香港律師會建議
修訂《物業轉易及財產條例》(第 219 章)
第 13 條的背景和理由

在 2008 年 4 月 18 日舉行的第一次法案委員會會議上，法案委員會主席要求政府當局提交文件，闡述香港律師會(律師會)建議修訂《物業轉易及財產條例》(第 219 章)("該條例")第 13 條的背景和理由。

背景

2. 根據普通法，土地售賣合約包含一項條款，就是賣方不但須證明妥善業權(亦稱作"可銷售的業權")，而且須能將之轉移(*Active Keen Industries Ltd* v *Fok Chi-keong* [1994] 1 HKLR 396)。這項責任須在合約訂明的完成買賣日期當日履行。

3. 按照普通法，賣方須證明買賣協議日期前 60 年的妥善業權。這個年期依據 1984 年該條例第 13 條縮短至 25 年，其後再依據《1988 年物業轉易及財產(修訂)條例》縮短至 15 年。

4. 根據該條例第 13(1)條，如有關政府租契在買賣合約日期前 15 年內批出，賣方必須出示由政府租契批出日期起的業權證明。如擬出售的土地根據年代更久遠的政府租契持有，賣方須出示該政府租契和買賣合約日期前至少 15 年的業權證據，而首份業權證明文件須證明中期業權根源，可以是轉讓契、以轉讓方式作出的按揭文件或法定押記文件，而該等文件須關乎賣方就擬出售的土地所擁有的全部權益。

律師會提出建議的原因

5. 律師會由於注意到兩宗案件的裁決，因此提出有關建議。這兩宗案件是高院雜項案件 1998 年第 3617 號 *Yiu Ping Fong & Anor v. Lam Lai Hing Lana* (*Yiu Ping Fong* 案)，以及高院民事訴訟 1998 年第 1531 號 *Guang Zhou Real Estate Development (Hong Kong) Co. Ltd. & Anor v.*

Summit Elegance Limited (*Guang Zhou* 案)。這兩宗案件的案情摘要分別載於**附件 A** 及**附件 C**，判決書副本則分別載於**附件 B** 及**附件 D**。

6. 律師會關注到，這兩宗案件的裁決所起的作用是，即使該條例第 13 條已有規定(即追溯妥善業權根源至最少達買賣協議日期前不少於 15 年)，但賣方仍有責任出示"單"與該物業有關的"所有"業權契據和文件的"正本"，以履行**給予**妥善業權的責任。理論上，這項責任會包括出示在須予證明的中期業權根源之前訂立的業權契據("中期前業權根源契據")正本的責任。

7. 源麗華聆案官最近在原訟法庭審理*忠豪有限公司 訴 梁標明及其他人*一案(高院民事訴訟 2007 年第 136 號)(忠豪案)時，引用了 *Yiu Ping Fong* 案及 *Guang Zhou* 案的裁決。*忠豪*案的摘要載於**附件 E**，判決書副本則載於**附件 F**。源麗華聆案官認爲－

> "除非法例有明文清楚規定把某項普通法權利撤除、修訂或更改，否則該權利維持不變，這是行之已久的法律原則。該條例之內根本沒有法定條文，對給予業權的普通法責任加以規限。"

她續稱－

> "因此，除非和直至 2008 年 2 月 6 日提交立法會的《2008 年成文法(雜項規定)條例草案》通過成爲法例，正式在該條例增訂建議的第 13A 條，否則任何人如提出買方沒有普通法權利堅持賣方須在賣地當日出示單與該物業有關的業權文件正本，本庭相當可能不會理會這個論點(除非合約規定無須出示該等文件的正本)。"

8. 律師會提出，基於先前對該條例第 13 條的解釋，律師一向不太着意取得中期前業權根源契據的正本。他們習慣接受經律師或政府公職人員核證或經兩名律師樓書記核簽證實爲真正副本的業權文件副本。

9. 律師會取得資深大律師的意見後，建議在《物業轉易及財產條例》加入一條新訂的第 13A 條。建議的條文所起的作用是，除非明訂有相反用意，否則爲給予土地業權，土地的買方只有權要求賣方交付以下文件的正本：(i)政府租契(如單與該土地有關)及(ii)任何單與該土地有關而賣

方須出示作爲該土地業權的證明的文件(即妥善業權根源最少達買賣協議日期前不少於 15 年)。建議的修訂會減輕很多業主面對的潛在問題。

建議修訂的影響

10. 政府當局及律師會認爲建議修訂會帶來以下影響－

(1) 從賣方的角度來看，預計實施建議修訂後，很多物業(主要是目前業權有疑點的舊物業)的業權可獲證明妥善或可銷售，從而增加有關物業的銷售能力，並有助實現舊區物業的發展潛力。

(2) 除非修改法例，否則有數以千計的業主如要在香港設立業權註冊制度之前出售物業，便可能無法履行訂立及給予業權的責任(根據 *Yiu Ping Fong* 案)。

(3) 再者，如物業市場大幅滑落，很多買家可能會試圖利用賣家無法出示中期前根源契據文件爲理由拒絕完成買賣。修訂法例可避免出現大量可能由此而引起的訴訟。

(4) 買方擔心，在某些情況下，中期前業權根源文件的年期超過法定的 15 年而當中出現技術性的欠妥之處，則會令業權有疑點。從買方的角度來看，有關的建議有助他們購入自己所選擇的物業，而無須擔心日後出現上述有疑問的業權問題。

(5) 有關的建議會利便和簡化代表買賣雙方行事的律師日常的物業轉易工作，因爲他們無須再爲證明或給予妥善業權而追查中期前根源契據業權文件。賣方律師無須再與賣方以前的律師或代表以前業主及發展商的律師通訊，以追查中期前根源契據的文件。

(6) 物業轉易程序簡化後，由於用於處理中期前業權根源文件的時間較少，賣方及買方負擔的法律費用應會減少。這對消費者有利。

(7) 由於物業轉易程序簡化後不再規定須出示中期前業權根源文件，律師承受的風險會較低，不會那麼容易被買方或賣方委託

人控告疏忽，指未能就物業取得妥善的業權或證明妥善物業業權。

(8) 有關建議可增加已按揭給財務機構的物業或已作爲財務機構的押記物業的銷售能力，這對香港的財務機構有利。假設地產市道大幅下滑，拖欠按揭還款的個案將會大增，而同時物業的買方及其律師行紛紛拒絕接受任何沒有中期前業權根源文件的業權，則財務機構便會陷入困境。

(9) 新訂第 13A 條實施後，買方因第三者對土地或針對土地享有權利而取得有問題業權的風險，可能甚爲輕微。實際上，享有相關權利的第三者會是以業權契據作抵押的衡平法按揭承按人。不過，本港大部分按揭採用書面法定或衡平法押記方式，即使有以業權契據作抵押的衡平法按揭存在，承按人的權益及權利將根據新訂第 13A(4)條獲明示保障。

(10) 新訂第 13A(1)條確認普通法下契約自由的一般原則，明文規定當事各方可以明訂協議指明，在買賣完成時，賣方除須出示作爲業權證明的文件外，也須出示其他文件。

諮詢

11. 政府當局已於 2006 年 4 月就律師會有關修訂該條例第 13 條的建議發表諮詢文件，並將文件發給各關注團體，包括香港大律師公會、消費者委員會、香港金融管理局、香港銀行公會、地產代理監管局、香港地產建設商會、香港產業交易法律學會有限公司及法律學者。另外，諮詢文件亦上載到律政司的網站。除接受諮詢人士的回覆外，也收到執業律師提出的很多意見。所有的回覆均支持這項建議。

律政司
法律政策科
2008 年 4 月

#341008

Yiu Ping Fong & Anor 訴 *Lam Lai Hing Lana* [1998] 4 HKC 476

原告人為某物業的買方，而被告人則為賣方。發展商首先於 1986 年把該物業的業權轉讓予 Lin Su Hsian (下稱"LIN")。LIN 其後於 1990 年把業權轉讓予 Chiu Pi Yun (下稱"CHIU")，而 CHIU 於 1996 年又把業權轉讓予被告人。在證明業權的過程中，被告人出示發展商於 1986 年給 LIN 的轉讓契的核證副本，連同一份稱為由 CHIU 於 1996 年 4 月 16 日發出的中文法定聲明的文件(下稱"上述台灣聲明")。CHIU 在上述台灣聲明中，解釋她為何沒有 1986 年的轉讓契正本，儘管她指稱該物業是於 1990 年向其母親 LIN 購入的。上述台灣聲明據稱是依據《宣誓及聲明條例》(第 11 章)作出，並且看來是按照該條例所指定而在 1996 年有效的法定聲明格式擬備的。不過，該文件明言是於台灣作出的，並指稱只是在台灣公證處由一名據稱是公證人的 Mr Ma 根據《公證法》第四條第六款"核證"的。Mr Ma 的身分及權力均未經駐台灣的英國領事機構核實或確認。

2. 原告人就該物業的業權提出兩項要求。第一項要求是關於上述台灣聲明作為《宣誓及聲明條例》所指定的法定聲明的有效性，而第二項則是關於 LIN 的身分，因為 LIN 在 1986 年及 1990 年的轉讓契中使用不同護照作為身分證明文件，而且護照的號碼亦不一樣。CHIU 其後表示不願意來港作出法定聲明。被告人回應時要求援引《物業轉易及財產條例》第 13 條及買賣協議第 17 條條款。買賣協議第 17 條條款作出多項規定，包括"賣方須依據《物業轉易及財產條例》第 13 條展示及給予該物業的妥善業權，有關費用則須自行支付。"原告人其後發出買賣雙方傳票，向法庭申請聲明書，指除了其他事項外，被告人未能對上述要求作出充分的回應。

3. 法庭判原告人得直，理由如下－

(1) 根據《宣誓及聲明條例》，上述台灣聲明不是有效的法定聲明。法定聲明必須是在香港作出，而根據《宣誓及聲明條例》第

12 條，法定聲明必須在太平紳士、公證人、監誓員或其他獲法律授權監誓的人面前作出。上述台灣聲明是在香港境外作出的。此外，聲明內稱爲公證人的 Mr Ma，並不是《宣誓及聲明條例》所指獲法律授權監誓的人。

(2) 上述台灣聲明不能作爲經公證人簽署見證的陳述書，原因是外國公證人的權力和簽署或印鑑應由駐台灣的英國領事機構核實。即使上述台灣聲明被視爲公文，但由於台灣並不是海牙公約(取消外國公文必須獲得法律認可的規定)的締約成員，聲明仍須獲得法律認可。

(3) **除非有明文規定免除賣方的責任，否則賣方須訂立或給予妥善業權**。訂立或展示妥善業權有兩個步驟。第一個步驟是展示業權證明書摘要，以證明妥善的業權，然後是出示業權契據並證明訂立妥善業權所需的其他事實，以證明摘要所顯示的業權。實際上，在香港這兩個展示和證明業權的步驟已合爲一個步驟，即由賣方律師把業權契據和業權文件送交買方律師，以審閱業權。因此，出示業權契據和業權文件以證明業權只是訂立或給予業權的一個步驟，而**證明業權並不等同訂立或給予業權**。(重點爲本文所加)

(4) 賣方並不是僅僅出示《物業轉易及財產條例》第 13(1) 條提述的文件來訂立或給予業權。**第 13(1) 條只提述業權的證明**，而第 13(2) 條則訂明出示業權文件的核證真正副本即已足夠。在簽立正式買賣協議後，賣方律師須把業權契據和業權文件送交買方律師審閱，而**第 13(2) 條的作用，是方便證明業權**。賣方律師只須把業權契據和業權文件的核證真正副本(而非正本)送交買方律師。**本條並無免除賣方在完成買賣時出示有關業權契據和業權文件正本的責任**。(重點爲本文所加)。

(5) **要訂立或給予妥善業權，賣方的律師在完成買賣時僅交出業權契據和文件的核證真正副本並不足夠，他必須充分解**

釋為何未能交出有關契據和文件的正本。因此，倘若賣方已就其不能在完成買賣時出示業權契據正本發出通知，買方便有合法理由查看賣方是否有足夠物業轉易證據，以解釋契據的正本爲何遺失。(重點爲本文所加)

(6) 買賣協議第 17 條條款不可理解爲當事各方有任何意圖免除賣方出示業權契據和文件正本的責任。

(7) 雖然賣方作出法定聲明記錄遺失文件正本一事，通常足以證明文件正本確實遺失了，但是即使被告人作出這樣的法定聲明，亦未能符合須援引足夠的物業轉易證據解釋遺失文件正本的要求。就遺失業權契據**作出法定聲明，目的旨在解釋契據在什麼情況下遺失，以及理應對契據有保管權的人已竭盡所能但無法尋回契據**。被告人只能說她個人從來未管有過 1986 年的轉讓契正本。由於她並沒有保管業權文件，因此她不能就她所知解釋契據在什麼情況下遺失。(重點爲本文所加)

(8) 遺失業權契據不單對有關物業會產生相逆權益的問題，更由於業權契據的擁有權已在土地轉易之時轉給買方，買方在買賣完成時便擁有該業權契據的所有權。如買方得悉其中一份業權契據遺失了，他有權拒絕完成買賣，**除非賣方向他提供充足的證據，證明失去的業權契據確實遺失了，而且相當可能不會尋回**。(重點爲本文所加)

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Annex B

*4 HKC 476, *; [1998] 4 HKC 476*

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Hong Kong Cases

YIU PING FONG & ANOR V LAM LAI HING LANA

[1998] 4 HKC 476

MISCELLANEOUS PROCEEDINGS NO 3617 OF 1998

COURT OF FIRST INSTANCE

HEARING-DATE-1: 4, 7 SEPTEMBER 1998

DECIDED-DATE-1: 23 SEPTEMBER 1998

YUEN J

CATCHWORDS:
Land - Sale of land - Proof of title - Vendor's obligation to make or give good title - Extent and effect of s 13(2) - Vendor to produce originals of title documents in possession on completion - Proprietary interest of purchaser in original documents of title - Conveyancing and Property Ordinance (Cap 219) s 13(1), (2)

Land - Chain of title - Foreign statutory declaration - Loss of original title deed - Statutory declaration sworn in Taiwan before person described as notary public - Identity, authority and signature not authenticated or verified by consular authorities - Validity - Whether statutory declaration sufficient conveyancing evidence explaining loss - Oaths and Declarations Ordinance (Cap 11) ss 11, 12, 14

Words and Phrases - 'Person authorized by law to administer an oath' - Oaths and Declarations Ordinance (Cap 11) s 12

HEADNOTES:
The plaintiffs were the purchasers and the defendant the vendor of a property on Tai Hang Road, Hong Kong. Title of the property was first assigned by the developer to one Lin Su Hsian in 1986. Lin then assigned the property to Chiu Pi Yun in 1990. Chiu in turn assigned the property to the defendant in 1996. In the course of proving title, the defendant produced a certified copy of the 1986 assignment from the developer to Lin, together with a document described as a 'Chinese statutory declaration dated 16 April 1996 given by Chiu Pi Yun' (the Taiwan declaration). Chiu in the Taiwan declaration provided an explanation why she did not have the original of the 1986 assignment, despite her assertion that she bought the property from her mother, Lin, in 1990. The Taiwan declaration purported to be one made pursuant to the Oaths and Declarations Ordinance (Cap 11) and appeared to follow the form in force in 1996 for statutory declarations prescribed under that Ordinance. However, the document was expressly made in Taiwan and purported only to have been 'certified' according to 'clause 6 of section 4 of the Notarisation Law' at the Notarisation Office, Taipei District Court, Taiwan, by a Mr Ma who was described as a notary public. The identity and authority of Mr Ma were not verified or authenticated by the British consulate authority in Taiwan.

