, surrender or otherwise deal with any premises which in their judgment are no longer required for the purposes of the Institute.

The trustee was obliged in terms of art 14E to deal with the centre's property as directed by the executive committee. That article read as follows:

> The Trustee shall deal with the property of the Institute as directed by the Executive Committee and shall be indemnified against risk and expense out of the Institute's property. A resolution of the Executive Committee, evidenced by a copy signed by two members thereof and by the Honorary Secretary shall, in all cases, be sufficient authority and protection to the Trustee for and in respect of any conveyance, transfer, payment or other act thereby directed.

In my judgment, art 14E did not mandate the sole manner in which the executive committee must communicate its directions to the trustee. Its directions could be communicated and acted upon in any number of ways. But to ensure that it had sufficient authority to act and that it would be indemnified in respect of such acts, the trustee required only a resolution of the executive committee evidenced by the signatures of two members and the honorary secretary.

The deed of assignment dated 4 May 1989, in terms of which the trustee was vested with legal title to the property, in one of its 'recital' clauses, paraphrased art 14E in the following terms:

> The rules of the Institute provide that the Trustee should deal with the property by way of sale mortgage charge lease or otherwise howsoever as directed by the Institute and that such direction shall be given by a resolution of the Executive Committee of the Institute passed by a majority of the members present at a duly convened meeting of the Institute.

That paraphrase may have led to some misunderstanding but, with respect to the draftsman of the clause, I do not consider it to be an accurate paraphrase of the meaning and true intent of art 14E.

In my judgment, therefore, to lawfully 'surrender' or 'otherwise deal with' any property in which the centre had an equitable interest, the executive committee had to pass a resolution to do so. The power of disposition lay with that committee.

On 17 November 1994, the executive committee met to deal with the many complexities involved in the process of dissolving itself and being re-constituted in an independent corporate form. At that meeting inter alia it was noted that the Monetary Authority had given consent to the use of the name 'Hong Kong Institute of Bankers' which would be registered as a limited company. The memorandum and articles of association of that future corporate body were then approved. This was not, therefore, simply an early meeting at which the members debated what would leave to be done in the future. This was a meeting at which matters were resolved; for example, the approval of the memorandum and articles of the future institute.

The minutes of this meeting of the executive committee then record the following:

> The meeting also resolved that all assets including the property of the Chartered Institute of Bankers — Hong Kong Centre, upon dissolution, be transferred to the future Hong Kong Institute of Bankers.

It is plaintiff's submission that this resolution to transfer all assets including property, upon dissolution, to the future institute could have been no more than a statement of future intent; to put it into colloquial terms: 'this is what we, the Executive Committee, intend to do in the future when we will then pass further and more specific resolutions.' On an ordinary reading, however, I cannot agree. In my judgment, it is plain that the executive committee did not at that time merely express an intention; to the contrary, it made a decision.

How then was this formal decision of the executive committee to transfer its equitable interest in the property communicated to the trustee?

By 17 November 1994 the trustee already knew that the centre intended to make changes to enable it to become independent from Great Britain and that these changes would be relevant to the passing of equitable interest in the centre's property. But concerning the executive committee's resolution to transfer its equitable interest, the trustee received a written

direction in terms of a letter dated 6 April 1995; that letter was signed by the chief executive officer and was expressed as follows:

> I refer to your memo dated 13 January 1995 (copy enclosed) concerning our property and forward herewith a copy of our minutes, confirming that it is the wish of the Chartered Institute of Bankers Hong Kong Centre to have the property transferred to the Hong Kong Institute of Bankers when it is established.
>
> Please advise whether any action is required on our part. We would like Bermuda Trust (Hong Kong) Ltd to regard the Hong Kong Institute of Bankers as the beneficial owner of the following premises: 2/F, Hing Yip Commercial Centre, 272-284 Des Voeux Road Central, Hong Kong.

A trustee may hold equitable title for a beneficiary not yet formed and that letter in my judgment is a clear direction by the donor of the property to the trustee to hold the equitable interest for the benefit of the donee.

