

**Written Submissions**

**By**

**THE HONG KONG CONVEYANCING &  
PROPERTY LAW ASSOCIATION LIMITED**

**on**

**Stamp Duty (Amendment) Bill 2012  
("the Bill")**

**5 February 2013**

## **Submissions on Stamp Duty (Amendment) Bill 2012 ("the Bill")**

1. Our Association welcomes the two measures contained in the Bill, namely, increase of the rates of the Special Stamp Duty (SSD) and the introduction of a new form of stamp duty, i.e., Buyer's Stamp Duty (BSD).

### **Increase of SSD**

2. We believe that to a certain extent SSD has been effective in containing the exuberant state in the residential market and it has in some way contributed to control speculation and to ensure the healthy and stable development of the residential property market. We support the increase to make it more effective.

### **Basic Law concern**

3. Hong Kong being a cosmopolitan city is renowned for its free trade policy. We are concerned that the introduction of BSD has the undesired feature of making a distinction between foreigners and Hong Kong Permanent Residents ("HKPR"). Would it tarnish its free trade image? Above all, will it be an infringement of the provisions of the Basic Law, in particular, Article 105 (free right to acquire properties) and Article 106 (policy of free trade)? We do not find any sign that the law draftsman has considered the point whether the gravity of the situation in proportion justifies the severity of measure to be introduced. We hope the Bill can withstand any such challenge.

## **BSD**

4. The main provisions relating to BSD are new Section 29CB (buyer's stamp duty on agreements for sale) and new Section 29DB (buyer's stamp duty on conveyances on sale). They are very wide and sweeping provisions that encompass all agreements for sale and conveyances on sale unless they fulfill the conditions set out in S.29CB(2) or S.29DB(2) respectively. It is not as claimed in the preamble to the Bill "to impose buyer's stamp duty on *certain* agreements for sale and conveyances on sale" but to charge *all* transactions with exceptions spelt out in subsections (2), (3), (4) and other subsections.

5. Both sections require the buyers or transferees to satisfy the Collector that the conditions are fulfilled before they are exempted from BSD. It is unfair to put the burden of proof upon them. Particularly, there are many more buyers who are HKPR than those who are not. In other words, all Hong Kong people have to go through the trouble to claim for exemption.

6. New Section 29CB(2)(b) and new Section 29DB(2)(b) provides that HKPR and non-HKPR who are closely related are exempt from BSD. Further, new Section 29CB(4) – (6) and new Section 29DB(5) – (7) go at length to provide for exemption for non-HKPR in certain situations. On the other hand, HKPR who have been working hard for Hong Kong's economy in the form of limited companies are left out without any exemption. Such exemptions to non-HKPR are extremely unfair to

HKPR and create unnecessary tension between the two. We would recommend that these exemptions to non-HKPR be scrapped so long as the Government is not able to provide similar exemption to limited companies genuinely held by HKPR.

## **HKPR**

7. We also worry the standard of proof that is required may cause difficulties to the buyers or transferees. Normally, to prove a buyer is a HKPR, the simplest way is by production of his identity card. We doubt that method is able to satisfy the condition. According to the definition of HKPR in Section 29A(1) HKPR is a person who is a holder of a **valid** HK permanent identity card. A lawyer has no way to ascertain whether an identity card is valid or not unless he writes to the Commissioner of Registration for verification. To carry out his duty properly, every time he handles a transaction involving a buyer with an identity card he has to ask the Commissioner for verification. That is cumbersome, time-consuming and incurring more costs.

## **Acting on his or her own behalf**

8. The Inland Revenue Department has informed the Law Society of Hong Kong that except for non-HKPR and HKPR who have purchased on behalf of non-HKPR, the Collector will require purchasers of residential properties to make statutory declarations as to whether they are HKPR and whether they have purchased on behalf of non-HKPR. It is noted that the BSD legislation will have a retrospective effect and will be

applicable to transactions which took place on or after 27<sup>th</sup> October 2012. The time limit for stamping instruments chargeable with BSD made in the interim period will be 30 days after the Amendment Ordinance is published in the Gazette. This means that thousands of HKPR who has bought residential properties in the interim period will have to make arrangements to make the requisite declarations within the short period of 30 days so as to satisfy the statutory requirements. Title deeds of the relevant transactions already delivered to the purchasers or mortgagees for safe custody in the meantime may have to be retrieved for BSD stamping purpose. All these procedure will incur unnecessary wastage of time and costs. Furthermore, we are not sure if apart from such declarations, further proof will be required for the purposes of satisfying the Collector under sections 29CB (2) and 29DB(2), and if so, what sort of evidence will the Collector require.

9. Solicitors still find it difficult to give proper legal advice in some cases whether his client is purchasing the property on his own or on behalf of another person. His Lordship, Bokhary PJ, in the opening statement in the attached judgment of the cases, **FACV 9 and 11 of 2011** observed: “Members of Hong Kong families often pool this (sic) resources or otherwise help their relations, to acquire a home”. This phenomenon is not uncommon in Home Ownership Scheme.