The plaintiffs made two requisitions on the title of the property. The first concerned the validity of the Taiwan declaration as a statutory declaration under the Oaths and Declarations Ordinance. The second concerned the identity of Lin as the passports used by Lin as the documents of identification in the two assignments in 1986 and 1990 were different and bore different numbers. It then transpired that Chiu was unwilling to come to Hong Kong to make a statutory declaration. The defendant, in response, sought to rely on s 13 of the Conveyancing and Property Ordinance **[*477]** (Cap 219) and also cl 17 of the agreement for sale and purchase, which stated, inter alia, that 'the Vendor shall show and give a good title to the Property pursuant to Section 13 of the Conveyancing and Property Ordinance Cap 219 his own expenses and he shall at the like expense make and furnish to the Purchaser such attested or certified copies of any deeds or documents of title, wills and matters of public record including the Occupation Permit as may be necessary to prove such title'. The plaintiffs thereafter commenced a vendor and purchaser summons seeking, inter alia, declarations that the defendant had failed to sufficiently answer the requisitions. Completion was scheduled for 30 September 1998.

Held, granting the application in part:

(1) The Taiwan declaration was not a valid statutory declaration under the Oaths and Declarations Ordinance (Cap 11). A statutory declaration must be declared in Hong Kong and before a justice of the peace, a notary public, a commissioner of oaths, or a person authorised by law to administer an oath, reference having been made to the forms set out in the first schedule to the Oaths and Declarations Ordinance, which was the manner to make a statutory declaration as provided by s 14 of that Ordinance. The Taiwanese declaration was declared outside Hong Kong. Further, the person called Mr Ma and described as a notary public in the declaration was not a person authorised by law to administer an oath under the Oaths and Declarations Ordinance. A 'person authorized by law to administer an oath' did not include a person authorised by foreign law to administer an oath (at 480I-481F).

(2) The Taiwanese declaration could not be used as a statement attested by a notary public since the authority and signature or chop of a foreign notary public should have been verified by the British consulate authority in Taiwan. Even if the Taiwanese declaration were to be regarded as a public document, it would still have to be legalised, as Taiwan was not a party to the Hague Convention Abolishing the Requirement of Legalisation of Foreign Public Documents (at 481G-I).

(3) A vendor had an obligation to make or give a good title unless there were express stipulations exonerating him from doing so. The making or showing of good title involved two steps. The first was to show a good title by producing an abstract of title. The title shown by that abstract was then proved by producing the title deeds and by proving such other facts as were necessary to make a good title. **[*478]** In Hong Kong, as a matter of practice, the two steps of showing and proving title were telescoped into one by the vendor's solicitors sending title deeds and documents to the purchaser's solicitors for perusal of title. Therefore, the proving of title by the production of title deeds and documents was only one step in the making or giving of title, and proving of title was not to be equated with making or giving title (at 482F/G-I).

(4) A vendor did not make or give title simply by producing the documents referred to in s 13(1) of the Conveyancing and Property Ordinance (Cap 219). Section 13(1) referred only to the proof of title, whereas s 13(2) expressly provided that it would be sufficient to produce certified true copies of the title documents. The effect of s 13(2) was to facilitate the proving of title when the vendor's solicitor sent title deeds and documents to the purchaser's solicitor for perusal after formal agreement for sale and purchase was executed. The vendor's solicitor could simply send certified true copies of title deeds and documents instead of originals. This section did not exonerate the vendor from producing at completion the originals of such title deeds and documents. *Ip Fung Yee v Norwegian Missionary Society* [1998] 1 HKC 334 (at 482I-483D).

(5) The vendor's solicitor could not make or give good title by handing over only certified true copies of title deeds and documents at completion without an adequate explanation as to why the originals could not be handed over. Hence, where the vendor had given notice that the original of a title deed could not be produced on completion, it was legitimate for the purchaser to examine whether there was sufficient conveyancing evidence to explain its loss (at 483D-H).

(6) Clause 17 of the agreement for sale and purchase could not be read as to have expressed any intention by the parties that the vendor was to be absolved from producing the original title deeds and documents. That clause did no more than to stipulate specifically that when the vendor's solicitor prove title by supplying attested or certified copies, the expenses of so doing were to be borne by the vendor (at 483H/I-484C).

(7) Although a statutory declaration recording the loss of the original document would usually suffice in proving the loss of the original document, the defendant vendor could not, by making a statutory declaration herself, satisfy the requirement of adducing sufficient conveyancing evidence to explain the loss. The purpose of a statutory declaration in respect of a missing title deed was to explain the circumstances in which the deed was lost and to show how the person who ought to have custody of the deed could not find it despite proper endeavours. The defendant vendor could only say that she personally never had the original 1986 assignment. She could not of her own knowledge explain the

cumstances of the loss because she was not the person who had custody of the title document (at 484C/D-G).

(8) Loss of a title deed did not just give rise to a question of possible adverse interests in the property. As ownership of the title deeds passed by the conveyance of the land, the purchaser had a proprietary right to ownership of the title deeds when the sale and purchase was completed. The purchaser was entitled to decline to complete if he was told that one of the title deeds was missing, unless he was provided with satisfactory evidence that the missing title deed was lost and unlikely to re-emerge. *Re Duthy and Jesson's Contract* [1898] 1 Ch 419 followed (at 484I-485B/C).

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(9) The second requisition had no substance. Section 23 of the Conveyancing and Property Ordinance (Cap 219) provided for the presumption of due execution. The plaintiff purchasers had not asserted that the signatures in the 1986 and 1990 assignments were different. Further, the solicitor handling the 1990 assignment had endorsed on the assignment that the passport used had only been issued in 1989 (at 485C-E).

Per curiam

Since there was litigation now pending in this court, the vendor could take advantage of the laxer rules for attesting of affidavits under O 41 r 12(2) of the Rules of High Court of Hong Kong to have an affidavit from Chiu in place of the Taiwan declaration (at 485G-H).

Duthy and Jesson's Contract, Re [1898] 1 Ch 419
Ip Fung Yee v Norwegian Missionary Society [1998] 1 HKC 334, [1998] 1 HKLRD 94

Conveyancing and Property Ordinance (Cap 219) ss 13(1), (2)
Oaths and Declarations Ordinance (Cap 11) ss 2, 3, 11, 12, 14
Rules of the High Court (Cap 4) O 41 r 12(2)

OTHER-REF-TO:
Emmet Title, paras 5.091, 5.147
Hague Convention Abolishing the Requirement of Legalisation of Foreign Public Documents
Williams Title (4th Ed) p 547

Originating summons
This was a vendor and purchaser summons brought by the purchasers, **Yiu Ping Fong** and Chong Kat Chee, against the vendor, Lam Lai Hing Lana, in respect of a property in Hong Kong. At issue was whether a statutory declaration sworn in Taiwan before a person described as a notary public was a valid statutory declaration under the Oaths and Declarations Ordinance (Cap 11). The facts appear sufficiently in the following judgment.

Mok Yeuk Chi (TS Tong & Co) for the plaintiffs.
Sir John Swaine SC and Kenneth CK Chow (YC Lee, Pang & Kwok) for the defendant.

JUDGMENTBY: YUEN J

YUEN J This is a vendor and purchaser summons. The plaintiffs are the purchasers and the defendant is the vendor of an apartment and car parking **[*480]** space (the property). Completion is scheduled for 30 September 1998.

Chain of title

The property was first assigned by the developer to Lin Su Hsian (Lin) in 1986. Lin then assigned the property to Chiu Pi Yun (Chiu) in 1990. Chiu in turn assigned the property to the present vendor in 1996.

The Taiwan declaration

In the process of proving title to the property, the vendor sent the purchasers a certified copy of the 1986 assignment from the developer to Lin, together with a document described as a 'Chinese Statutory Declaration dated 16 April 1996 given by Chiu Pi Yun'.

this document, Chiu states that she had bought the property from her mother Lin in 1990, and says why she does not have the original of the 1986 assignment: she says she had in 1990 deposited at her brother's office all the title deeds she had collected from the solicitors handling the transaction, but in 1994 found only a copy of the 1986 assignment.

This 'Chinese Statutory Declaration' purports to be one made pursuant to the Oaths and Declarations Ordinance of Hong Kong, and appears to follow, for the most part, the form in force in 1996 for statutory declarations prescribed in Cap 11.

However, it was expressly made in Taiwan, and purports only to have been 'certified' according to 'clause 6 of Section 4 of the Notarisation Law' at the Notarisation Office, Taipei District Court, Taiwan by Mr Ma Yau Min, who is described as a notary public. The identity and authority of Mr Ma were not verified or authenticated by the British Consulate. I shall refer to this document hereafter as 'the Taiwan declaration'.

Requisitions

The purchasers' solicitors raised two requisitions. The first concerned the validity of the Taiwan declaration as a statutory declaration under the Oaths and Declarations Ordinance (Cap I I).

The second dealt with proof of Lin's identity -- in the certified copy of the 1986 assignment, she had been identified on the basis of a Taiwanese passport bearing a certain number. In the assignment by Lin to Chiu in 1990, she had been identified on the basis of another Taiwanese passport bearing a different number, which had been issued after 1986.

Taiwan declaration not a valid statutory declaration under Oaths and Declarations Ordinance (Cap 11)

The first issue I have to consider was whether the Taiwan declaration was a valid statutory declaration under the Oaths and Declarations Ordinance (Cap 11). In my judgment, it is not, primarily because it was declared **[*481]** outside Hong Kong, and also because Mr Ma (described as a notary public) was not a person authorised by law to administer an oath under Cap 11.

Section 12 of the Oaths and Declarations Ordinance provided in 1996 (as it still does now) that 'a justice, notary commissioner or other person authorised by law to administer an oath may take and receive the declaration of any person made before him in the manner provided by section 14'.

The manner provided by s 14 is that 'a declaration shall be in one of the forms set out in the First Schedule'. This provision is mandatory.

When one refers to the form set out in the relevant schedule, it is clear that the statutory declaration must be declared in Hong Kong and before a justice of the peace, a notary public or commissioner for oaths.

Accordingly, the declaration of Chiu having been declared in Taiwan cannot be a valid statutory declaration under the Oaths and Declarations Ordinance of Hong Kong.

Another reason why the Taiwan declaration cannot be a valid statutory declaration is because Mr Ma was a notary public only in Taiwan. It was argued on behalf of the vendor that a Taiwanese notary public could be included as a 'person authorized by law to administer an oath' in s 12. I cannot accept that proposition.

When those words are interpreted within the context of the Oaths and Declarations Ordinance, it is clear that they refer to s 3, which provides that a court and persons acting judicially may administer an oath. This latter category of persons is in turn defined in s 2 to mean a tribunal, commission or other person having by law power to receive evidence on oath.

I cannot accept the vendor's argument that this includes persons authorised by *foreign* law to administer an oath. If it were so, much clearer language would have been used. As comparison, one can refer to the explicit language used in s 11 of Cap 11 and O 41 r 12(2) when referring to persons authorised by foreign countries to administer oaths.

The vendor also submitted as an alternative argument that if the Taiwan declaration was not a valid statutory declaration under the Oaths and Declarations Ordinance (Cap 11), it could nevertheless still be ed as a statement attested by a notary public.

However, Mr Ma being a *foreign* notary public, his authority and signature (or in this case, his chop) should have been verified by the British consulate and that had not been done. The declaration here appears to be a private document, but even if it were to be regarded as a public document, it would still have to have been legalised, as Taiwan was not a party to the Hague Convention Abolishing the Requirement of Legalisation of Foreign Public Documents.

Accordingly, there was no valid statutory declaration explaining the loss of the original 1986 assignment.

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Effect of s 13(2) Conveyancing and Property Ordinance (Cap 219)

The next issue was the effect and extent of s 13(2) of the Conveyancing and Property Ordinance (Cap 219).

Section 13(1) provides:

> Unless the contrary intention is expressed, a purchaser of land shall be entitled to require from the Vendor, as proof of title to that land, only production of the Crown lease relating to the land sold and --
> (a) proof of title to that land --
> (i) ...
> (ii) in any other case, extending not less than 15 years before the contract of sale of that land commencing with an assignment, a mortgage by assignment or a legal charge, each dealing with the whole estate and interest in that land; ...

Section 13(2) then provides:

> Where this section requires the production of any document, it shall be sufficient to produce a copy --
> (a) attested, before 1 November 1984, by 2 solicitors' clerks; or
> (b) certified by a public officer or a solicitor,
> to be a true copy.