There had, therefore, been a decision made by the executive committee to transfer the equitable interest in the property to the institute upon its incorporation and that decision had been communicated to the trustee by the chief executive officer. In addition, for the avoidance of doubt, the relevant minutes had been sent. Those minutes, I presume, must have been the minutes of the executive committee dated 17 November 1994. Reference has been made to no others.

A week later, on 13 April 1995, the trustee replied to the letter of direction in the following terms:

> We refer to your Memorandum of 6 April 1995 regarding the above matter.
>
> We write to confirm that Bermuda Trust (Hong Kong) Limited now regards the Hong Kong Institute of Bankers as the beneficial owner of 2nd Floor, Hing Yip Commercial Centre, 272-284 Des Voeux Road, Central, Hong Kong.
>
> In the meantime, would you please let us have a certified true copy of the Minutes in this respect of [sic] our records.

It is to be noted that the trustee, requested a 'certified true copy' of the relevant minutes: presumably to protect its own interests in terms of art 14E of the centre's constitution.

Of course, on 13 April 1995, when this letter was written by the trustee to acknowledge the directions given, the institute had not yet come into existence. It was only to be incorporated on 10 August of that year. On the face of the trustee's letter it may appear that it understood it was to regard the institute as the holder of equitable title with immediate effect. If that is the case, I do not see that this unilateral mistake can vitiate the disposition. Equity looks to the intent rather than the form. The intent of the centre was unambiguous. There could be no conceptual or evidential uncertainty as to the beneficiary on the part of either the centre or the trustee. In any event, by 10 August of that same year when the institute was incorporated, the effect of any mistake on the part of the trustee fell away.

As I see it, the essential issue is whether some two years later, at the

time of the sale of the property to the plaintiff, there could be any doubt in whom the equitable interest in the property then lay. I do not see that by that time there could be any such doubt, more especially as by 31 March 1996 the centre itself had been formally dissolved.

As to the principle that equity looks to the intent rather than the form, I believe it is pertinent to note that on 6 October 1995 there took place in a joint meeting of *both* the final annual general meeting of the centre and the first general meeting of the institute. The minutes of that joint meeting record the following:

> The Chairman moved to transfer all business, and assets of the Chartered Institute of Bankers — Hong Kong Centre, as at 10 August 1995 to the Hong Kong Institute of Bankers. Seconded by Mr. David Li, the motion was carried.

Mr Warren Chan SC, for the two defendants, has submitted that here was clear ratification by the centre in general meeting of the resolution passed earlier by the executive committee to transfer all assets to the institute and evidence too, of course, of the institute's acceptance of such transfer. In such circumstances, it is difficult to see where the risk of a challenge to good title would emanate.

Identification of the transfer document

The plaintiff has argued that, even if there was an attempt to transfer the equitable interest in the property, it is not possible to identify the required written document which gave effect to that transfer, this being a mandatory requirement pursuant to s 5 of the Conveyancing and Property Ordinance (Cap 217). This argument, if I understand it correctly, appears to suggest that there must be just one written instrument which meets the requirements of the section. In my judgment, however, the section is not to be interpreted so narrowly. Snell *Equity* (29th Ed) p 107, under the heading 'Dispositions of interests under trusts', states the following principle:

> ... the disposition must actually be *in* writing, and not merely be *evidenced* by writing. The disposition may be in two or more interconnected documents, only one of which is signed.

One of the authorities cited for this principle is *Re Danish Bacon Co Ltd Staff Pension Fund* [1971] 1 WLR 248, in which Megarry J considered s 53(1)(c) of the Law of Property Act, 1925, which read:

> (c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will.

In respect thereof he went on to say:

> However, if a statutory requirement that a 'memorandum' shall be 'in writing' may be satisfied by two or more documents, I do not see why two or more

documents should not satisfy the requirement that a 'disposition' shall be 'in writing.' True, section 40(1) is merely directed to providing written evidence of a transaction, whereas under section 53(1)(c) the matter is one not merely of evidence but of the disposition itself. Yet two documents are used in constituting a strict settlement of land or establishing a trust for sale of land, and there are well-established rules for the incorporation of documents in a will; and if two or more documents, when read together, dispose of an equitable interest, I do not see why the court should insist on separating them and subjecting each separately to the test of section 53(1)(c).