10. Even in cases not involving Home Ownership Scheme, it is difficult to ascertain in law whether one is acting on his own or in trust

for another person. The applications of the legal principles on resulting trust, constructive trust, presumption of advancement, gifts etc are rather complicate and confusing. Take the following example: it is not certain whether BSD is payable where a foreigner provides money to purchase a residential property in the name of a HKPR without any oral or written trust document. The law is where a person purchases a property in the name of another, then, as a rule, unless there is some further indication of an intention at the time to benefit the other person or some presumption of such an intention, such property is deemed in equity to be held on a resulting trust for the purchaser (**attached paragraph 400.107 Vol 26 Halsbury's Laws of Hong Kong**). However, where a father purchases property in the name of a child (or the relationship of the parties is recognized in law as to create a presumption of advancement) the transaction does not create a resulting trust for the purchaser but is an advancement or gift to the child unless there is evidence of a contrary intention at the time of the transaction or the circumstances are such as to raise a presumption against the advancement or gift (**attached paragraph 400.109 Vol 26 Halsbury's Laws of Hong Kong**). The complications of presumptions of advancement and presumption of resulting trust, and their rebuttal by evidence to the contrary, cannot be underestimated. The question is how to show to the satisfaction of the Collector that the purchaser is acting on his or her own behalf where it is more often than not the case no agreement whether oral or written is made.

11. We believe that there are many more buyers who are HKPR than those who are not. It also seems that mostly non-HKPR may be prepared to go to the expense of paying for BSD in acquiring Hong Kong properties where they are not exempted. It is therefore wrong in principle that it requires the majority of the buyers who are HKPR to make a declaration to prevent only the remote chance that foreign buyers take advantage by pretending to be or using a HKPR.

12. We take the view that provisions should be drafted in a way that BSD applies to certain transactions rather than to all with certain exemptions. We propose that the two sections be amended to the effect specifically that any non-HKPR buying residential property be required to pay BSD.

**Sections 29CB(4)(b)(iii) and 29DB(5)(b)(iii)**

13. Without prejudice to our recommendation to scrap exemptions for non-HKPR under new Section 29CB(4) – (6) and new Section 29DB(5) – (7), Section 29CB(4)(b)(iii) and Section 29DB(5)(b)(iii) of the Bill provide exemption of replacement residential property to vendor or transferor and refund of BSD to buyer or transferee where the residential property being replaced has been sold pursuant to an order for sale made by the Lands Tribunal under section 4(1)(b)(i) of the Land (Compulsory Sale for Redevelopment) Ordinance. These provisions, as we understand, do not apply to agreement for sale reached without court order during mediation which is currently encouraged by the Lands Tribunal.

14. It is suggested that the provision should also cover the agreement for sale once application under the Land (Compulsory Sale for Redevelopment) Ordinance has been made. Likewise, the suggestion also applies to other provisions in the Bill concerning acquisition or transfer of residential properties pursuant to a Court Order.

**Demolished Buildings (Re-development of Sites) Ordinance (Cap 337)**

15. Under S.29CB(4) and 29DB(5) vendors or transferors in certain agreements for sale and conveyances on sale are given relief because they have to sell their residential properties not on their own volition and want to make a replacement purchase. We would like to highlight a type of similar situation where the owners are forced by circumstances to sell their properties but without relief. They are owners of pre-war buildings that have been certified dangerous and served with a re-development notice under S.4 of the Demolished Buildings (Re-development of Sites) Ordinance (Cap 337).

16. The owners of these pre-war buildings are mostly oversea absentee landlords with limited resources but then have to face the difficult position that they are required to redevelop their properties upon certain terms and conditions with a time limit ordered by the Director of Buildings under S.4 of the Ordinance. In lack of ability and resources they are forced to sell the properties to developers.

17. The hardship they have to face is in no way less than those owners mentioned in those two sections. They deserve the same exemption when they buy replacement properties. By the same token, the purchasers or transferees of those properties should be entitled to refund of buyer's stamp duty if they can show the acquisition is for redevelopment. We believe that there will not be many cases falling within this category but the help to those owners is significant.

18. We propose that sale by owners of buildings affected by the order made by the Director of Buildings under S.4 of the Demolished Buildings Ordinance (Cap 337) be included in S.29CB(4)(b) and S.29DB(5)(b) of the Bill.

### **Section 29CC**

19. In the Agreements for exchange of properties, Section 29CC appears to make a distinction between:-

- (i) exchange of residential property and non-residential property;
- and
- (ii) exchange of residential property and residential property.

In cases of exchange of residential property and non-residential property, the stamp duty is by reference to the value of the residential property whereas in the case of exchange of residential property for residential

property, the stamp duty is on the equality of the consideration. We wonder what the reason is for such distinction.

### **Section 29DD**

20. Section 29DD of the Bill provides for refund of BSD in case of redevelopment within 6 years. It is our experience that all the redevelopment projects to acquire properties are through limited companies, local or overseas. For large redevelopment projects, they usually take much more than 6 years from acquisition to redevelopment. For the small redevelopment projects, usually they are being carried out by small or medium developers and BSD will be a severe burden on them from the outset. It is heard that most of the redevelopment projects by developers are forced to come to a halt. The policy not to hinder redevelopment cannot therefore be achieved.