There has been much debate in this court as to the true meaning and effect of s 13(2), and a number of authorities have been quoted to me, in particular *Ip Fung Yee v Norwegian Missionary Society* [1998] 1 HKC 334, [1998] 1 HKLRD 94, which on one reading seems to suggest that so long as certified true copies are produced, it is not necessary for a vendor to explain the loss of original title deeds.

In my view, the real position is this. Unless there are express stipulations exonerating him from so doing, a vendor has an obligation to *make or give* a good title. There are two steps in the making or giving of good title.

The first is to *show* a good title. In England, that is done by the vendor's solicitor producing an abstract of title. The title shown by that abstract is then *proved* by producing the title deeds and by proving such other facts as are necessary to make a good title.

In Hong Kong, as a matter of practice, no abstracts are produced, and the two steps of showing and proving title are telescoped into one by the vendor's solicitor sending title deeds and documents to the purchaser's solicitor for his perusal of title.

The proving of title by the production of title deeds and documents is therefore but one step in the making or giving of title, and proving of title is not to be equated with making or giving title. A vendor does not make or give title simply by producing the documents referred to in s 13(1).

The effect of s 13(2) is, in my view, to facilitate the proving of title when the vendor's solicitor sends title deeds and documents to the **[*483]** purchaser's solicitor for perusal after the formal agreement for sale and purchase is executed. The vendor's solicitor can simply send certified true copies of title deeds and documents instead of originals.

Section 13(2) does not, in my judgment, exonerate the vendor from producing at completion the ginals of such title deeds and documents, at least those that relate exclusively to the property being sold.

That is clearly so because s 13(1) refers (only) to proof of title. And s 13(2) provides explicitly that it is only ' *where this section requires* the production of any documents' that it would be sufficient to produce certified true copies. The words which I have emphasised show clearly the limited circumstances in which s 13(2) applies.

When s 13(2) is understood this way, I do not think my view conflicts with that of the learned deputy judge in *The Norwegian Missionary Society* case. A vendor's solicitor can *as part of proof of title under s 13(1)* send certified true copies of title deeds and documents to the purchaser's solicitor for perusal, without having to prove that the originals are lost. However, a vendor cannot *make or give good title*, by handing over only certified true copies at completion without an adequate explanation as to why the originals cannot be handed over.

The handing over of original title deeds and documents (or at least those which relate exclusively to the property being sold) is an important part of the vendor's obligation in a sale of land. That obligation is well established in the common law.

A purchaser of land is entitled as a matter of proprietary right to possession of the original title deeds (Williams *Title* (4th Ed) p 547), which is the best evidence of ownership.

Further, it is important for him to get possession of the original title deeds so that he can be sure that the property is not subject to an equitable mortgage by deposit of title deeds. If the deeds are in the hands of some person other than the vendor, the purchaser is thereby placed on enquiry as to the reason for this, and he has constructive notice of the facts which such enquiry would disclose (Emmet *Title* ?5:147).

Where, therefore, as in this case, the vendor has given notice that she would not be able to produce the original 1986 assignment on completion, it is legitimate for the purchaser to examine whether there is sufficient conveyancing evidence to explain its loss.

Effect of cl 17

Sir John Swaine SC, counsel for the vendor, submitted that cl 17 in the agreement for sale and purchase excused the vendor from producing the original title deeds and documents.

Clause 17 provides:

> The Vendor shall show and give a good title to the Property pursuant to Section 13 of the Conveyancing and Property Ordinance Cap. 219 at his own expenses **[*484]** and he shall at the like expense make and furnish to the Purchaser such attested or certified copies of any deeds or documents of title, wills and matters of public record including Occupation Permit as may be necessary to prove such title. The costs of verifying the title by inspection and examination including search fees shall be borne by the Purchaser.

With respect to Sir John, I cannot read that clause as expressing any intention by the parties that the vendor is to be absolved from producing the original title deeds and documents. Much clearer language would have to be used. That clause, in my view, does no more than stipulate specifically that when the vendor's solicitor prove title by supplying attested or certified copies, the expenses of so doing are to be borne by the vendor.

No sufficient conveyancing evidence to explain loss

The loss of the original documents must be proved, and in England, there is case law that a statutory declaration to this effect would usually suffice (*Emmet* ?5.091). I do not see why it should be different in Hong Kong, and indeed this practice has been recognised in all the authorities quoted to me.

It was further submitted on behalf of the vendor here that even if the Taiwan declaration is not a valid statutory declaration, the vendor herself has made a statutory declaration in Hong Kong declaring that she did not have the original 1986 assignment, and that would suffice, together with the Taiwan declaration.

I cannot accept that proposition. The purpose of the statutory declaration accompanying a missing title deed is to explain the circumstances in which the deed was lost and to show how the person who ought to have custody of it could not find it despite proper endeavours. The vendor here can only say that she personally never had the original 1986 assignment. She cannot of her own knowledge explain the circumstances of the loss because she was not the person who had custody of it. That was Chiu, and as I have held, there was no valid statutory declaration made by Chiu.

Not just question of blot on title

Sir John's 'fall-back' submission was that even if the vendor has failed to provide sufficient conveyancing evidence of the loss, the loss of the 1986 assignment was not that important. He submitted that the likelihood of Lin effecting an equitable mortgage by deposit of her title deed at some stage between 1986 and 1990 was so small as to be fanciful. No one has come up in the last eight years to claim an interest in the property.

However, in my view, the loss of the title deed does not just give rise to a question of possible adverse interests in the property. It is well established that ownership of the title deeds pass by conveyance of the land. The purchasers here have a proprietary right to ownership of the title deeds when they complete. If they are told that one will be missing, they are **[*485]** entitled to decline to complete unless provided with satisfactory evidence that the missing title deed is lost and unlikely to re-emerge.

An example can be found in *Re Duthy and Jesson's Contract* [1898] 1 Ch 419, referred to in *Emmet* ? 5.091. The parties knew where the title deeds and documents were (with solicitors for deceased mortgagees who had been paid off). There were no adverse claims to the title. Nevertheless the purchaser declined to complete until the deeds were handed over and the court upheld his stand.

No substance in second requisition

As a matter of completeness, I would add that I do not see any substance in the purchasers' second requisition concerning Lin's identity.

Section 23 of the Conveyancing and Property Ordinance provides for the presumption of due execution. It has not been asserted by the purchasers that they consider the signatures in the 1986 and 1990 assignments different. It is true that the passport numbers stated are different, but the solicitor handling the 1990 assignment from Lin to Chiu had endorsed on the assignment that the passport used had only been issued in 1989. There is therefore, in my view, nothing in the point of the different passport numbers.

Conclusion

I find that the purchasers are entitled to regard their requisition on the missing 1986 assignment as insufficiently answered, and to insist on the production at completion of the original 1986 assignment or a valid statutory declaration from Chiu to explain its loss.

I fully understand the vendor's difficulty in this regard. I am told that Chiu is in Taiwan and has refused to come to Hong Kong to make a statutory declaration here. It may also be difficult for the signature and identity of the Taiwan notary to be verified by the relevant officials of the People's Republic of China.

I would only note that it would appear to me that since there is litigation now pending in this court, the vendor could take advantage of the laxer rules for attesting of affidavits under O 41 r 12(2) of the Rules of High Court of Hong Kong to have an affidavit from Chiu in place of the Taiwan declaration. However this is of course only a possibility for the vendor to consider and should not be regarded as part of my judgment.

Order

I would therefore make a declaration in terms of para (1) of the prayer in the originating summons save that the reference to requisition No 3 should be deleted. As completion date has not yet arrived and the purchasers have not terminated the agreement so far, I do not consider it appropriate to make any declarations in terms of para (2), or to give any orders or **[*486]** directions in terms of para (3), save to say that if the vendor is unable to produce the original 1986 assignment or a sufficient statutory declaration close to completion date, I do not see how the vendor can have any defence to the reliefs ught in para (3). As for the costs of the originating summons, I would make an order nisi that the costs be to the plaintiffs.

Finally I would like to thank both counsel for their assistance.

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Guang Zhou Real Estate Development (HK) Co Ltd & Another 訴 _Summit Elegance Ltd_ (高院民事訴訟 1998 年第 1531 號) (原訟法庭)

1. 本訴訟源於 1997 年 9 月 4 日就 5 個地段訂立的買賣協議。買方(被告人)向賣方(原告人)提出 15 項要求。只有第 10 及 14 項與律師會的建議有關，因為這兩項是就遺失的文件提出的要求。

2. 賣方同意將 5 個毗鄰的地段售予買方，雙方訂於 1998 年 1 月 31 日完成交易。買方於完成買賣日拒絕完成交易。

3. 買方就兩份遺失的文件提出要求。第 10 項要求涉及內地段第 7441 號的官契。由於賣方從未管有該份官契的正本，他們只能出示官契的核證副本。買方對核證副本不滿意，堅持要求賣方出示官契正本，或如官契遺失或誤置的話，則須作出官契遺失或誤置的法定聲明。

4. 第 14 項要求，涉及就內地段第 7443 號通道權訂立的解除責任契據。賣方同樣只出示核證副本，理由是無法取得該契據的正本。買方不接納這個解釋，堅持要求賣方於完成買賣時交付解除責任契據的正本。

5. 有關的法律爭議是賣方能否藉核證副本而非正本給予妥善的業權，以及賣方是否已充分回應買方提出的要求。

6. 至於兩份遺失的業權文件的正本，賣方辯稱，根據買賣合約第 7 條條款，他們可使用核證副本代替正本文件，以給予妥善業權。第 7 條條款訂明－

> "賣方須根據《物業轉易及財產條例》第 13 條出示及給予該物業妥善的業權，有關的費用則須自行支付。賣方也須盡量為買方制備及提供所需的任何契據、業權文件、遺囑及公共紀錄的核證副本，以證明業權，費用同樣須自行支付……"

7. 法庭裁定－

(i) 業權證明只是給予物業業權程序的其中一個步驟。《物業轉易及財產條例》第 13(2) 條的規定只是方便業權的證明，但並沒有免除賣方須於完成買賣時提供業權文件正本的責任。第 7 條條款只不過是重覆這方面的要求，讓賣方按第 13 條的規定，交付文件的核證副本證明業權，以完成給予業權的其中一個步驟。

(ii) 擁有業權文件正本的所有權，是業主一項重要的權利。如法律條文真的要免除賣方在完成買賣時提供業權文件正本的責任，條文該以更清楚確切的字眼訂明。不過，我們並未在協議的第 7 條條款或其他部分，找到這樣清楚確切的字眼。

(iii) 事實上，賣方可以選擇訂明，又或者買賣雙方可以同意，買方無權堅持對方必須出示所有或其中一些業權契據及文件的正本。

(iv) 然而，協議第 8 條條款訂明，賣方必須交付買方與物業有關的業權文件，而沒有限制只交付這些業權文件的核證副本。

Annex D

[2000] HKCU 621

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Hong Kong Unreported Judgments

GUANG ZHOU REAL ESTATE DEVELOPMENT (HONG KONG) COMPANY LIMITED, KINGSFORD INTERNATIONAL INVESTMENT LIMITED v SUMMIT ELEGANCE LIMITED

HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

HCA 1531/1998

DECIDED-DATE-1: 7 AUGUST 2000

CARLYE CHU, DEPUTY J

CATCHWORDS:

Land - Sale and purchase agreement - Requisitions raised by buyers, some of which were outstanding at time of completion - Buyers did not complete on basis of failure of sellers to show good title - Whether sellers failed to satisfactorily answer requisitions - Whether sellers failed to show good title

JUDGMENT

This action arose out of an agreement for the sale and purchase of 5 lots of vacant land dated 4 September 1997 made between the plaintiffs as vendors and the defendant as purchaser ("the Agreement"). The 5 lots were known as Inland Lots Nos. 7439, 7440, 7441, 7442 and 7443, also known as Nos. 10, 12, 14, 16 and 18 Wharf Road, situated in North Point (collectively referred to as "the Properties"). The 1st plaintiff was the registered owner of Inland Lots Nos. 7439 and 7440 whereas the 2nd plaintiff was the registered owner of the other 3 lots of land. The purchase price was HK$ 290 million. Deposits totalling HK$ 43.5 million had been paid. The completion date stipulated in the Agreement was 30 January 1998, but because that was a holiday, it was postponed to the following day, 31 January 1998.

Prior to the execution of the Agreement, the parties had on 28 April 1997 executed a Chinese letter of intent. This was followed by a Chinese provisional agreement made on 21 August 1997. As early as 9 May 1997, solicitors for the plaintiffs had already sent to the defendant's solicitors the title deeds relating to the Properties. By letter dated 16 May 1998, the solicitors for the defendant raised a total of 15 requisitions, 10 of which remained outstanding by the time of completion. The defendant did not complete on the basis that the plaintiffs had failed to show and give a good title in the manner provided for in the Agreement. The plaintiffs forfeited the deposits.

On 2 February 1998, the plaintiffs commenced these proceedings seeking declarations to the effect that the defendant had repudiated the Agreement and that the deposits had been rightfully forfeited, and also seeking damages for breach of the Agreement. The defendant counterclaimed for declarations that the plaintiffs had failed to answer satisfactorily the requisitions raised and the defendant was entitled to rescind the Agreement, and also for the return of the deposits and reimbursement of the abortive conveyancing costs as well as for a lien over the Properties.

The Evidence

The facts surrounding this case are not disputed. The witness statement of the only factual witness, Miss Pauline Tsang, a former employee of the plaintiff, was received into evidence by agreement. Similarly, the expert evidence adduced by the plaintiff to the effect that the market value of the Properties was HK$ 91 million as at the time of the completion, was also admitted by consent. The same goes for the defendant's evidence on the amount of the abortive conveyancing costs and expenses.

The Issues

The primary issues between the parties are whether the plaintiffs had satisfactorily answered the requisitions raised, and whether the plaintiffs had failed to show and give a good title to the Properties. The 10 requisitions outstanding at the time of completion are nos. 1, 2, 3, 6, 8, 10, 11, 12, 13 and 14. Requisitions nos. 6 and 8 were not pursued by the defendant at the trial. Broadly speaking, the remaining 8 requisitions fall into the following categories:

(1) Easements and rights of way reserved unto the Crown and the Crown lessee of Inland Lot No. 7444 (Requisitions nos. 1 and 2);

(2) Restrictive covenant in the Crown Leases in respect of user (Requisition no. 3);

(3) Missing documents (Requisitions nos. 10 and 14);

(4) Outstanding contribution for remedial works carried out by the Building Authority (Requisition no. 11); and

(5) Errors in the documents as to the descriptions of the Properties (Requisitions nos. 12 and 13).