If more than one document is capable of meeting the requirements of s 5 of our Conveyancing and Property Ordinance, the test must be whether those documents are sufficiently interconnected. In this regard, I can do no better than echo the submission of Mr Chan for the defendants, namely, that the minutes of the executive committee meeting of the centre dated 17 November 1994 constituted both the decision and the direction to the trustee to transfer equitable interest. The letter from the chief executive officer dated 6 April 1995 to the trustee amounted to the communication of the executive committee's direction to hold the equitable interest for the benefit of the institute. The minutes and the letter are, therefore, to be read together, the one being inextricably linked to the other.

In this regard, for the sake of completeness, as it was the executive committee only and not the chief executive officer which had power to dispose of landed property and as the only document from that committee is the minutes of 17 November 1994 (sent under cover to the trustee), I find general support for my findings in *Re Strathblaine Estates Ltd* [1948] 1 Ch 228 at 230 per Jenkins J:

> The minutes show that there was an agreement to divide the company's unsold freehold properties amongst the shareholders, and I think the company must accordingly be regarded as having become a trustee for the shareholders of the properties in question. The existence of such a trust is borne out by the fact that the title deeds of the properties were handed to and have been retained by the shareholders. *The minutes relating to the agreement to divide the company's unsold properties were signed by the chairman, and I think they constitute sufficient written evidence to satisfy the requirements of s. 53 of the Law of Property Act, 1925.* (my emphasis)

The issue of stamp duty

In contending that there was no written instrument that passed equitable title, the plaintiff, inter alia, referred to the uncontested fact that neither of the written instruments referred to by defendants had been charged with duty in accordance with the provisions of the Stamp Duty Ordinance (Cap 117). This matter was argued at the hearing with particular reference to s 15 of the Ordinance which reads:

> (1) No instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever except —

> (a) criminal proceedings;
> (b) civil proceedings by the Collector to recover stamp duty or any penalty payable under this Ordinance,
>
> or be available for any other purpose whatsoever, unless such instrument is duly stamped:
>
> Provided that an instrument which is not duly stamped may be received in evidence in civil proceedings before a court if the court so orders upon the personal undertaking of a solicitor to cause —
>
> (i) such instrument to be stamped in respect of the stamp duty chargeable thereon; and
> (ii) any penalty payable under section 9 in respect thereof to be paid.

There is, of course, a proviso contained in that section and in regard thereto, by letter dated 24 September 1997, the defendants' solicitors gave the following undertaking:

> If you insist, we could procure a Statutory Declaration from Cecilia Ting testifying that she was the Chief Executive Officer at CIB-HK at that time and submit a copy of the Memorandum for stamping.

It should further be noted that during the hearing, on behalf of the defendants, counsel gave a formal undertaking to have the relevant documents stamped if they were found by this court to be instruments which passed title in terms of s 5 of the Conveyancing and Property Ordinance.

Mr Chan has argued that, in light of the formal undertakings, there is nothing in the stamp duty point; that it is a matter of conveyancing and does not affect title. In this regard he referred to the Privy Council judgment in *Lap Shun Textiles Industrial Co Ltd v Collector of Stamp Revenue* [1976] AC 530 at 535, per Lord Wilberforce:

> A third head of possible difficulty was said to relate to matters of title. But their Lordships were not satisfied of the reality of this difficulty under the system prevailing in Hong Kong. The dictum of Eve J in *Re Indo-China Stew Navigation Co* [1917] 2 Ch 100, 106 suggesting that registration of a transfer while inadequately stamped would not bring about a legal transfer does not appear to their Lordships to be correct.

This judgment, of course, precedes our present Stamp Duty Ordinance which came into force in 1981. I further accept that the passage may well be obiter. However, in my view, the principle stated holds good. A failure to ensure that an instrument chargeable with stamp duty is duly stamped does not go to title.