21. It is suggested that Section 29DD should be amended:-

(i) to make it clear that purchaser of a vacant site should be entitled to such refund. If the intention of the bill is to deprive purchasers of a vacate site of such benefit, it is suggested further consideration should be given why such purchasers are not entitled to such benefit.

(ii) to the effect that developers of the properties under the Demolished Buildings (Re-development of Sites) Ordinance should also be entitled to the refund of BSD in case of redevelopment.

## **Section 63A**

22. We support the added provision that the Financial Secretary may by notice amend the rates of the Special Stamp Duty and Buyer's Stamp Duty. This will enable the Financial Secretary to deal with urgent situation in a timely manner. Solicitors may know and advise their clients with certainty when they have to pay the new rates of stamp duty.

We reserve the right to make further submissions on the Bill if necessary.

**The Hong Kong Conveyancing &  
Property Law Association Limited**

**5 February 2013**



TAM KWOK CHIU

3<sup>rd</sup> Defendant

- and -

TAM KWOK CHIU

Third Party

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Court : Mr Justice Bokhary PJ, Mr Justice Chan PJ,  
Mr Justice Ribeiro PJ, Mr Justice Litton NPJ  
and Lord Hoffmann NPJ

Date of Hearing : 22 October 2012

Date of Judgment : 13 November 2012

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**J U D G M E N T**

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Mr Justice Bokhary PJ :

1. Members of Hong Kong families often pool this resources, or otherwise help their relations, to acquire a home. The Home Ownership Scheme – as Mr Justice Chan PJ demonstrates in his judgment which I have had the benefit of reading in draft and with which I agree – leaves room for such arrangements while, naturally, setting its face against profiteering. That is the context in which the anti-alienation provisions safeguarding the Scheme are to be understood. What happened in these cases was not alienation.

2. The law of trusts operates as necessary on arrangements of this kind to make them work in conformity with conscience. I have had the benefit of reading in draft the judgment prepared by Lord Hoffmann NPJ. I agree with it. Accordingly I would allow these appeals to restore the declarations made at first instance.

Mr Justice Chan PJ :

3. I agree with the judgment of Lord Hoffmann NPJ. I would like to add just a few observations. The meaning of “alienation” in the Schedule and ss 17B and 27A of the Housing Ordinance (“the Ordinance”) must be construed in the context of the Home Ownership Scheme (“HOS” or “the Scheme”) and having regard to the language of the relevant provisions.

4. The Scheme was introduced in 1978 to serve the social purpose of assisting eligible persons to acquire a home when they cannot otherwise afford to do so. An applicant is required to disclose in his or her application the persons with whom he or she would occupy the flat and the total income and assets of the applicant and these occupants which must not exceed a certain limit. The disclosure on the identity of the occupants together with the restrictions imposed under the Schedule and ss 17B and 27A are aimed at ensuring that after acquisition, the flat will actually be occupied as a home for the applicant and his or her family members (although change of the composition of this “household” after acquisition is clearly permitted). The disclosure on this household’s combined income and assets at the time of acquisition is to ensure that the applicant, together with whatever financial support he or she may get from family members (if necessary), is eligible for such home purchase. (In the case of a Green Form applicant, while there is no eligibility requirement, upon a successful application, he or she has to give up the public housing unit he or she is occupying and to stay in the HOS flat and the same statutory restrictions on alienation apply.)

5. The Scheme thus clearly anticipates that the applicant and the family members who would be occupying the flat with him or her may have to pool their financial resources together in paying for the purchase price or making repayments towards any mortgage loan which may be required in the purchase. The Housing Authority in fact recognizes this factual reality or

possibility and permits the change of ownership to reflect the financial contributions of the authorized occupants. The pooling of family resources together obviously does not contravene the Housing Authority's policy or offend against the purpose of the Scheme. It is clearly different from any subsequent re-sale or transfer or parting with possession of the flat by the owner after acquisition without satisfying the prescribed requirements or the approval of the Housing Authority.

6. The purchase price at which an owner acquires a HOS flat is fixed at a discount of the market price or at cost without including the value of the land. The restrictions in the Schedule (which form part of the terms and conditions of the sale) and ss 17B and 27A are intended to prevent the owner from taking advantage of this discount and making a quick profit by any unauthorized re-sale or transfer or parting with possession of the flat after acquisition. They are not intended to frustrate or outlaw genuine family arrangements of pooling the financial resources of family members together to acquire the HOS flat.

7. The natural and ordinary meaning of "alienation" refers to the transfer and divesting of any legal or equitable rights and interests in a property by the owner to another person. The cases cited by the parties regarding the meaning of this word (eg *Re Biedermann* [1922] 2 Ch 771, *In re Symon, Public Trustee v Symon* [1944] SASR 102, *Re a Solicitor*, unreported, 8 December 2000, CACV No 117 of 2000) involved ascertaining its meaning in the document or statutory provision concerned read in the particular context and are not helpful in the present case. Apart from context, one must also examine the language used in each case.