In addition, the plaintiffs also take the point that the defendant had, by offering the Properties for sale by tender, accepted the title and must be taken to have waived any objection on title raised.

Requisition No. 1

This requisition, together with Requisition no. 2 below, relate to certain easements or rights of way created under the Crown Leases relating to the Properties and its neighbouring lot, Inland Lot No. 7444.

Inland Lots Nos. 7439 to 7444 are adjacent lots. It appears that, previously, there was a communal staircase running through these lots. The staircase stood on the front portions of the buildings previously erected on these lots. The Crown Leases of these lots all excepted and reserved unto Her Majesty and her licensees a free and uninterrupted right to pass and repass the staircase and landings then erected on these lots. The right in respect of Inland Lot No. 7443 had been released by a Deed of Release dated 7 October 1996. The rights of way over the other lots had not been released and remained subsisting.

In the letter dated 16 May 1998, the defendant's solicitors requested the plaintiff to arrange for the release by Her Majesty of the rights of way relating to Inland Lot Nos. 7439 to 7442 and to let them have the relevant Deeds of Release.

On 26 August 1997, the plaintiffs' solicitors answered that the plaintiffs had made an application to the Lands Department for the extinguishments of the rights, and it had been approved subject to the payment of administrative fee, which the plaintiffs had effected. The plaintiffs' solicitors further said that they would revert to the defendant's solicitors once the formal agreement was signed.

By letter dated 16 January 1998, the plaintiffs' solicitors further informed the defendant's solicitors that the plaintiffs had executed the relevant no objection letters and paid the administrative fee, and undertook to supply certified copies of documents upon receipt of the same from the government.

The solicitors for the defendant did not accept these answers. In their letter dated 23 January 1998, they stated that it was not known whether the government had executed the Deeds of Release and they were not given any copy of the Deeds. They asserted that the Deeds are title documents relating exclusively to the Properties. They therefore insisted on the plaintiffs producing the original Deeds of Release duly executed by the government and registered upon completion. The solicitors for the defendant also asked for certified copies of the Deeds be provided in the meantime.

The solicitors for the plaintiff responded by letter dated 26 January 1998, enclosing certified copies of the correspondence between the plaintiffs and the government and also copies of the engrossed Deeds of Release, the terms of which had been agreed with the government. They said that the Deeds were in the course of execution by the government. They observed that the execution of the Deeds is a matter of formality since the government's offer to release the rights had been accepted and the plaintiff had paid the relevant fees.

By letter of 27 January 1998, the defendant's solicitors disagreed that the execution of the Deeds is mere formality. They referred to the letter from the Lands Department making the offer, which stated that the offer was not intended to create any legal obligation, whether by acts or part performance, and that the government will not accept any legal obligations unless the necessary legal documents have been duly executed and registered. They therefore maintained that the original Deeds duly executed and registered had to be delivered at completion.

The Deeds of Release were subsequently executed by the government on 5 February 1998 and registered on 29 May 1998.

It can be seen from the correspondence summarized above that the objection of the defendant falls into 2 parts. The first relates to the plaintiffs' failure to secure the execution by the government of the Deeds of Release prior to completion. The second part concerns the plaintiffs' inability to deliver the duly executed and registered Deeds of Release upon completion.

In answer to the first part of the objection, the plaintiffs pleaded in the Statement of Claim and leading counsel argued that there is no blot on the title and there is no risk of the government enforcing the rights. I agree. The communal staircase that formerly stood on and ran through these lots was no longer in existence. This fact is readily ascertainable from an inspection of the Properties, which will reveal that the lot adjacent to the Properties, Inland Lot No. 7444, had been redeveloped jointly with other neighbouring lots, and there is no staircase either on Lot No. 7444 or running through these lots. What is now at the front of all these lots is a pedestrian walkway that forms part of Wharf Road. There is in reality no way by which the government can exercise or enjoy the rights reserved unto her.

Further, the acts of the government in making a formal offer for the release of the rights, in requesting and accepting payment of administrative and registration fees for the release and in agreeing with the plaintiffs the terms of the Deeds of Release are clear indications of the government's willingness and agreement to forego the rights reserved under the Crown Leases. It is true that the matter cannot be considered as final and secured unless and until the Deeds of Execution are executed by the government. It is also not entirely correct to describe the execution of the Deeds as mere formality, given the terms of the letters of offer from the Lands Department. In my judgment, however, the possibility of the government retracting from her position and refusing to execute the Deeds is entirely remote. There is no reason why the government would wish to do so, given the demolition of the staircase and the construction of Wharf Road.

In the case of *Jumbo Gold Investment Ltd. v Yuen Cheong Leung & Another* [2000] 1HKLRD 935, Bokhary PJ, in dealing with an unwaived breach of condition giving rise to a right of re-entry by the government, observed that (at p.771C-D):

"The question is therefore whether, assuming that the Government has that right, there is any real risk that it would actually take the drastic step of enforcing it to the detriment of innocent owners. I entirely agree with Mr Justice Litton PJ that the correct answer is in the negative. It is simply not in the nature of good government to harm innocent people unnecessarily like that. Accordingly, it is safe to proceed on the basis that the Government would never do so."

In my view, these observations are entirely applicable to the present case. The purchaser's concern that the government would refuse to execute the Deeds of Release and/or would enforce the rights of way is not borne out by the facts and circumstances of the case, notably the development of the lots in question since the granting of the Crown Leases and the attitude of the government as manifested by the steps she had taken leading to the preparation of the Deeds of Release.

The defendant had pleaded and counsel had argued that the plaintiffs' solicitors had never asserted in their answers to this requisition that there is no risk of enforcement by the government. Instead, the plaintiffs had chosen to procure from the government Deeds of Release. That being the case, it is not open to the plaintiffs now to rely on this ground as saying that they had satisfactorily answered this requisition. Reliance is placed on the well known case of *Active Keen Industries Limited v Fok Chi-keong* [1994] 1HKLR 396 which demonstrates that a vendor who has a good title must nevertheless show a good title by answering requisitions satisfactorily.

It is not in dispute that the plaintiffs' solicitors had not mentioned in their answer to this requisition that there is no risk of enforcement by the government. But that in my view is not fatal. In this connection, it is important to appreciate what is required of an answer to a requisition and of the vendor or his solicitors' duties in relation thereto. Litton J.A. (as he then was) in *Active Keen Industries Limited* (at pp. 407 & 413) had observed that the vendor's duty to answer requisitions is not an onerous one. What is required is that the requisitions should be answered in a straightforward manner and with candour, so that the purchaser can be reasonably confident that all the relevant facts are revealed and be able to decide whether the vendor has a good title. The parties' solicitors are not expected to act as advocates and to "bandy propositions of law". Ultimately, it is for the parties to decide for themselves what the legal position is, based on the facts and circumstances made known to them.

In the present case, the plaintiffs' solicitors had in their answers set out the communications they had with the government and the events leading to the preparation of the engrossed Deeds of Release. Copies of the relevant correspondence and documents had also been supplied. The manifested attitude of the government must be obvious to the defendant's solicitors. It is then for the defendant's solicitors to form an opinion as to whether there is any defect in the plaintiffs' title. In arriving at a conclusion on the title, it must necessarily involve a consideration as to the risk of the government enforcing the rights of way or the lack of it. This is because a reasonably competent conveyancer will appreciate that a good title does not mean a perfect title.

Mr Lam, counsel for the defendant, submitted that the plaintiffs' solicitors had not disclosed all the relevant matters to the defendant. What were said to be omitted were the photographs depicting the previous conditions of the Properties and the neighbouring lots and information as to the redevelopment of Inland Lot No. 7444 in about 1983. As to the latter information, although it did not form part of the answers to this requisition, it was supplied in connection with requisition no. 2, which is also a requisition on the relevant rights of way. At any rate, the Properties were to be sold on an "as it" basis and the defendant declared under clause 21 of the Agreement that it had duly inspected the Properties. A physical inspection of the Properties will reveal the fact of a redevelopment incorporating Inland Lot no. 7444 and that of the demolition of the staircase previously running through the Properties and Inland Lot no. 7444. The omission to supply photographs depicting the condition of the Properties and the neighbouring lots before the buildings on the Properties were demolished is therefore also immaterial.

I turn to the second part of the objection under this requisition. The defendant's case is that the Deeds of Release fall within the meaning of "Crown lease" under the Interpretation and General Clauses Ordinance, cap.1 and for the purpose of the Conveyancing and Property Ordinance, cap.219. As such, it is incumbent upon the plaintiffs to furnish them upon completion.

I accept that under section 3 of the Interpretation and General Clauses Ordinance, "Crown lease" extends to cover "any instrument whereby the term of a Crown lease may have been extended or the provisions thereof varied". Accordingly, any deed for the release of the rights of way reserved under the Crown leases relating to the Properties will come within the definition of "Crown lease". However, I do not accept that the plaintiffs' inability to deliver the properly executed Deeds of Registration upon completion amounts to a failure to show good title for the purpose of section 13 of the Conveyancing and Property Ordinance. This is because the Deeds of Release had not been executed by the government before the completion date. They only came into legal existence upon being executed by the government. That being the case, they did not form part of the Crown lease or part of the title documents to which the defendant was entitled upon completion. In this regard, the cases of *Liu Tak Kin v Chan Yiu Kai* [1998] 4 HKC 362 and *Earning Code Ltd. v Lau King Lin* HCA No. A3874 of 1991 (unreported) are distinguishable. In both cases, the documents that the vendor failed to produce, being consent letter and Letter of Modification, were already in existence at the time of completion. The documents were therefore part of the title documents so that failure to produce them amounts to failure to show good title. In short, the obligation to deliver title documents can only relate to documents already in existence, but not to documents yet to be created.

In the circumstances, I consider that the plaintiffs had sufficiently answered this requisition.

Requisition No. 2

This requisition concerns the right of way created over Inland Lot No. 7443 in favour of Inland Lot No. 7444. The Crown lease of Inland Lot No. 7443 excepted and reserved unto Her Majesty and the lessee of Inland Lot No. 7444 a free and uninterrupted right to pass and repass the staircase and landings erected on the front portion of the building then erected on Inland Lot No. 7443. The right reserved in favour of the Crown had been extinguished by a Deed of Release executed in 1996, leaving only the right in favour of the lessee. A reciprocal right was reserved in favour of the lessee of Inland Lot No. 7443 under the Crown lease of Inland Lot No. 7444.

Under this requisition, the defendant asked the plaintiffs to furnish evidence to prove that the right of way had been released by the lessee of Inland Lot No. 7444. The plaintiffs' solicitors replied that the right in question is a common staircase right of way shared by Inland Lots Nos. 7443 and 7444, and that the right of way had been extinguished by abandonment due to change of land use.

The defendant's solicitors in the letter of 28 August 1997 (mistakenly dated as 29 August 1997) sought clarification as to whether there was consent or waiver from the lessee of Inland Lot No. 7444 before the staircase was demolished. The plaintiffs' solicitors then forwarded a copy of the Deed of Release executed by the government in 1996.

By letter dated 23 January 1998, the defendant's solicitors replied that they did not accept the answer given by the plaintiffs' solicitors as being sufficient. In particular, they pointed out that abandonment is a matter of fact and inference. They did not consider the mere fact of the staircase being demolished as sufficient to support an inference of abandonment and there was no evidence to support the assertion that the right had been abandoned by change of land use. The defendant's solicitors further referred to the judgment of Mason J. in the Australian case of *Treweeke v 36 Worseley Road Pty Ltd.* (1973) 128 CLR 274, which is to the effect that the owner of an easement, by resorting to an alternative access available, is not to be taken as having abandoned the easement.

By letter dated 26 January 1998, the plaintiffs' solicitors contended that all the evidence indicated that the right of way had been extinguished. They pointed out that the neighbouring lots had been redeveloped and the new building that was erected straddled 8 different lots, but there was no staircase adjacent to Inland Lot No.7443. They further pointed out that as a result of the redevelopment, the right over Inland Lot No. 7444 in favour of Inland Lot 7443 had similarly been extinguished.

The defendant's solicitors by letter dated 27 January 1998 maintained that the requisition had not been satisfactorily answered. They were of the view that there was no evidence to support the assertion of the right being extinguished and they also could not see the relevance of the redevelopment and the erection of the new building on the neighbouring lots.

The issue here is whether the right in favour of the lessee of Inland Lot No. 7444 had been abandoned and extinguished. It is common ground that abandonment of easement is a question of fact, and that non-user *per se* is not conclusive evidence of abandonment. But where there is surrounding circumstances indicating clearly an intention not to resume the user, then a presumption of a release of the easement will arise and the easement will be lost: see the judgment of Sir Ernest Pollock M.R. in *Swan v Sinclair* [1924] 1 Ch 254, 256 cited in *Gale on Easements* (16th edition) para. 12-63 at p.455.

The communal staircase that used to stand on the Properties and Inland Lot No. 7444 had clearly been demolished. Inland Lot No. 7444 had further been redeveloped jointly with other neighbouring lots to form a multi-storey building. There is no staircase running along and through Inland Lots Nos. 7443 and 7444. There is also, as observed under requisition no. 1, the construction of Wharf Road together with a pedestrian walkway in front of the Properties and Inland Lot No. 7444. These facts, taken together, constitute clear and overwhelming surrounding circumstances indicating that the right of way cannot and will not be revived.

In addition, as Mr Tang, S.C., for the plaintiffs pointed out, the right of way in question is not a free standing right. There are similar and reciprocal rights involving the other lots comprising the Properties. With the demolition of all the buildings on the Properties and the plan to redevelop the entire site into a hotel, all the other rights would have been extinguished, leaving only the right involving Inland Lots No. 7443 and 7444. In practical terms, there cannot be any enjoyment of the right by the lessees of any of these lots, given that the subject matter is a communal or common staircase that ran along the front portions of all these lots. And when Inland Lot No. 7444 had been redeveloped jointly with other lots to form a large building and there is no staircase linking to Inland Lot no. 7443, it must be clear beyond doubt that all the rights concerning the common staircase no longer exists.