In fairness, of course, counsel for the plaintiff does not strongly argue to the contrary. As I understand it, it is rather his argument that a document which is unstamped may not be used by a vendor to *prove* good title. In this regard, he has referred me to an article in the Hong Kong Law Journal by PG Willoughby (then Director of Professional Legal Education at the

University of Hong Kong) entitled: *Professional Conduct and Stamp Objections* (1981) 11 HKLJ 361. In part the article reads:

> Having regard to the fundamentally different policy of the Hong Kong stamp duty legislation, which has always imposed a statutory obligation on the parties to stamp certain instruments, and bearing in mind the civil liability to pay the duty (which was until recently supported by criminal sanctions), it seems that failure to stamp is not a mere technicality which counsel can be permitted to waive. Rather it seems more likely that it is the duty of counsel to uphold the law and endeavour to ensure that the statutory obligation to stamp is observed.
>
> There is perhaps a further aspect to this matter which should be considered and that is whether in Hong Kong failure to stamp an instrument goes to its validity and therefore whether even under the ruling affecting members of the English Bar stamp points can be taken. It seems that references to the validity of an instrument in this context are to the unusual situation that used to affect certain instruments such as bills of exchange and promissory notes[12] which could not be stamped out of time. However, the wording of section 15(1) of the Stamp Duty Ordinance is such that it seems that in Hong Kong an unstamped or insufficiently stamped instrument may properly be regarded as 'invalid'. It may be, therefore, that for this reason also it is proper for counsel to object to the admissibility of instruments that are not duly stamped.

Certainly, the Ordinance lays down an obligation to ensure that stamp duty is charged and a failure to do so means that an instrument shall not be received in evidence or 'be available for any other purpose whatsoever'. But s 15 gives a discretionary power to the court to receive such instruments in evidence subject to suitable undertakings; that is, undertakings of the kind given by Mr Chan. If the proviso allows for such instruments to be used in evidence to prove good title, in my judgment, it must follows that they can be used outside court to prove good title subject, of course, to a similar undertaking. That undertaking was given by the vendor's solicitors.

In my view, therefore, the fact that the instruments passing equitable title from the centre to the institute were unstamped did not prevent the vendor from proving good title subject to any undertaking necessary to ensure that the statutory obligation to stamp was observed and the purchaser protected from possible liability.

Recission by the plaintiff

The formal agreement of sale dated 8 August 1997 placed upon the vendor the obligation to show good title to the property. The agreement further provided that in every respect time was to be of the essence. As concerns the completion date, the parties originally agreed that it should be on or before 10 September 1997. However, two days before that date it was agreed that it should be extended by fourteen days to 24 September.

The matter of the completion date, however, did not rest there. On 20th

of the month, the plaintiff's solicitors sought a further extension of fourteen days until 8 October. Defendants' solicitors advised that they were taking instructions and would revert. On 23 September, plaintiff's solicitors requested a response to their request. There was no immediate response. Instead, on 25 September — the day *after* the completion date — defendants' solicitors sent a detailed letter to answer the balance of the requisitions. At the end of the letter they said that the vendor did not consider any further 'postponement' to be necessary and gave notice to complete without specifying a date. On the same day, plaintiff's solicitors responded by saying (in part):

> We are considering further on the question of ultra vires in relation to the gift from CIB-HKC to HKIB ...
>
> We have not drafted the undertaking letter as we were not, and still are not, sure what documents will be given to us to form parts of title deeds. Your notice to complete is certainly pre-nature (sic) as the title queries have not been settled.

It is, therefore, apparent that, although there had been no agreement to extend the completion date, nothing was done by either party to complete on the specified date. Instead, attempts to answer the requisitions were continued and those attempts were considered and answered.