8. The language of the relevant provisions points to a construction which is much narrower than that held by the Court of Appeal. In order to fall

within the Schedule and ss 17B and 27A, the alienation in question must be a transfer or divesting *by the owner* of his or her rights and interests in the flat and this supports the argument that a positive act by the owner is required. The statutory restrictions also prohibit an unauthorized mortgage, charge and conveyance which normally involve the execution of an instrument. This strongly suggests that the type of alienation contemplated by these provisions does not include the situation of a constructive or resulting trust as alleged in the present cases which usually arises by operation of law. Further, alienation is not altogether prohibited: provided that certain requirements are satisfied, eg the specified period has expired or the premium calculated according to a specified formula has been paid, the Housing Authority may approve such a transaction. What is prohibited is an alienation which is in breach of the terms and conditions of the sale. And if what is involved is in effect some arrangement which would not defeat the purpose of the Scheme and which the Housing Authority would consider acceptable, it would not be caught by these provisions. In my view, the type of alienation which is caught is a transaction which is aimed at enabling the owner to take an unfair advantage of the benefit conferred on him or her by the Scheme to make a quick profit. It does not include the family arrangements alleged in the present two cases.

9. For the reasons given by Lord Hoffmann NPJ, I too would allow these appeals.

Mr Justice Ribeiro PJ :

10. I agree with the judgment of Lord Hoffmann NPJ.

Mr Justice Litton NPJ :

11. My initial anxiety in entertaining these two appeals arises from the possibility that the “family arrangements” upon which the appellants rely might have contained elements of deception : That is to say, deception of the Housing

Authority in that lies might have been told in the application forms as regards the households intended to be benefitted under the Home Ownership Scheme. This might then in turn have brought into play the principle that a resulting or a constructive trust cannot be enforced by a contributor if he or she had to rely on such an arrangement to succeed.

*FACV 11/2011*

12. However, as regards the case of *Lam Wa v Ling Shui Fai and others* (FACV 11/2011) the matter comes to this Court on preliminary issues, upon the assumption that the bare facts pleaded in the statement of claim are true : Namely, that in order to increase the chance of success in the drawing of lots for the flats, two applications would be made, one in the name of the parties' mother, the other in the names of the defendants; that the down payment and initial expenses for the purchase would be paid by the mother; that the purchase price would be financed by mortgage; that members of the family who occupied the flat would pay the mortgage instalments and recurring expenses; that those family members who so paid would have a beneficial interest in the flat to the extent of their respective contributions.

13. In the event, the defendants' application was successful. The appellant and her late husband occupied the flat, made the mortgage payments and defrayed the running expenses.

14. There is nothing in the case as pleaded which could prevent the court from giving the appropriate relief in equity, if the arrangement did not fall foul of the provisions of s 17B of the Housing Ordinance.

*FACV 9/2011*

15. In this case the judge Fung J, upon finding after trial that a constructive trust had come into existence, hesitated to give relief and had his

findings (without any final order) referred to the Housing Authority. He only made his declaration in the plaintiff's favours when he received no adverse reaction from the Housing Authority.

*Conclusion*

16. I agree with the judgments of Mr Justice Chan PJ and Lord Hoffmann NPJ. I too would allow these appeals and make the orders proposed by Lord Hoffmann NPJ.

Lord Hoffmann NPJ :

17. Until 1978 the provision of social housing in Hong Kong, as in most other countries, took the form of low-rent tenancies granted by public authorities. The Government then took the imaginative step of establishing the Home Ownership Scheme ("HOS"), by which the public authority was given power to sell the flats in its ownership at a substantial discount to persons of modest means, thereby giving them not only homes in which to live but also the advantages and responsibilities of ownership.

18. As the primary purpose of the scheme was to provide qualified purchasers with a permanent home, the HOS contained restrictions on alienation or parting with possession, intended to prevent the purchasers from realizing an immediate profit by the sale of the flat or an income from letting it to someone else. The objective was both to prevent the purchasers from making a cash profit from having received a discount at the public expense and to ensure that the effect of a sale on the public housing stock was more or less neutral, that is to say, that those who had been sold a flat would not again be candidates for social housing, at least until a substantial period of time had elapsed.

19. The Scheme was introduced by amendments inserted into the Housing Ordinance, Cap 283 (“the Ordinance”) by the Housing (Amendment) Ordinance 1978. Section 17A of the Ordinance gave the Housing Authority power to sell its flats and s 17B of the Ordinance contained the restrictions on alienation. This section has been amended and replaced several times since 1978<sup>1</sup>, but for present purposes it is sufficient to say that it has always provided that any “alienation” of the property during what I shall call the restriction period should be void. The restriction period was originally 10 years but in 1999 it was reduced to 5 years<sup>2</sup>. By a further amendment in 1982 and subsequently in 1995, s 27A made it a serious criminal offence (punishable by a fine of \$500,000 and imprisonment for a year) to purport to make an alienation which was made void by s 17B<sup>3</sup>.