Mr Lam submitted that detailed evidence supporting abandonment, such as photographs and the Deed of Mutual Covenant of the redevelopment incorporating Inland Lot No. 7444, had not been supplied by the plaintiffs' solicitors in the course of answering the requisitions. It was also said that the information regarding the redevelopment and the construction of a new building was only disclosed shortly before the completion date. Mr Lam suggested that it would not be fair to expect the defendant's solicitors to accept this as a sufficient answer to the requisition.

I accept that, it appears from the letters dated 29 August 1997 and 23 January 1998, the defendant's solicitors was labouring under the misconception that the plaintiffs' solicitors were referring to the demolition of the staircase on Inland Lot No. 7443 when they said that the common right of way had been extinguished by change of land use. Mr Lam did not suggest, and I do not consider it is open to the defendant to say, that the answer given by the plaintiffs' solicitors had in any way contributed to that misconception. Although the plaintiffs' solicitors could have elaborated on the change of land use in their first answer, that answer is not misleading. It is also to be noted that the defendant agreed that it had made physical inspection of the Properties before signing the Agreement. I do not regard the non-provision of the photographs depicting the Properties and the neighbouring lots or the Deed of Mutual Covenants of the redevelopment as being material.

In my view, any misconception of the defendant's solicitors must have been dispelled by the reply from the plaintiffs' solicitors of 26 January 1998, which indicates that, as a result of the redevelopment on the neighbouring lots, there is no longer any staircase, and that the reciprocal right in favour of Inland Lot No. 7443 had also been extinguished. Although this reply came shortly before the scheduled completion date, it did not come too late. The solicitors had been corresponding on this requisition for a considerable period of time, and the point of extinguishment by abandonment had been canvassed. There is sufficient time and material to enable the defendant's solicitors to properly consider the plaintiffs' answers and to form a view on the sufficiency of them.

I would also add that, even without the benefit of the answer in the letter of 26 January 1998, it should have been obvious to the defendant's solicitors that, given the circumstances and, in particular, that the right in question is not a free standing right, there is no real risk of the owner of Inland Lot No. 7444 enforcing the right.

In summary, I consider that the plaintiffs had satisfactorily answered this requisition.

Requisition No. 3

This requisition relates to a restriction in the Crown leases of the Properties as to user. Under the relevant Crown leases, it was provided that the lots or any part thereof should not be used for the trade and business of, inter alia, victualler or tavern-keeper without the previous licence of Her Majesty. It is common ground that the Properties were intended to be developed into a hotel. Both the Buildings Authority and the Town Planning Board had given approval for the intended development. The plaintiffs had also given undertakings to the Lands Tribunal to develop the Properties into a hotel in accordance with the plans approved by the Buildings Authority.

In view of the restrictive covenant and the intended development, the defendant asked whether the plaintiffs had obtained the requisite licence from the government for the intended user. The plaintiffs' solicitors answered that the plaintiff's application for removal of the covenant had been approved subject to the payment of administrative fee, which had been paid. By letter dated 30 September 1997, the plaintiffs' solicitors sent a copy of a letter from the Lands Department dated 24 September 1997, indicating no objection to modification of the Crown lease. The plaintiffs' solicitors, in a later letter, undertook to provide certified copy of any document to be received from the government.

The defendant's solicitors did not accept the answers. By letter dated 23 January 1998, they pointed out that the No-Objection letters to be executed by the government form part of the Crown lease, and are title documents to be furnished by the plaintiffs at completion. They also said that the Lands Department's letter stated that there was no binding contract between the plaintiffs and the government until the No-Objection letters had been executed and registered. They therefore required the plaintiffs to deliver on completion the duly executed and registered No-Objection letters.

By letter dated 26 January 1997, the plaintiffs' solicitors replied that there was already a contract between the plaintiffs and the government in that the formal offer to remove the restriction made by the government had been accepted by the plaintiffs on 5 August 1997. The execution of the No-Objection letter is therefore merely to formalize the contract. It was also pointed out that the plaintiffs and their mortgagee bank had already signed and returned the No-Objection letters for execution by the government.

The defendant, relying on the reasons they gave in relation to requisition no. 1, disagreed that the execution of the No-Objection letters is a mere formability. They insisted that the original of the duly executed and registered No-Objection letter had to be produced at completion for the purpose of showing and passing good title.

The No-Objection letters were eventually executed by the government on 5 February 1998 and registered on 4 March 1998.

The arguments and principles of law involved in this requisition are similar to those under requisition no. 1. Principally, the plaintiffs argued that there is no real risk of enforcement of the restrictive covenant by the government. That in my view must be correct. The series of acts of the government, starting from offering to remove the prohibition to the issue of unsigned No-Objection letters, can only be consistent with an intention to remove the prohibition under the Crown lease and not to enforce the restriction. There is also no good reason for the government to wish to withdraw from that position and refuse to execute the No-Objection letters, considering that the intended development had been approved by various authorities and the Lands Tribunal. For the reasons set out under requisition no. 1, I do not agree that this point about no risk of enforcement is not open to the plaintiffs because it had not been specifically raised in their answers. This point must be part and parcel of the wider question of whether the plaintiff had shown a good title.

As in the case of the Deeds of Release, while I accept that the No-Objection Letters, being variations of the provisions of the Crown leases, come within the definition of "Crown leases", I do not agree that the plaintiffs had to deliver the duly executed and registered No-Objection letters in order to show and give a good title. These letters were executed and created subsequent to the completion date. They did not form part of the title documents in existence. The plaintiffs' obligation under section 13 of the Conveyancing and Property Ordinance therefore does not extend to them.

The plaintiffs had pleaded and argued that this requisition does not properly relate to title in that there was no warranty or representation as to the suitability of the Properties being used for hotel purposes. Under clause 22(a) of the Agreement, the defendant agreed that it shall satisfy itself as to the permitted user of the Properties by making the relevant enquiries. Under clauses 29 and 30 of the Agreement, however, the sale was with the benefit of the approval for the development of a hotel and subject to the plaintiffs' undertaking to the Lands Tribunal to redevelop the Properties in accordance with the approved plans for the construction of a hotel. Further under clause 32, the defendant undertook to observe the said undertaking given to the Lands Tribunal and to indemnify the plaintiffs against liabilities arising from non-compliance. In the circumstances, it is reasonable for the defendant to have raised the requisition.

Nevertheless, for the reasons set out above, I am of the view that the requisition has been satisfactorily answered.

Requisitions No. 10 and 14

Both these 2 requisitions relate to missing documents and since the arguments involved are similar, they will be dealt with together.

Requisition no. 10 concerns a Crown lease of Inland Lot No. 7441. The plaintiffs could only produce a certified copy as the original was never in the plaintiffs' possession. The defendant was not satisfied with the certified copy, and insisted on the production of the original or, alternatively, a statutory declaration that the Crown lease had been lost or mislaid, if that was the case.

Requisition no. 14 concerns the Deed of Release in respect of the right of way over Inland Lot No. 7443. Again, the plaintiffs could only produce a certified copy of it on the basis that they could not obtain the original. The defendant did not accept the explanation and insisted on the delivery of the original Deed at completion.

The issue here is whether the plaintiffs can use certified copies instead of the originals in giving good title. Mr Tang S.C. argued that the plaintiffs are entitled to do so based on a joint reading of clause 7 of the Agreement and section 13 of the Conveyancing and Property Ordinance. Clause 7 reads:

> "The Vendors shall show and give good title to the Properties in accordance with Section 13 of the Conveyancing and Property Ordinance, Cap. 219, and prove at his own expense and at the like expense shall make and furnish to the Purchaser such certified copies of any deeds or documents of title wills and matters of public record as may be necessary to prove such title. The costs of verifying the title by inspection and examination including search fees shall be borne by the Purchaser who shall also, if he requires copies of any documents in the vendors' possession relating to other premises retained by the Vendors as well as to the Properties, pay the costs of such certified copies."

The relevant part of section 13 of the Conveyancing and Property Ordinance provides that:

"(1) Unless the contrary intention is expressed, a purchaser of land shall be entitled to require from the Vendor, as proof of title to that land, only production of the Crown lease relating to the land sold --

...

(2) Where this section requires the production of any document, it shall be sufficient to produce a copy --

(a) attested, before 1 November 1984, by 2 solicitors' clerks; or

(b) certified by a public officer or a solicitor, to be a true copy."

The argument of Mr Tang S.C. is that clause 7 entitles the plaintiffs to show as well as to give title in the manner prescribed by section 13. This is so notwithstanding that section 13, on its own wordings, deals only with proving title.

In *Yiu Ping Fong v Lam Lai Hing Lana* [1998] 4HKC 476, Yuen J, in considering the meaning and effect of section 13 of the Conveyancing and Property Ordinance, held that the effect of section 13(2) is merely to facilitate the proving of title, but not to exonerate the vendor from producing at completion the original title deeds and documents. Mr Tang S.C. accepted this. In construing a clause relating to title in the sale and purchase agreement, Yuen J. further held that the particular clause does not have the effect of absolving the vendor from his obligation of producing the original title deeds and documents, and that much clearer language would have to be used to achieve that effect. The relevant clause, which Yuen J. was construing, reads as follows:

"The Vendor shall show and give a good title to the Property pursuant to Section 13 of the Conveyancing and Property Ordinance, Cap. 219 at his own expenses and he shall at the like expense make and furnish to the Purchaser such attested or certified copies of any deeds or documents of title, wills and matters of public record including occupation permit as may be necessary to prove such title. The costs of verifying the title by inspection and examination including search fees shall be borne by the Purchaser."

It can be readily seen that this clause is rather similar to clause 7 in the present case. The essential difference lies in the additional words of ", and prove" in clause 7 after the reference to section 13 of the Conveyancing and Property Ordinance. Mr Tang S.C. argued that the additional coma and the words "and prove" indicate that clause 7 should be read as comprising 2 parts. The first is dealing with the manner of showing and giving of title where it provides that good title shall be proved and made in accordance with section 13. The second is to deal with the vendor's liability as to the costs of proving title by certified copies. It was said that clause 7 should therefore receive a construction different from that of the clause in *Yiu Ping Fong* , so that certified copies are sufficient to give a good title. I am unable to agree with this submission for the following reasons.

Although the use of the coma does break the first sentence of clause 7 into 2 parts, the first part of the sentence cannot be read and construed as having the effect of enabling the vendor to give title by the mere production of certified copies of title deeds and documents. This is because the proving of title is but one step in the giving of title. The words of "show and give a good title to the Properties in accordance with Section 13 of the Conveyancing and Property Ordinance, Cap. 219" in the first part of the first sentence is doing no more than saying this. Its effect is only to enable the plaintiffs to prove title, as part of the process of giving title, by sending certified copies of the documents, as stipulated under section 13. In as much as section 13 does not affect a vendor's right under the common law to have possession of the original title deeds, the first part of the first sentence in clause 7 of the Agreement does not in any way reduce that right.

Secondly, it is plain that the proprietary right to possession of the original title documents is an important right on the part of an owner: *Yiu Ping Fong*, op cit, at pp.483F-G, 484H-485B. Accordingly, as Yuen J. observed, clear language is required before the Court will hold that a vendor's right to have the original title documents has been curtailed. Such clear language is not present in clause 7 or other parts of the Agreement. It is, for instance, open to the vendor to stipulate or for the parties to agree that the purchaser is not entitled to insist on the production of the originals of all or some of the title deeds and documents. On the contrary, clause 8 of the Agreement provides that the vendor shall deliver to the purchaser such of the documents of title as relate exclusively to the Properties, without in any way limiting the scope to certified copies of these documents of title. Mr Tang S.C. submitted that clause 8 has to be read subject to clause 7, but that is not borne out by the express words. Nor is there any good reasons or circumstances for so implying. A plain reading of the 2 clauses does not show them to be mutually exclusive and I do not consider that the general words used in the first part of the first sentence of clause 7 should be construed as qualifying clause 8.

The plaintiffs are therefore not entitled to deliver certified copies of the Crown Lease and of the Deed of Release for the purpose of giving a good title. The inability of the plaintiffs to deliver the originals at completion amounts to a breach of their obligation to give good title. The defendant is entitled not to complete and to rescind the Agreement.

Requisition No. 11

This requisition arises from a letter dated 15 June 1990 from the Buildings and Lands Department. In the Assignment dated 15 August 1991, it was stated that the assignment of Inland Lot No. 7442 was subject to this letter. In this letter, the Buildings and Lands Department advised that they intended to invoke section 28(3)(b) of the Buildings Ordinance and to carry out remedial works to certain drains and sewers and to recover the costs from the owners subsequently.

The defendant's solicitors enquired whether the remedial work had been carried out and whether the costs had been paid in full. The plaintiffs' solicitors forwarded a letter from Messrs. W.I. Cheung & Co., solicitors for the 2nd plaintiff's predecessor-in-title, to the plaintiffs' solicitors dated 28 August 1996 advising that their client had not been called upon to pay the costs of the remedial work, and undertaking to pay the contribution payable upon demand from the authority.

The defendant's solicitors did not accept the letter from Messrs. W.I. Cheung & Co. as being sufficient. They took the view that non-compliance with a building order constituted an undischarged incumbrance and that the undertaking given by the 2nd plaintiff's predecessor-in-title is of no value to the defendant. They therefore required evidence to prove that remedial works had been carried out to the satisfaction of the Buildings Department and that all costs of the government, if any, had been paid in full. The plaintiffs' solicitors responded that the letter is only advisory in nature and the risk of any enforcement action is remote.

It is obvious that the defendant's solicitors were mistaken as to the effect and purport of this letter from the Buildings and Lands Department and the effect of section 28(3)(b) of the Buildings Ordinance. Section 28(3)(b) was amended in 1992. Under the unamended version, the Building Authority may, where it considers the drains or sewers of any building are inadequate or in a defective or insanitary condition, carry out the drainage works and recover the costs thereof from the owner of such building. The letter of 15 June 1990 therefore does not involve any building order, but is a notice of the Building Authority's intention to carry out the remedial work and to subsequently recover the costs from the owners. There is therefore no question of non-compliance with a building order. The defendant's requisition in this regard is misconceived.