What then was the result? I am satisfied that the contract did not terminate at midnight on 24 September but continued with the substitution of a reasonable time for the failed express condition that completion be on the specified date. The consequence that I have detailed was stated by Hunter JA in *Camberra Investment Ltd v Chan Wai Tak* [1989] 1 HKLR 568 at 574, this dicta being approved by the Privy Council in *Chong Kai Tai & Anor v Lee Gee Kee & Anor* [1997] 1 HKC 359 at 370 D-G:

> I regard the point as fundamental and very relevant as revealing both parties to have been at fault. Their obligations under cl 3 were mutual. The duty of the defendant to tender an executed assignment and that of the plaintiff to tender the balance of the purchase price were concurrent conditions. Neither performed: neither tendered: neither triggered the corresponding obligation of the other. The defendant neither executed nor tendered an assignment before 1pm and thereafter was denying his obligation so to act and preventing his solicitor from taking any step to that end. The plaintiff tried to tender and failed. The cheque constituted at most conditional payment and not the 'full' payment required. An effective tender required cash or its equivalent, neither of which was available that Saturday afternoon.
>
> In my judgment this contract remained uncompleted at midnight on 28 February by the fault of both parties. It did not then terminate as was at one time suggested. It remained on foot with the substitution of a reasonable time for the failed express condition.

Although the defendants solicitors continued to attempt to answer plaintiff's requisitions and although plaintiff, as Mr Chan expressed it, continued to

co-operate, during that process, on 29 September, plaintiff rescinded the agreement. The letter read:

> Despite the efforts we have made, your client has not proved title to the property. The completion date, as extended, has expired on 24th September 1997.
>
> We now give you notice that our client rescinds the agreement for sale and purchase. Your client is requested to return the deposit of HK$3,270,000.00 to us forthwith.

In my judgment, however, at that time the vendor was continuing to attempt to answer plaintiff's requisitions and was doing so with candour in a bona fide attempt to show good title. Indeed, it appears that a further letter from defendants' solicitors crossed the letter of recission. Yes, there may have been some shifting of ground in an attempt to answer the requisitions but the issues were far from simple. Matters were capable of resolution and I am satisfied that in the final result defendants were able to show good title so that any risk of that title being successfully challenged became negligible.

In the circumstances, in my judgment, plaintiff was not able, without notice, to rescind in the manner it did. Time for completion could be made an essential term but only by serving a notice to complete within a reasonable time. In this regard, see for example, *Douglas Ltd v Ji Shan International Investment Ltd & Anor* [1998] 2 HKC 165 at 178E:

> In this case, in order to make time of the essence again and failure to complete a repudiatory breach, the vendor must serve a notice demanding completion by the confirmor within a reasonable time.

There may of course, be occasions where such a notice is unnecessary. That will depend on the facts of each case. In this regard, see for example *A-Mayson Development Co Ltd v Betterfit Ltd* [1992] 2 HKC 533 at 535G-536A per Godfrey J (as he then was):

> There are circumstances in which the purchaser may call off the contract at once, without waiting to see whether the vendor can succeed in proving title on or before completion: see *Price v Strange* [1978] Ch 337 per Goff LJ at p 355. For example, in my judgment the purchaser does have a right to call off the contract as soon as he discovers a fundamental defect in the title, or some other fundamental breach of contract by the vendor. However, although, upon discovering before completion a fundamental defect in the vendor's title, the purchaser may thereupon treat the contract as at an end, in my opinion he may not do so merely for minor deficiencies, removable defects, matters of conveyance and so on: compare *Pips (Leisure Productions) Ltd v Walton* (1981) 260 EG 601, per Megarry VC, at pp 603, 604. Where proof of title is insufficient, but the title is not necessarily defective, the purchaser is, in my judgment, bound in the ordinary way to give the vendor a proper opportunity of establishing the title.

In my judgment, however, as I have said, in the present matter it was incumbent upon the plaintiff to serve notice. This was not done. Plaintiff's recission, therefore, amounted to a breach of the contract. Defendants were entitled to accept that breach. Thereafter, it became unnecessary — if it was still required — for the vendor to answer any outstanding requisitions.

Conclusion

It is my judgment that plaintiff is not entitled to the declarations sought; plaintiff's summons is dismissed. As for the counterclaim, that is allowed. Costs are awarded in favour of the defendants, that order to be an order nisi in the first instance with liberty to apply within 21 days.

Reported by Calvin SF Luis

(1) Our client is not prepared to supply you with certified copy of Letter Memorial No 1599984 as the same does not affect title to the above property.
(2) There is no certificate of compliance issued up to date hereof.