20. Applicants for a HOS flat had to fill in a form (“the white form”<sup>4</sup>) in which they declared the names of the persons who would occupy the flat and their incomes. Eligibility depended upon the combined incomes of the occupants falling below the HOS limit. Applicants usually raise most of the purchase money on mortgage. It is not however unusual for applicants to lack the means to pay even the balance of the discounted price and keep up the

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<sup>1</sup> The 1982 version of the Ordinance, inserted by s 7 of the Housing (Amendment) Ordinance 1982, said (so far as relevant) that “where any land in any estate is sold under section 17A to any person ... any alienation or conveyance or purported alienation or conveyance or any agreement to alienate or convey such land ... by that person in breach of any term or condition of the agreement for sale and purchase or any covenant in the deed of assignment relating to such land ... shall be void”. Section 6 of the Housing (Amendment) Ordinance 1995 substituted a new s 17B which, so far as relevant, provided that “where ... land in an estate is sold under section 17A ... and the person to whom the land is sold purports to mortgage or otherwise charge the land or to assign or otherwise alienate it ... and that person acts in breach of any term or condition of the agreement for sale and purchase or any covenant in the deed of assignment relating to the land ... the purported mortgage, other charge, assignment or other alienation, together with any agreement so to mortgage, charge, assign or otherwise alienate, shall be void”.

<sup>2</sup> The restriction period was contained in the statutory terms and conditions of the agreement for sale and purchase and the deed of assignment contained in a Schedule to the Ordinance. The 1982 Schedule prohibited alienation unless a period of 10 years had elapsed and the purchaser paid a premium to the Crown. The period was reduced to 5 years in 1999.

<sup>3</sup> Section 27A.

<sup>4</sup> There is also a green form for applicants who have a tenancy of social housing which they wish to surrender in exchange for a HOS flat: see the judgment of Mr Justice Patrick Chan PJ.

mortgage instalments. In such a case, they typically seek assistance from family or friends.

21. Such contributions to the purchase price may be gifts or loans, but the ancient rule of equity is that normally, in the absence of evidence to the contrary, the law will presume a resulting trust, that is to say, the acquisition of a beneficial interest in the property by the person providing all or part of the purchase price, in proportion to his contribution. Or the parties may have had a common intention that the person providing the funds was to have a beneficial interest and may even have executed a deed of trust saying what that interest should be.

22. The question which arises in both the appeals before the Court is whether the implied creation of a beneficial interest in a person other than the legal assignee (whether by a common intention constructive or resulting trust) by his payment of all or part of the purchase price is an “alienation” forbidden by s 17B and made punishable by s 27A.

23. The facts of the two appeals may be shortly summarized as follows:

(a) *Lam Wa v Chu Yuen Lun Garmen* (FACV 11/2011)

(i) The plaintiffs claim to be beneficial owners of a flat in Kowloon which had been bought under the HOS by the defendants in 1984. The plaintiffs and the defendants were each respectively a son and daughter-in-law of the late Madam Wong (“the mother”). The plaintiffs allege that in 1983 the mother decided to buy a HOS flat for use by members of the family. But to increase the chances in the ballot for oversubscribed properties, they made two applications: one in her name and one in the name of the

defendants. The defendants' application was successful and the flat was sold to them for \$225,000, of which \$200,000 was funded by a mortgage. The plaintiffs allege that the defendants paid neither the initial deposit nor the mortgage instalments. There was a family arrangement by which the mother would pay the initial deposit and expenses, and thereafter those members of the family who actually occupied the flat would pay the mortgage instalments and expenses. Those who contributed to the purchase price would have a proportionate beneficial interest in the property. The mother paid the deposit and the first few mortgage instalments but the plaintiffs say they moved into the flat in about March 1985 and thereafter paid all the instalments until the mortgage was paid off in April 1999. In January 1997 the defendants entered into a provisional agreement to sell the flat to a third party for \$1.2 million. The plaintiffs then started proceedings claiming a declaration that they were beneficial owners and an order setting aside the provisional agreement.

- (ii) The plaintiff's allegations are disputed but the case (although started in 1999) has not yet gone to trial. In 2007 Deputy Judge Gill ordered the trial of two preliminary issues, which it is unnecessary to set out in full because in essence they raised the same point: would the creation of a beneficial interest as alleged by the plaintiffs be a void alienation for the purposes of s 17B? *Chu J* decided that it would not, but her decision was reversed by the Court of Appeal (*Tang Ag CJHC, Yeung and Kwan JJA*).

(b) *Cheuk Shu Yin v Yip So Wan and Lo King Fai* (FACV 9/2011)

In 1999 the respondents, a retired couple from the Mainland, successfully applied for an HOS flat in Fanling and bought it for \$1,214,000. Completion took place on 10 April 2000. In this case there has been a trial, at which Fung J found that the whole purchase price had been paid out of a joint account in the names of the respondents' son and his wife, the appellant. A solicitor had actually been instructed to draw up a declaration of trust recording that the respondents held the flat on trust for them, but it was never executed. The appellant and her husband were divorced in 2006 and the husband died in 2010. The judge, although satisfied that they were beneficially entitled to the flat, had some concern about whether he ought to make a declaration to that effect because he thought there might have been some illegality in the way the respondents bought the flat. Both parties were unrepresented and, unsurprisingly, neither drew his attention to s 17B. But the Housing Authority, in its answer to his inquiries, did not appear to be troubled by the case. So on 22 October 2009 he made the declaration. The Court of Appeal upheld the judge's findings of fact, but, following their decision in *Lam Wa v Ling Shui Fai* (reported *sub.nom Ling Wing Fai Billy v Ling Shui Fai* in [2010] 5 HKLRD 247) they reversed his decision.