Mr Lam for the defendant however rested his argument on another basis. Subsequent enquiries made with the Buildings Department reveal that the remedial works had been completed on 5 October 1993. However, the amount of contribution payable is still in the course of being finalized and the demand notes have yet to be issued. Mr Lam therefore argued that the plaintiffs should have disclosed such a liability to the defendant because it is only a matter of time that the demand would be made and it is incorrect to say that there is no risk of enforcement action.

In determining whether there is any risk of enforcement, one must look at section 33 of the Buildings Ordinance, which deals with the recovery of costs of works by Building Authority. Sub-section (9) empowers the Building Authority to register against the title of any property a certificate setting out the payment liability. The certificate so registered shall constitute a first charge on the property. However, the Proviso to subsection (9) also provides that the liability under the subsection shall not accrue against a bona fide purchaser for valuable consideration who, subsequent to the completion of the works and before the registration of the certificate, has acquired and registered an interest in the property.

It is plain from the Proviso to subsection (9) that there can be no risk of enforcement action insofar as the defendant is concerned. The defendant had acquired an interest in Inland Lot No. 7442 by the Agreement, which was registered in the Lands Registry on 25 September 1997. The amount of contribution, let alone the issue of certificate on payment liability, had not been finalized by then. The defendant can clearly avail itself of the Proviso. Viewed in this light, the alleged non-disclosure of liability or, as Mr Lam put it, the failure to advise that the works had been completed is no cause for complaint. There is in short no substance in this requisition.

Requisitions No. 12 and 13

These 2 requisitions concern errors in the description of the Property in 2 documents. Requisition no. 12 relates to the description of Inland Lot No. 7443 in an assignment executed in 1981. In the recital to the assignment, the lot no. is mistakenly referred to as "7334". As for requisition no. 13, it concerns the descriptions of Inland Nos. 7443 and 7442 in an assignment executed in 1996 between the 2nd plaintiff and its predecessors-in-title. In the Schedule that contains the descriptions of the property, the 2 lots were said to be shown and coloured "pink hatched green" on the plans attached to their respective Crown leases, when in fact the lots are coloured "pink and pink hatched green" on the said plans.

The defendant's solicitors requested for both errors to be rectified. In relation to the 1981 assignment, the plaintiff's solicitors took the view that rectification was not necessary as the error was only in the recital. Upon the insistence of the defendant's solicitors, the plaintiffs procured the solicitors who prepared the assignment to effect the rectification and forwarded a certified copy of the rectified assignment to the defendant's solicitors. The defendant did not accept that and insisted that the rectified assignment duly re-registered be available by completion.

Mr Lam, in the course of his submissions, in my view, fairly and rightly accepted that the error in the 1981 assignment is less important. This error, which is clearly a typographical one, appears only in the recital of the 1981 assignment. The description of the lot has been correctly set out in the main body of the assignment. Even without the rectification made, the assignment cannot be said to be defective as such. Certainly, it does not amount to any blot or defect in the title. This requisition cannot stand.

As to the 1996 assignment, again upon the insistence of the defendant, the plaintiffs' solicitors caused the assignment to be rectified and the rectification initialled by a solicitor of the firm, and sent it to the Lands Office for re-registration, after the defendant's solicitors refused to attend to the re-registration. The defendant's solicitors considered it insufficient for the rectification to be initialled only by the solicitor. They further insisted on the delivery of the duly rectified and re-registered assignment at completion.

It transpires from the subsequent correspondence exchanged between the plaintiff's solicitors and the Lands Office that the latter took the view that the amendment is a material one such that the rectification should be initialled by both parties or by either party together with the attesting solicitor. The 2nd plaintiff eventually also initialled the assignment and the rectified assignment was re-registered.

In the 1996 assignment, the 2 lots in question are described as: "ALL That piece or parcel of ground situate lying and being at North Point Hong Kong and registered in the Land Registry as INLAND LOT NO. 7442", in the case of Inland Lot no. 7442, and "INLAND LOT NO. 7443", in the case of Inland Lot no. 7442, "TOGETHER with the messuages erections and buildings thereon (if any) which said piece or parcel of ground is shown and coloured pink hatched green on the plan attached to the Crown Lease (as described in paragraph 2 of this part)". The part of the plans attached to the respective Crown leases that is coloured "pink hatched green" covers the areas subject to the respective rights of way. The bulk of the lots are in fact coloured pink on the respective plans.

Mr Tang S.C. argued that it is obvious from the opening part of the verbal description in the Schedule that the 1996 assignment relates to the whole of Inland Lot Nos. 7442 and 7443, as opposed only to parts thereof or the parts covering the rights of way. The clerical errors in the references to the plans are therefore immaterial.

Mr Lam, on the other hand, referred to a passage in *Sihombing and Wilkinson, Hong Kong Conveyancing, Law and Practice* , volume 1(A) para. 213 that was quoted in the judgment of Cheung J. in *Green Park Properties Limited v Dorku Limited* (unreported) HCA8564/1998. The passage reads:

> "Where property is assigned both by way of a verbal property description and reference to a plan, it is important that the draftsman makes it clear whether, in the case of inconsistency, the plan or the verbal description should prevail. If the plan is to prevail over any property description, the appropriate words used should be that the property is 'more particularly delineated ... on the plan annexed to assignment memorial number ...': *Eastwood v Ashton* [1915] AC 900 (HL). If, however, the property description is to prevail, the appropriate wording should be that the plan is to be used 'for the purposes of identification only': *Wigginton & Milner Ltd v Winster Engineering Ltd* [1978] 1 WLR 1462."

Mr Lam argued that the absence of such words as "for identification only" renders the error in the reference to the plan a defect in the assignment and also a defect in the title.

There can be no doubt that the errors in the 1996 assignment are clerical errors. Strictly speaking, there is no inconsistency between the verbal description contained in the assignment and the delineations of the lots as appear on the plans attached to the Crown leases. The 2 lots are correctly identified in the plans. The error is within the assignment itself, namely, in the cross-reference to the plans. This being the case, the absence of the words "for identification purpose" to indicate that the plans are subordinate to the verbal description is not significant. Firstly, the absence of those words does not give the plans any predominance over the verbal description. Secondly, in deciding what property is intended to be passed under the conveyance, one would have to look at the whole of the conveyance. Accordingly, what is more important is whether the explicit verbal description in the 1996 assignment has sufficiently and clearly set out the property to be conveyed. If it is sufficient, the plan must be treated as subordinate and is to be disregarded in the event of any inconsistency: see *Emmit on Title* , 19th Ed., para. 17.012

In this case, the verbal description explicitly states that the property to be conveyed is the whole of Inland Lots Nos. 7442 and 7443. The cross-reference to the plans has to be read subject to this explicit description. Any suggestion that the assignment is only to convey the portion of the 2 lots that cover the rights of way is unrealistic upon a construction of the whole conveyance and considering that the consideration stipulated is $ 48.6 million. The references to the plans attached to the Crown leases must be regarded as subordinate. Even if one were to turn to the plans, one would have no difficulties in ascertaining the boundaries and location of the 2 lots in question. I do not consider that the clerical errors in the 1996 assignment are fatal or of such significance as to amount to a doubt or defect in the plaintiff's title to the 2 lots.

Mr Lam argued that it is not open to the plaintiffs to say in these proceedings that rectification was not necessary, since the plaintiffs had, in response to this requisition, proceeded to rectification and re-registration. In support of the argument, Mr Lam referred to the case of *Liu Tak Kin v Chan Yiu Kai*, op cit. In that case, one of the requisitions raised was that there was a discrepancy in the description of the property between the schedule and the reservation clause in an assignment. The vendor procured the assignment to be amended and initialled by the attesting solicitors. The purchaser insisted that the signatures of the assignors were required. The vendor's solicitors disagreed on the basis that the errors were typographical. At the hearing of the vendor and purchaser summons, counsel for the vendor argued there could be no doubt in the title even without the amendments. Deputy Judge Chung (as he then was) agreed with counsel for the purchaser that as this argument had not been raised in the correspondence by the solicitors and that the solicitors had, instead, proceeded to procure the amendments and arrange for re-registration, it was too late to raise it at the hearing. Accordingly, he held that the requisition was not satisfactorily answered.

In the present case, the plaintiffs' solicitors had in their letter dated 26 August 1997, stated that they did not consider rectification and re-registration were necessary. They also observed that the plans were for reference only. It is true that, upon the insistence of the defendant's solicitors, they eventually proceeded to effect the rectification and to arrange for re-registration. But the fact remains that the argument raised by Mr Tang S.C. at this trial is not an entirely new one such that it ought not be considered in deciding whether the plaintiffs' answer was sufficient.

Mr Lam further pointed out that the letter dated 26 January 1998 from the plaintiffs' solicitors was misleading in stating that the amended assignment had been accepted for registration and the assignment had been registered. The amended assignment was in fact pending registration. Mr Lam submitted that the plaintiffs' solicitors had therefore failed to fulfil the requisite duty in answering requisition as set out in *Active Keen Industries Limited*, op cit.

It is certainly incorrect for the plaintiffs' solicitors to say in their letter that the amended assignment had been accepted for registration or that it had been registered. The solicitors were probably too presumptuous or over-confident in so stating. I would not however be prepared to say that they were acting without candour or were consciously misleading the defendant. The fact of the matter is that the requisition of the Lands Registry was only raised on 27 February 1998. Notwithstanding all these, the incorrect statement about the registration of the amended assignment is immaterial as there is neither doubt nor defect in the plaintiffs' title even without the rectification, let alone the registration of the amended assignment. The failure to complete the rectification process and/or to deliver the re-registered assignment upon completion does not amount to a failure to give or make good title. This requisition no. 13 therefore fails.

Waiver and Acceptance of Title

It is not in dispute that the defendant had in or about October 1997 offered the Properties for sale by tender. On this basis, Mr Tang S.C. argued that the defendant had accepted the title or must be taken to have waived any objection on title raised by them. The cases of *Hillier Development Limited v Tread East Limited* [1993] 1 HKC 285 and *Lai Chi On v Strong Sing Development Limited* [1994] 3 HKC 568 were relied upon.

In *Hillier Development Limited v Tread East Limited*, the purchaser raised a requisition on a previous assignment, to which an answer was delivered by the vendor. There was no further follow up or reply on it and the purchaser then forwarded a draft assignment to the vendor. Thereafter the purchaser's mortgagee raised a requisition on that same previous assignment and the purchaser forwarded it to the vendor. The vendor repeated the earlier answer and did not answer further. The Court of Appeal held that the purchaser, not having taken objection to the vendor's initial answer, must be taken to have waived the objection.

In *Lai Chi On v Strong Sing Development Limited*, the purchaser raised requisition for the first time after the draft deed of assignment was sent to the vendor. It was held that it must be conclusively implied that the purchaser had accepted the title by forwarding the draft assignment and had waived any possible objection or requisition he might have.

Waiver and implied acceptance of title are questions of fact to be determined by reference to the circumstances of each case. I agree with Mr Lam that the circumstances of the present case are very different from those in the 2 authorities cited. All that the defendant had done was to advertise the Properties for sale. This act is not necessarily indicative of an intention to waive objections to the title. It is not the sort of conduct that a normal prudent purchaser would not have performed until he is satisfied with the title: see *Farrand on Contract and Conveyance* (4th Ed) p.130. As Mr Lam said, it is not uncommon in Hong Kong for purchasers to offer to sell as confirmors properties yet to be assigned. Indeed, it is a known fact that purchasers in Hong Kong would offer to re-sell the properties even before any formal sale and purchase agreements were signed, and before any title documents were delivered. It is a different matter, and different considerations will apply, where a purchaser forwards a draft assignment. Further, unlike in the 2 authorities cited, the defendant's advertisement for sale was put up after requisitions had been delivered and was followed by further follow-up requisitions. I do not accept that the defendant had by conduct accepted the plaintiffs' title or that the defendant can be taken to have waived the objections on the title raised.

Conclusion

For the reasons set out above, the plaintiffs had failed to answer requisitions nos. 10 and 14 and had also failed to give a good title to the Properties. It follows that the plaintiffs' claim has to be dismissed.

On the other hand, the defendant is entitled not to complete and to rescind the Agreement, which it did by its letter dated 31 January 1998. There will accordingly be declarations to these effects. The defendant is further entitled to the return of the deposits paid, being the total sum of HK$ 43.5 million, and also the abortive conveyancing costs and disbursement in the sum of HK$ 104,738. There will also be a declaration that the defendant holds a lien over the Properties in respect of these sums.

In short, the plaintiffs' claim is dismissed. There will be judgment for the defendant against the plaintiffs on the counterclaim for:

(1) A declaration that the plaintiffs had failed to answer requisitions nos. 10 and 14 raised by the defendant's solicitors.

(2) A declaration that the defendant was entitled to rescind the sale and purchase agreement dated 4 September 1997 and has done so by the service of its letter dated 31 January 1998.

(3) The return of the deposit in the total sum of HK$ 43,500,000.

(4) The payment of the sum of HK$ 104,738.

(5) Interest on the said sums of HK$ 43,500,000 and HK$ 104,738 at judgment rate from the date of judgment to the date of full payment.

(6) A declaration that the defendant has a lien over the Properties in respect of the said sums of HK$ 43,500,000 and HK$ 104,738 until full payment of the same.

There will also be an order nisi that the plaintiffs pay the defendant the costs of this action, to be taxed if not agreed. The order nisi to be made absolute after the expiration of 14 days from the date of handing down of the judgment.

Mr Robert Tang S.C. and Mr Louis K.Y. Chan instructed by Messrs. K.B. Chau & Co. for the plaintiffs.

Mr Johnson Lam instructed by Messrs. K.C. Yung & Co. for the defendant.