By an exchange of letters on 11 September 1991, the purchaser's solicitors maintained that the requisitions have not been answered and stated that they must be resolved before completion, whilst the vendor's solicitors maintained that they have been satisfactorily answered and insisted on completion on 15 September 1991.

On 12 September 1991, the purchaser's solicitors wrote:

> We are still looking forward to your client's satisfactory answers to other outstanding requisitions and in particular written document proving that the conditions under the conditions of exchange No 10485 have been complied with to the satisfaction of the Director of Public Works and the Registrar General (Land Officer).

The vendor's solicitors responded on the same day. They maintained that the requisitions were invalid and did not raise any doubts on title. They insisted on completion on 15 September 1991 which was a Sunday. The purchaser did not complete on that day. On 16 September 1991, the vendor terminated the agreement and forfeited the deposit on the ground of the purchaser's failure to complete.

On the next day, 17 September 1991, the purchaser issued a writ claiming specific performance of the agreement. By maintaining this claim, the purchaser was prepared to accept the vendor's title.

The vendor's obligation

In a contract for the sale of land, the obligation is of course on the vendor to show good title. Counsel for the vendor accepted that under the agreement, the title which the vendor contracted to convey was a legal estate. The vendor therefore was obliged to show good title to a legal estate.

The first requisition

By the first requisition, the purchaser's solicitors requested a certified copy of the letter attaching the carpark layout plans which were registered pursuant to special condition 17. A land search would reveal its registration and the purchaser's solicitors must have conducted the search since the requisition identified it by reference to the Memorial number of its registration. Obtaining a certified copy was a straightforward matter involving minimal expense. It could have been done by the solicitors for either party. However, the vendor's solicitors maintained that the document did not affect title and the purchaser's solicitors insisted on its production. The position of both parties over such a simple matter could be said to be unmeritorious.

The legal position was that the obligation was squarely upon the vendor to show good title. Where a document needs to be produced by the vendor as proof of title, it is no answer for him to say to the purchaser that he could easily obtain it himself.

In my view, the letter attaching the carpark layout plans was a document which the vendor needed to produce (by way of certified copy) to prove title. Special condition 16 required carparking spaces to be provided. Apart from requiring the approval and registration of the carpark layout plan, Special condition 17 obliged the developer, and hence its successors in title, to maintain the carpark spaces in accordance with the approved plan and not alter the layout except with the prior consent of the Director. To show good title to the carpark sold, the vendor had to prove by producing the document that it is a carparking space corresponding with the approved plan. If it did not, the carpark sold would be a carparking space provided in breach of the conditions of exchange and Government would be entitled to take action in respect of such breach in which event its use and enjoyment would be affected.

Sir John Swaine SC, who addressed us for the vendor on the first requisition, argued that if this were the purchaser's concern, then the requisition should have so stated specifically. In that event, he accepts the vendor would have to produce the letter attaching the carpark layout plans. I do not accept this argument. It ignores the point that it was the vendor who had the duty of showing good title.

I therefore consider that the Judge and the Court of Appeal were right in holding that the first requisition had not been satisfactorily answered.

In coming to her view, the Judge (*Le Pichon J*) relied on the following statement of Mr Recorder Edward Chan QC in *Wong Bik Ching v Yu Hon Chung & Another* (unrep., MP No 2969 of 1996, 15 May 1997):

> I am of the view that prima facie when an instrument was registered against the property and it was not apparent from the land search that the document had ceased to affect the property, the document ought to be treated as part of the title deeds which the vendor should make available to the purchaser.

It should be emphasised that on this approach, the matter is only prima facie and it may therefore be displaced on examination. Provided this approach is understood to apply to registered instruments that are properly registerable under the Land Registration Ordinance (Cap.128), I think it is sound. I agree with Godfrey JA in the Court of Appeal (with whom Mortimer V-P and Rogers JA agreed) when he referred to documents that are properly registerable and said:

> Occupation permits, certificates of compliance and other instruments of that sort which demonstrate that the vendor is entitled to a legal estate in the premises and that his title is not defeasible are instruments by which the premises "may be affected" (see s.2(1) of the Land Registration Ordinance (Cap.128). They are properly registerable at the Land Office