24. In *Lam Wa v Ling Shui Fai* Chu J said that the creation of the beneficial interests of the plaintiffs occurred by operation of law. It was not the result of "any positive act" on the part of the defendants and it was not therefore an alienation by them. The Court of Appeal said that there had been positive acts by the defendants. They had entered into the family arrangement, used the mother's money to pay the deposit and initial expenses and allowed the plaintiffs to occupy the flat. All that is true, but I nevertheless think that

alienation is not the most natural way of describing what happens when equity imposes a constructive or resulting trust. The word normally denotes a juridical act performed by someone entitled to an interest in property for the purpose of transferring all or part of that interest to another. Even if there had been such a juridical act, for example, by an express declaration of trust, it would not necessarily be described as an alienation of the land which had been purchased. It would be the creation of a new derivative interest in that land. On the other hand, I would not decide this case upon a linguistic point. As Keith JA said when dealing with these provisions in *Re A Solicitor* (unreported, 8 December 2000, CACV 117/2000 at para 12:

“The meaning of the word ‘alienation’ depends on the context in which it was used and on the purpose which the legislation in which it appears was intended to serve.”

25. The Court of Appeal was therefore in my view right to concentrate on the question of whether it was necessary to give “alienation” a wide meaning in order to give effect to the policy of the Ordinance.

26. What was the policy of including the alienation restriction in the Ordinance? The Secretary for Housing, moving the second reading of the 1978 Bill, said<sup>5</sup>:

“Because Home Ownership flats will be sold at cost, and not at market level prices, it was decided that a 5-year restriction on resale is necessary, in order to discourage speculation on the part of the purchaser.”

27. In moving the second reading of the 1982 Bill, the Secretary for Housing said<sup>6</sup>:

“Flats produced under the home ownership scheme are intended for one purpose only – to provide homes for people eligible for them. It is not the intention of the schemes to give opportunities for speculations, or to provide such housing for people who fall outside the eligibility criteria. For this reason, realistic sanctions are provided against abuses.”

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<sup>5</sup> Hansard, 26 April 1978, p 854.

<sup>6</sup> Hansard, 10 February 1982, pp 398-399.

28. The Court of Appeal in *Ling Wing Fai Billy v Ling Shui Fai* said<sup>7</sup>:  
“The purpose of s.17B is to ensure that HOS flats should go to qualified persons in accordance with the HOS rules. HOS flats are subsidised and they are not meant to be traded as if they were outside the HOS.”

29. The Court of Appeal were emphatically of the opinion that unless s 17B outlawed the creation of equitable interests under a constructive or resulting trust, the policy of the statute would be undermined. Although in the cases before them the contributions had been made by members of the family, in principle it would be difficult to distinguish a case in which an outsider obtained the entire beneficial interest by paying the whole of the purchase price. The court posed two rhetorical questions<sup>8</sup>:

“Suppose, an applicant for a HOS flat, who, after learning that his application was successful, agrees to sell his ‘right’ to a third party who would then make all necessary payments. Could it be said that because by operation of law the applicant would hold the beneficial interest in the flat upon signing of the sale and purchase agreement upon trust for the third party, there was no alienation within the meaning of s.17B, because the successful applicant never had any beneficial interest to ‘alienate’? Suppose an intended applicant agrees with another person that he would apply for a HOS flat which he would hold for the other person, and his application was successful, and the other person then makes all the payments. Can it be said that there has been no alienation, purported alienation or agreement to alienate within the meaning of s.17B? We think not.”

30. Although the Court of Appeal thought that the answers to these questions were obvious, the judgment contains, if I may say so with respect, little analysis of why this should be so. For my part, I do not see how the creation of equitable interests in the flat can give rise to the abuses which s 17B was intended to prevent. What can the owner of an equitable interest do to enforce his rights? In the ordinary way and apart from statutory restrictions, a person for whom property is held on trust absolutely can terminate the trust and require the trustee to convey him the legal estate. In the case of a HOS flat, however, this remedy is not open to him. An assignment of the legal estate would be unlawful under s 17B. If the equitable owner has only a part

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<sup>7</sup> [2010] 5 HKLRD 247, 259 at para 42.

<sup>8</sup> [2010] 5 HKLRD 247, 256 at para 30.

beneficial interest, the normal remedy is for him to obtain an order that the property be sold and the proceeds distributed. But he cannot have the flat sold, because this would also be unlawful under s 17B. Nor can he require that the property be let to provide him with an income, because the statutory terms and conditions in Schedule 4 of the Ordinance contain a covenant against parting with possession. Until the expiration of the restriction period, all the equitable owner's normal means of realizing the value of his interest are barred. So there is nothing which he can do which would interfere with the occupation of the flat by the eligible purchasers to whom it was sold.