LOAD-DATE: 07/21/2006

***忠豪有限公司 訴 梁標明、梁恩明及梁華明*(高院民事訴訟 2007 年第 136 號)**

原告人是九龍青山道某物業的買方，而各被告人則爲賣方。被告人於 1989 年購入該物業，爲有關物業的分權共有人。買賣雙方於 2006 年 9 月 27 日簽訂臨時買賣協議，原告人同意購買，而被告人亦同意售賣該物業，價格爲港幣 750 萬元。依據臨時買賣協議，雙方於 2006 年 10 月 12 日簽訂正式買賣協議，並訂於 2006 年 11 月 30 日完成交易。買方已就該宗物業買賣支付訂金。

2. 在買方提出展示業權要求的階段，買賣雙方出現爭議。雙方律師就賣方是否須提供該條例第 13 條指明的 15 年期以前的中期前業權根源文書，彼此意見分歧。原告人律師要求賣方出示 30 份 15 年期以前的業權文件。該 30 份業權文件是於 1957 至 1971 年期間註冊的。

3. 對於該 30 份中期前業權根源文書是否單與該物業的業權有關，雙方沒有爭議。被告人的律師認爲，原告人的律師要求的文件屬中期前業權根源文書，原告人無權索取這些文件。被告人的律師最初拒絕提供這些文書。雙方進一步交換意見後，被告人建議在不損害其權益的原則下，就遺失的文件作出法定聲明。

4. 原告人的律師認爲，被告人未能證明和給予該物業的妥善業權。在原定的完成買賣日期翌日，原告人的律師去信被告人的律師撤銷買賣協議，理由是被告人未能妥善回應展示業權的要求，也未能給予、證明或展示妥善業權。原告人進一步要求全數退回已支付的按金。原告人尋求屬宣布性質的濟助，讓他們合法地撤銷協議、取回按金，並就對方違反協議獲得損害賠償。

5. 源麗華聆案官裁定，除非被告人能提供令人滿意的法定聲明，以解釋爲何遺失業權文件，否則被告人無法給予原告人妥善業權。雖然原告人未能恰當地提出賣方出示超過 15 年前的業權契據正本的要求，而被告人亦已履行責任，證明 15 年以內的業權，但被告人無法履行訂立或給予業權的普通法責任。因此，原告人接受被告人因未能給予該物業妥善業權的預期違約是正確的。

Annex F

Court of First Instance of Hong Kong

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HCA 136/2007

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

ACTION NO. 136 OF 2007

BETWEEN

Loyal Hope Limited (忠豪有限公司)	Plaintiff
And	
Leung Pui Ming (梁標明)	1st Defendant
Leung Yan Ming (梁恩明)	2nd Defendant
Leung Wah Ming (梁華明)	3rd Defendant

Coram : Before Master M. Yuen in Chambers

Date of Hearing : 21December 2007

Date of Judgment : 20 March 2008

JUDGMENT

1. This is an Order 86 Application.

2. The plaintiff was a purchaser and the defendants were the vendors of a property at the ground floor of 267 Castle Peak Road in Kowloon. The defendants are tenants in common of the property in question. The defendants acquired the said property in the year of 1989. The parties have signed a provisional agreement on 27 September 2006 in which the plaintiff agreed to buy and the defendants agreed to sell the property at a price of HK$7.5 million.

3. Pursuant to the provisional agreement, the parties signed a formal agreement for sale and purchase

on 12 October 2006. Completion was scheduled for 30 November 2006. Deposits totalling HK$750,000 have been paid towards the purchase.

4. Dispute arose between the parties on a slightly distorted focus at the title requisition stage. There was difference in opinion between the solicitors on whether the vendors had the obligation to provide pre-intermediate root of title instruments of the property beyond the 15 years duration specified in section 13 of the Conveyancing and Property Ordinance, Cap 219 ("the Ordinance").

5. The whole case focused on:-

(a) whether the plaintiff's solicitors have raised proper requisition of title; and

(b) whether the defendants have failed to give good title of the property.

Chronology of the Events

6. On 16 October 2006 the plaintiff's solicitors received various title documents of the premises from the defendants' solicitors.

7. On 21 October 2006 requisition of title began. Details of the correspondence exchanged would be referred to at a later stage. In gist, the plaintiff's solicitors requested for the supply of 30 title documents beyond the 15 years duration specified in section 13 of the Ordinance. These 30 title documents were registered between the years of 1957 and 1971.

8. There was also no dispute between the parties that those 30 pre-intermediate root instruments deal exclusively with the title of the property.

9. The defendants' solicitors took the view that the documents requested by the plaintiff's solicitors were pre-intermediate root of title instruments which the plaintiff was not entitled to demand. The defendants' solicitors first wrote to refuse to provide those pre-intermediate root of title instruments. Further exchanges resulted in a proposed supply of statutory declaration, on a without prejudice basis, by the defendants to deal with the missing documents.

10. The plaintiff's solicitors concluded the defendants have failed to prove and give good title of the property. On 1 December 2006 (one day after the scheduled completion date) the plaintiff's solicitors wrote to the defendants' solicitors to rescind the agreement for the defendants' failure to satisfactorily answer the title requisitions, give, prove or show good title to the property. The plaintiff further demanded repayment of all deposits made.

11. On 19 January 2007 the plaintiff took out the present action to seek declaratory relief of rightful rescission of the agreement, repayment of the deposits and damages for breach.

12. On 8 March 2007 the defendants filed their defence and counterclaim. The defendants counterclaimed the plaintiff for wrongful rescission and sought declaration for rightful forfeiture of deposits, right to resell the property, damages for breach of agreement, and vacation of the registration of the memorials concerning the present sale.

13. On 31 July 2007 the parties obtained an Order of the Court by consent in the following terms: -

(i) all 3 defendants do within 14 days from the date hereof deposit a sum of HK$800,000 into Court in an interest earning account as security money;

(ii) upon the 3 defendants deposit the said sum of HK$800,000 into Court, the plaintiff absolutely abandon its rights and interests claim against the property known as Ground Floor, No. 267 Castle Peak Road, Kowloon, Hong Kong;

(iii) the registration of the agreement for sale and purchase by memorial number 06102000910019 and the sealed copy amended writ of summons (by) memorial no. 07012200930067 be vacated.

14. On 10 September 2007 the plaintiff filed the present application under Order 86 for the following: -

(i) a declaration that the agreement dated 12 October 2006 mentioned in the statement of claim be rescinded and the plaintiff be relieved of all liability for further performance of its obligations under the aforesaid agreement;

(ii) return of the deposit of HK$750,000 be made under the aforesaid agreement; and

(iii) damages to be awarded to the plaintiff for the defendant's breach of the aforesaid agreement.

15. The defendants resisted the plaintiff's application on a number of grounds. Issues worth mentioning are: -

(i) lack of proper requisition;

(ii) requisitions raised by the plaintiff have been sufficiently answered;

(iii) the defendants have no duty to furnish the plaintiff with the original documents of title deeds over 15 years prior to the present transaction;

(iv) contractually, the parties have agreed the supply of certified copies of the documents to be sufficient means to satisfy the vendor's obligation to give title; and

(v) the agreement for sale and purchase had fallen through solely on account of the plaintiff's failure to tender payment of the purchase price on completion day.

Requisitions made

16. In defence counsel's submission the plaintiff's solicitors had not raised proper requisition of title. To understand the parties' dispute it would be more useful to recite the original text in some of the letters exchanged between the parties.

17. After delivery of the title deeds by the defendant's solicitors on 16 October 2006 the plaintiff's solicitors wrote on 21 October 2006 to ask for production of 30 of the original title documents, all over 15 years old,

"... The following are documents relating exclusively to the subject property, please kindly let us have the originals...."

On 24 October 2006 the defendants' solicitors responded,
"... We are not prepared to let you have those pre-intermediate root instruments."

On 25 October 2006 the plaintiff's solicitor wrote back:

"... Pursuant to *Yiu Ping Fong*'s decision, your client is obliged to provide all original title documents relating exclusively to the subject property."

On 25 October 2006 the defendants' solicitors replied,
"We opine that the *Yiu Ping Fong* case is distinguishable as the document in question in that case is not a pre-intermediate root instrument."

On 1 November 2006 plaintiff's solicitors wrote again,
"With respect, *Yiu Ping Fong*'s implication extends to all original title deeds relating exclusively to subject property reaffirms the common law position that a purchaser is entitle(d) to all title documents and there is no destination (distinction) between pre-root or post-root documents. We reiterate our requisition."

On 1 November 2006 the defendants' solicitor replied,
"We find nothing in the judgment of the *Yiu Ping Fong* case ruling that the duty of giving good title by producing the original title deeds is extended beyond the statutory period as laid down in Section 13 of the Conveyancing and Property. Hence we maintain our view."

18. Further letters were exchanged between the 2 firms of solicitors back and forth when they were at loggerhead as to whether the decision in *Yiu Ping Fong* was applicable to compel the vendor to provide all original title documents beyond the 15 years duration stipulated in section 13 of the Ordinance. The parties also pulled into their discussion the later case of *Guang Zhou Real Estate* as well as the consultative paper of the Law Society in April 2006. The parties, however, made no reference to the contractual terms in the agreement for sale and purchase in their letters in exchange.

19. Despite the disagreement, no vendor-purchaser summons was taken out by either party to seek the court's adjudication. Neither did the parties seek to exercise their contractual rights under clause 8 of the sale and purchase agreement to annul the sale.

20. On 6 November 2006 (about 3½ weeks before the completion date) the defendants' solicitors wrote to the plaintiff's solicitors to state, on a without prejudice basis, that they were proposing to send certified copies of the requested documents with a statutory declaration made by the vendors declaring that the vendors did not possess the original of the requested documents since the date of their purchase of the said property.

21. There was another chain of some 18 letters exchanged between the 2 firms of solicitors debating over the sufficiency of the contents of the statutory declaration and whether copies of the memorials would sufficiently satisfy the requirement of the supply of certified copies of the actual instruments registered by way of the memorials.

22. The letters exchanged between the parties concerning the dispute about the sufficiency of the statutory declaration were as follows:-

On 6 November 2006 the defendants' solicitors wrote:
" We maintain our view. On a without prejudice basis, however, we propose to undertake to send you certified copies of the requested documents together with a statutory declaration to be made by our clients declaring that they had all along not possessed the originals of the requested documents since the date of their purchase of the above property...."

On 8 November 2006 the plaintiff's solicitors replied:

" We reiterate our stance for the original documents. The declaration of lost being conveyancing evidence to account for the non-production must be made by the person who has personal knowledge on how the document(s) was received and lost. The declaration proposed by you, according to Yiu Ping Fong's ruling is not acceptable by our client."

On 8 November 2006 the defendants' solicitors' response was:
" We wonder why the Statutory Declaration to be made by our clients is not acceptable. Your attention is drawn to the fact that our clients purchased the above property in 1989 under Assignment Memorial No. UB 4159640 (re-registered by Memorial No. UB 6125172) without creating any Mortgage at the same time. Our clients only made a Mortgage in 1994 under Mortgage Memorial No. UB 6118721. Therefore, they should have possessed the relevant title deeds and documents at the material time."

On 10 November 2006 the plaintiff's solicitors wrote:-
" In your letter of 6/11/2006, you mentioned that your client will declare that they did not possess the document in question since they purchased the property i.e. in 1989. However, in you(r) letter of 8/11/2006 you said that your client should have possessed the title deeds at the material time which seems contradictory. In any event, we would accept certified copy of the documents in question together with a declaration of lost made by the party/parties who have actually received and taken possession of the documents in question but subsequently has/have lost them. A declaration that since the acquisition of the property the documents have never been received will not be accepted."

On 28 November 2006 the defendants' solicitors answered,
"…. We maintain our view as expressed in our previous letters. On a without prejudice basis, however, we enclose our third draft Statutory Declaration to be made by our clients for the purpose of explaining the loss of the requested title deeds and documents.

We also enclose certified copies of the requested documents, subject to your undertaking to hold the same to our order and return to us forthwith on demand.

We trust that we have satisfactorily answered all your requisitions and therefore, that good title to the above property has been proved and given. As completion is scheduled to take place on or before 30th November 2006, please let us have your draft Assignment and Undertaking Letter for our approval as soon as possible."

On 29 November 2006 the plaintiff's solicitor replied,
"We note that the third draft Statutory Declaration is still not satisfactory as it is still uncertain on who has lost the missing documents. It may be kept/lost by Messrs. Fred Kan & Co, the subsequent mortgagee(s) and/or their solicitors. We reiterate our requisition. We are perusing the certified copies provided by you under your said letter and reserve the right to raise requisitions thereon."

23. On 30 November 2006 (the date due for completion) the plaintiff's solicitors wrote:

"Further to our letter of 29/11/2006, after perusing the certified copies you provided on 28/11/2006, it is noted that some of them contain only the memorial box without the full documents. They are of Memorial Nos. 769954, 712040, 381619, 365496, 360193, 423093, 356677, 341439, 334737, 356676, 332871, 332870 and 319965. Please let us have the full documents for our perusal. We put on record that our requisitions have not been satisfactorily answered up to date. All rights of our client are hereby reserved."

24. On 30 November 2006 the defendants' solicitors gave the following answer:

"... We would like to put on record that we have not received any payment of the balance of purchase price up to the present moment. Moreover, please return all the certified copies of title deeds and documents sent under our covering letter dated 28 November 2006. All our clients' rights are reserved."

25. On 1 December 2006 (1 day after the day due for completion), the purchaser's solicitor stated:

" We wrote to put on record that despite the scheduled completion date, i.e. 30th November 2006 has passed, your clients have failed and/or refused to

(1) give prove or show a good title to the above property and

(2) answer our title requisitions satisfactorily and

(3) provide the original documents requested under our letter of 21/10/2006 which are relat exclusively to the above property in accordance with clause 9 of the Agreement for Sale Purchase dated 12th October 2006.

We are instructed that our client has decided to rescind the purchase and we are instruct demand your client to return forthwith all deposits paid by our client.

......"

26. It can be seen from the letters exchanged, the defendants' solicitors first proposed to supply an affirmation by the defendants to depose to the fact that they never possessed those missing instruments. The plaintiff's solicitors refused to accept such declaration as a satisfactory declaration to explain the absence of the missing instruments. It was the demand of the plaintiff's solicitors that the declaration of loss had to be made by the person who had custody of the instrument and lost the same subsequently. The defendants' solicitor subsequently changed their stance and said the defendants should have possessed all those title documents at all material times.