31. It might be said that payment of the purchase money by a third party in the position described in the Court of Appeal's examples involved some element of "speculation" because he might hope to realize a profit on a rise in the property market (less payment of the premium) on a sale after the restriction period has expired. But this degree of speculation is no more than is permitted to the purchaser himself; if he has paid the purchase price, he too may hope to gain when he is able to sell the property. Once the restriction period has expired, he can sell the flat and the law is not concerned with what he does with the proceeds. Why, in that case, should he not be entitled to agree in advance that when they arise, they will belong to the persons who paid for the flat?

32. In any case, I doubt whether paying the purchase price of a HOS flat would be an attractive form of commercial investment. The money would be locked up as an unregistered interest in land, unrealizable and producing no income, for the whole of the restriction period. During that period, as Hong Kong well knows, property prices may go down as well as up. I think it is significant that before the alienation point was taken before Chu J in *Lam Wa v Ling Shui Fai*, there had been several cases, going back to 1993, in which judges of first instance had assumed that in principle HOS flats could be subject

to constructive or resulting trusts in favour of contributors to the purchase price<sup>9</sup>. The people of Hong Kong are not without commercial ingenuity and I should imagine that if there were money to be made in subscribing the purchase price of HOS flats, someone would by now have started such a business. But there is no sign of it. The evidence of cases before the court suggests that only family members are willing to contribute.

33. I should have thought it was in the public interest that persons with incomes so low that they are not only eligible for a HOS flat but unable to pay the deposit or keep up the mortgage payments out of their own resources should be able to buy a flat with the assistance of their family or friends, on the basis that the latter will have beneficial interests which they can realize when the restriction period has expired.

34. The possibility of abuses arising from the creation of equitable interests in HOS flats therefore seems to me rather remote. But the Housing Ordinance has been amended many times and if abuses should at some future date manifest themselves in ways presently unknown, the legislature can deal with the problem.

35. As against these so far imaginary abuses, the denial of a remedy to a person who paid all or part of the purchase price on the understanding that he would acquire a beneficial interest can be very unjust. The appellants argued in the Court of Appeal that the statute should not be used as an instrument of fraud and the Court of Appeal replied that if the policy of the statute required a remedy to be denied, it overrode any question of doing justice between the parties. That is obviously true, but the fact that it would often be unjust to

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<sup>9</sup> *Wong Lai Suk Chun v Wong Chiu Ming* [1993] 1 HKC 522 (wife's contribution); *Fan Siu Ngan v Yeung Kin Yip*, unreported, 30 March 2001, HCA 10488/1997 (contribution by co-habiting man); *Re Chow Man Kwong, ex p Chow Man Kwong* [2001] HKLRD 482 (brother's contribution); *Leung Chi Man v Mok Sau Lim*, unreported 23 March 2005 HCMP 1599/2003 (contributions by family); *Lee Tso Fong v Kwok Wai Sun* [2008] 4 HKLRD 270 (payment of price by mother).

deny a beneficial interest to someone who paid the purchase price in the expectation that he would get one is a reason for not construing the statute so widely as to have this effect. Not only would he be denied a remedy, he would have committed a criminal offence for doing something which to most people in his position would seem normal and even generous.

36. Both of these appeals have been concerned with a resulting or constructive trust, coming into existence by operation of law. In neither case was there an express declaration of trust, although in *Cheuk Shu Yin v Yip So Wan and Lo King Fai* (FACV 9/2011) one was drawn up by a solicitor but never executed. But I do not think that the answer would have been any different if there had been an express declaration. The reason why the creation of a beneficial interest does not come within s 17B is not because the trust arises by operation of law rather than by an intentional act but because the creation of an equitable interest is not in my opinion an alienation of the land assigned to the purchaser. It is the creation of a new interest in that land. It would in my opinion be very strange if the parties could create a constructive trust by their common intention but were required at all costs to avoid reducing this to an express declaration in writing.

37. In *Ling Wing Fai Billy v Ling Shui Fai* the Court of Appeal recorded counsel for the appellants as having conceded that if the purchasers of the flat had entered into a similar arrangement after they had bought the flat, for example, by declaring themselves trustees of the flat for someone who undertook to pay the rest of the purchase price, it would be void under s 17B. But I do not think that this concession was rightly made. The creation of an equitable interest after purchase puts the beneficial owner in no better position to realize his interest than if it had been created simultaneously with the purchase. Neither is an alienation of the flat.

38. For these reasons, I would allow both appeals and restore the declarations made by Chu J and Fung J.

Mr Justice Bokhary PJ :

39. By the unanimous decision of the Court, these appeals are allowed to restore the declarations made at first instance. Costs will be dealt with on written submissions in regard to which the parties should seek procedural directions from the Registrar. The Court is indebted to all counsel for their valuable assistance.