Parties' common law obligations

27. Under common law the vendors have an obligation to deliver good title. As stated by Madam Justice Yuen (as she then was) in *Yiu Ping Fong* [1999] 1 HKLRD 793 at page 798G – J:

"The handing over of original title deeds and documents (or at least those which relate exclusively to the property being sold) is an important part of the vendor's obligation in a sale of land. That obligation is well established in the common law.

A purchaser of land is entitled as a matter of proprietary right to possession of the original title deeds, Williams on Title (4th ed) at p.547, which is the best evidence of ownership.

Further, it is important for him to get possession of the original title deeds so that he can be sure that the property is not subject to an equitable mortgage by deposit of title deeds. If the deeds are not in the hands of some person other than the vendor, the purchaser is thereby placed on enquiry as to the reason for this, and he has constructive notice of the facts which such enquiry would disclose.

Where, therefore, as in this case, the vendor has given notice that she would not be able to produce the original 1986 assignment on completion, it is legitimate for the purchaser to examine whether there is sufficient conveyancing evidence to explain its loss."

28. To enable the purchaser to approve and accept title, the purchaser should be entitled to raise requisition on issues concerning title. Falling short of statutory enactment or contractual agreement to the contrary, parties in a land transaction ought to supply title proof from root. The established practice under common law is for proof of good title for a period of not less than 60 years prior to the current land sale contract.

29. A portion of the legal practitioners was under the impression that the giving of title went hand in hand with the proof of it. When the incidence of proof was removed, the corresponding incidence of furnishing the documents in support would be alleviated. When the incidence of proof was reduced to 25 years in 1984 and further reduced to 15 years in 1988 by way of amendments made to section 13 of the Ordinance a number of the practitioners believed the vendor's obligation to provide and supply the original title documents was correspondingly reduced to the period of 15 years before contract.

30. In *Yiu Ping Fong* [1999] 1 HKLRD 793 Madam Justice Yuen made clear to the profession that the incidence of proving title was not to be equated with the incidence of giving title. The enactment of section 13 of the Ordinance does not exempt the vendors from their common law obligation to deliver the original title documents upon completion of the land transaction in order to give title. But of course, the incidence of proof as well as the incidence of giving title (by way of delivery of the title instruments) can be varied by the parties' clear intention to the contrary.

31. The ruling in *Yiu Ping Fong* was adopted and applied by Deputy Judge Chu (as she then was) in *Guang Zhou Real Estate* [2000] 2 HKLRD 855 was well as by Deputy Judge To in *Goldmex Limited* [2006] 2 HKLRD 795. Though Mr. Justice Reyes in *C & W Watch* HCMP-920/2005 made some observations about the decisions in *Yiu Ping Fong* and *Guang Zhou*, Mr. Justice Reyes did not rule against the decision in *YiuPing Fong* or that of *Guang Zhou* concerning the vendors' common law obligation to give title.

32. Counsel on behalf of the defence sought to argue the ruling in *Yiu Ping Fong*should be confined to land sales within the 15 years duration contemplated in section 13 since the parties in *Yiu Ping Fong* were executing a land sale effected within the 15 years period. I do not agree such limitation can be imposed on the ruling of Madam Justice Yuen since Yuen, J was acknowledging the existence of a general common law right. It is trite law that a common law right remains unless and until removed, amended or altered by clear and express statutory enactment. There simply is no statutory provision within the Ordinance to limit the common law obligation to give title.

33. Thus unless and until the Statute Law (Miscellaneous Provisions) Bill 2008 tabled at the Legislative Council on 6 February 2008 were to become law in its suggested new section 13A of the Ordinance this court is unlikely to entertain any argument against the subsistence of a purchaser's common law right (falling short of contractual provision to excuse the same) to insist production of original title documents relating exclusively to the property on the date of the completion of the land sale.

Contractual Variation of the Parties' common law rights?

34. Clause 7 of the sale and purchase agreement reads: -

"The vendor shall give prove and show a good title to the Property and shall prove the same at his own expense in accordance with Section 13 of the Conveyancing and Property Ordinance and shall at the like expense make and furnish to the Purchaser such certified copies of any deeds or documents of title wills as may be necessary to prove such title. The costs of verifying the title by inspection and examination including search fees shall be borne by the Purchaser who shall also, if he requires certified copies of any documents in the Vendor's possession relating to other properties retained by the Vendor as well as to the Property pay the costs of such certified copies."

35. Clause 9 of the agreement reads: -

"Such of the documents of title as relate exclusively to the Property and as may be necessary to prove good title shall be delivered to the Purchaser at the expense of the Vendor. All other documents of title in the possession of the Vendor shall be retained by the Vendor who shall, if so required on completion of the sale give to the Purchaser a covenant for production safe custody and delivery of certified copies thereof to be prepared by and at the expense of the Purchaser."

36. Clause 10 of the agreement reads: -

"Save and except those title deeds relate exclusively to the Property, it is hereby expressly agreed: -

a. that for the purpose of enabling the Purchaser to approve title and raise requisition or objection in respect of title to the Property, delivery to the Purchaser or his solicitors of photocopies of title deeds or documents of title to which the Purchaser is entitled by law (hereinafter called "the said title deeds") by the Vendor before completion shall be sufficient, provided that the Vendor gives an undertaking to the Purchaser to furnish certified copies of the said title deeds within reasonable time but in any event not later than 60 days from the date of completion. The cost and expense for procuring photocopies and certified copies of the said title deeds shall be borne by the Vendor; and

b. that the failure of the Vendor to furnish certified copies of the said title deeds to the Purchaser on the date of completion shall not by itself be a ground for delay of completion by the Purchaser or be treated as or constitute a default or failure on the part of the Vendor to complete the sale and purchase in accordance with the terms of this Agreement."

37. Contractually the parties acknowledged by way of clause 7 the vendors' obligation to give, prove and show good title. In the same clause the parties stipulated their contractual method of proof with reference to section 13 of the Ordinance. In clause 7 the parties also specified the incidence of costs payment. Whilst the parties have qualified the method of proof, they remained silent about the means of giving of title. In the absence of contrary intention, common law rights remain.

38. In clause 9 the parties spelt out what documents were required to be delivered. Title documents which relate exclusively to the property and which were required for proof of good title should be delivered to the purchaser. In relation to all other title documents which were in the possession of the vendors, the vendors should, if so required by the purchaser, give to the purchaser a convenant for production, safe custody and delivery of certified copies of the same.

39. "All other documents" in the 2nd sentence of clause 9 was not qualified with reference to exclusiveness or for proof of title. "All other documents" here referred to all title documents which did not fall within the description given in the 1st sentence of this clause. It covers both title documents relating exclusively and non-exclusively to the property. The handling of the non-exclusive title deeds was subsequently set out in clause 10 of the agreement.

40. The 2nd sentence in Clause 9, however, was drafted specifically for title documents in possession of the vendors. Clause 9 was silent about documents not in the possession of the vendors. The parties' common law rights cannot be removed or varied falling short of clear agreement to the contrary. Thus for documents not in the possession of the vendors, the vendors' common law obligation remains. The vendors had a duty to give and supply those original title documents at the day of completion, alternatively an undertaking at the requisition stage for the production of the same upon completion.

41. It was said by Mr. Recorder Tang, SC (as he then was) in *Wu Wing Kuen* HCMP-646/1999 (9 July 1999 unreported) at paragraph 16 of his judgment "At common law on an open contract, the vendor must bear the expense of obtaining title deeds required by the purchaser to be handed over on completion, although such title deeds are not in the vendor's possession, and are not referred to in the abstract. See *Re Duthy & Jesson's Contract* [1989] 1 Ch 419."

42. The common law requirement for the supply of missing documents can be seen as an obvious step to avoid non-disclosure of equitable mortgages by way of depositing title deeds.

43. When title documents are missing, lost or destroyed, the vendors do have an obligation to provide sufficient conveyancing evidence to account for the non-production of those missing documents [see *WU Wing Kuen* HCMP-646/1999, [1999] 3 HKLRD 738 (CA), [2001] 1 HKLRD 212 (CFA)].

Proper Requisiton of Title?

44. Thus at title requisition stage, in contemplation of the ultimate production of the original title deeds upon completion, the plaintiff's solicitors should be entitled to raise requisition about the existence or the absence of those title documents as opposed to demanding production of the original title documents beyond the 15 years period.

45. The demand by the plaintiff's solicitors on 21 October 2006 for the supply of the original title deeds beyond the 15 years period was not a valid requisition.

Failure to give Title?

46. Of these 30 missing documents, the defendants were capable of providing photocopies of 17 of them. In respect of the remaining 13 instruments the defendants were only able to provide copies of the memoranda of registration.

47. The 3rd draft of statutory declaration (as recited by the plaintiff's solicitors) reads:-

> "1. We are the registered and beneficial owner of the property briefly described in the First Schedule hereto ("the Property").
>
> 2. We received all the title deeds and documents relating to the Property from Messrs. Fred Kan & Co, Solicitors sometimes in 1989. We took the said title deeds and documents to our residence for safe-keeping.
>
> 3. Lately, we had agreed to sell the Property. We were informed by our solicitors, Messrs. Ng, Tam Ko & Chan, Solicitors that some title deeds and documents as more particularly described in the Schedule hereto ("the said Missing Documents") are not among the said title deeds and documents. We therefore looked for the said Missing Documents in our present residence but could not find the same.

4. We have made an exhaustive search for the said Missing Documents amongst all our papers and documents and belongings kept in our residence and elsewhere but so far we have not been able to trace or find the said Missing Documents.

5. We hereby declare that despite our reasonable effort to trace the said Missing Documents, we have no knowledge of the whereabouts of the same and that the said Missing Documents have not been pledged by way of security to any person or corporation.

6. We verily believe that the said Missing Documents have been lost and cannot be found."

48. The statutory declaration proposed was not from the person who had knowledge about the missing document. Madam Justice Yuen in *Yiu Ping Fong* said at page 799H " ... The purpose of the statutory declaration accompanying a missing title deed is to explain the circumstances in which the deed was lost and to show how the person who ought to have custody of it could not find it despite proper endeavours. The vendor here can only say that she personally never had the original 1986 assignment. She cannot of her own knowledge explain the circumstances of the loss because she was not the person who had custody of it."

49. The same statement of law was adopted by Deputy Judge To in the later case of *Chor Kar Yin* in HCMP 1728/2006.

50. In accordance with the requirement specified by Madam Justice Yuen, the defendants' proposed statutory declaration would not be a satisfactory statutory declaration to affirm to the circumstances of the loss of the documents.

51. Can one possibly run the argument that the standard of proof differs when one is seeking to aver to a missing title document at the proof of title stage as opposed to the title giving stage? This point has not been raised by the parties nor has any authority been advanced either for or against the said proposition. I do not find it necessary to deal with this point for the resolution of the present dispute. The degree of conveyancing evidence required would likely differ according to the special fact circumstances of the case before Court.

52. Unless the parties gave clear explanation as to why first hand information was not available, one would normally expect an affidavit of loss of documents to be attended to by the person who lost the documents. This, of course, is not an inflexible rule. One can certainly envisage the situation such as the demise of the person losing the title deeds which makes it impossible to have first hand information from him or her on the circumstances surrounding the actual loss. As long as clear evidence was given to account sufficiently for the loss removing the risk of unforeseen prior equity, that could constitute good explanation for the missing documents.

53. With reference to the letters in exchange between the solicitors, the reasonable inference to accept was the defendants were never in possession of the missing title documents. There was, however, no explanation in the proposed 3rd draft of the vendors' statutory declaration to account for the circumstances under which the defendants were not given the missing title deeds, whether explanation had been given by Fred Kan & Co to the vendors of the whereabouts of those documents, and why the staff of Fred Kan & Co would not be in a better position to explain the missing documents. When so much first hand informations were missing from the explanation in the proposed statutory declaration, one cannot possibly come to other conclusion but to accept the proposed statutory declaration to be insufficient for the purpose of accounting for the missing circumstances.

54. There can be no dispute that the memorials cannot be equated with the actual instruments which were registered by way of the memorials (see Godfrey, J's decision in *Lai Chung Yue* [1987] 3 HKC 406 at p-408D). Whether the memorials could be equated with the documents or whether the memorials could be accepted as secondary evidence to establish the contents of the documents is a red herring in this hearing since we are not concerned with the proof of title here. When the party has no obligation to prove the contents of the documents, all that would be required would only be a statutory declaration to account for the circumstances of the loss.

55. The defendants were unable to give good title to the plaintiff unless the defendants were able to provide a satisfactory statutory declaration to account for the loss of the title documents.

56. Though the plaintiff has failed to raise proper requisition on 21 October 2006 in demanding production of the original title deeds over 15 years old and the defendants had fulfilled their obligation to prove title within the 15 years duration, the defendants were however unable to make or give title in accordance with their common law obligation. The plaintiff was therefore correct to accept the anticipatory breach of the defendants in their failure to give good title to the property.

57. There was no argument before this court as to whether the title was marketable.

Orders of the Court

58. The plaintiff is entitled to reliefs (1) (2) and (5) of the Minutes of Order. Relief (3) ought to read as "Damages, of a quantum to be assessed, be awarded to the plaintiff for the defendant's breach of the aforesaid agreement".

59. Counsel acting on behalf of the plaintiff has indicated in the course of his submission that the only damages the plaintiff was seeking were the conveyancing fees and the estate agency fees paid by the plaintiff. If those two were the only heads of liquidated damages, I do not feel the parties need to go through the assessment exercise. I grant leave for a further order of "liberty to apply" to be included in relief (3) to enable the parties to attend to the issue of quantum more economically should there be no substantial dispute of facts about the quantification. However, should there be substantial dispute of facts over the amount of damages, the parties have to proceed to a proper assessment hearing.

60. I also grant costs order nisi for the plaintiff to be awarded costs of this action and this Order 86 application, with certificate for counsel.

(M. Yuen)
Master of the High Court

Mr. Tim Wong instructed by Messrs Ong & Chung for Plaintiff

Mr. Andy Hung instructed by Messrs Fung & Fung for Defendants