(Kemal Bokhary)  
Permanent Judge

(Patrick Chan)  
Permanent Judge

(R A V Ribeiro)  
Permanent Judge

(Henry Litton)  
Non-Permanent Judge

(Lord Hoffmann)  
Non-Permanent Judge

Mr Anderson Chow SC, Miss Eva Sit and Miss Elizabeth Cheung, instructed by Hong Kong Bar Association's Free Legal Service Scheme, for the appellant in FACV9/2011

Mr Eric Chung and Mr Yan Kwok Wing, instructed by Ken Chiu & Co, for the respondents in FACV9/2011

Mr Denis Chang SC, Mr Earl Deng and Miss Carrie Chow, instructed by Rowdget W Young & Co, for the appellant in FACV11/2011

Ms Lisa Wong SC and Mr Keith Lam, instructed by Chong, So & Co, for the respondent in FACV11/2011

- .. *Association v Kwok Wai Kai* [2009] HKEC 986, [2009] HKCU 888, CA. See also *Abbatt v Treasury Solicitor* [1969] 3 All ER 1175, [1969] 1 WLR 1575.
- 2 *Re West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund Trusts, Barnett v Ketteringham* [1971] Ch 1, [1970] 1 All ER 544.
  - 3 *Re Recher's Will Trusts, National Westminster Bank Ltd v National Anti-Vivisection Society Ltd* [1972] Ch 526 at 538-539, [1971] 3 All ER 401 at 407-408; *Conservative and Unionist Central Office v Burrell (Inspector of Taxes)* [1982] 2 All ER 1, [1982] 1 WLR 522, CA (Eng); *Universe Tankships Inc of Monrovia v International Transport Workers' Federation* [1983] 1 AC 366, [1982] 2 All ER 67, HL.
  - 4 See the cases cited in note 2 supra.
  - 5 *Re West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund Trusts, Barnett v Ketteringham* [1971] Ch 1, [1970] 1 All ER 544.
  - 6 See [400.081]-[400.082].
  - 7 See the cases cited in notes 2 and 4 supra.
  - 8 See *St Andrews Allotment Association's Trusts, Sargeant v Probert* [1969] 1 All ER 147, [1969] 1 WLR 229; *Re William Denby & Sons Ltd Sick and Benevolent Fund, Rowling v Wilks* [1971] 2 All ER 1196, [1971] 1 WLR 973; *Re West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund Trusts, Barnett v Ketteringham* [1971] Ch 1, [1970] 1 All ER 544; *Re Sick and Funeral Society of St John's Sunday School, Golcar* [1973] Ch 51, [1972] 2 All ER 439; *Re Bucks Constabulary Widows' and Orphans' Fund Friendly Society, Thompson v Holdsworth (No 2)* [1979] 1 All ER 623, [1979] 1 WLR 936.
  - 9 *Re Bucks Constabulary Widows' and Orphans' Fund Friendly Society, Thompson v Holdsworth (No 2)* [1979] 1 All ER 623, [1979] 1 WLR 936, where Walton J criticised the contrary view of Goff J in *Re West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund Trusts, Barnett v Ketteringham* [1971] Ch 1, [1970] 1 All ER 544.
  - 10 *Re Bucks Constabulary Widows' and Orphans' Fund Friendly Society, Thompson v Holdsworth (No 2)* [1979] 1 All ER 623, [1979] 1 WLR 936; *Re GKN Bolts and Nuts Ltd Sports and Social Club, Leek v Donkersley* [1982] 2 All ER 855, [1982] 1 WLR 774.

#### (iv) Property put into the Name of Another

**[400.107] Effect of purchase in or transfer into another's name**  
 Where a person purchases property<sup>1</sup> in the name of another or in the name of himself and another jointly, or gratuitously transfers property to another or himself and another jointly, then, as a rule, unless there is some further indication of an intention at the time to benefit the other person<sup>2</sup> or some presumption<sup>3</sup> of such an intention, the property is deemed in equity to be held on a resulting trust for the purchaser or transferor<sup>4</sup>. Thus there is a resulting trust where the transfer is into the joint names of the transferor and a minor to whom the transferor does not stand in loco parentis<sup>5</sup>.

So far as improvements are concerned, the general rule is that moneys voluntarily spent by one party on improving property beneficially owned by him and another will not increase the former's proportionate beneficial interest in the property unless the parties specifically agree or exceptionally if such an agreement may be inferred<sup>6</sup>.

- 1 Payment of legal fees, stamp duty and removal costs relating to the purchase are not treated as part of the purchase cost for the purpose of resulting trust: *Curley v Parkes* [2005] 1 P & CR DG 15, [2004] EWCA Civ 1515. ...
- 2 *Earl of Plymouth v Hickman* (1690) 2 Vern 167; *Crop v Norton* (1740) 2 Atk 74; *Maddison v Andrew* (1741) 1 Ves Sen 57 at 61; *Rider v Kidder* (1805) 10 Ves 360; *George v Bank of England* (1819) 7 Price 646; *Currant v Jago* (1844) 1 Coll 261; *Deacon v Colquhoun* (1853) 2 Drew 21; *Wheeler v Smith* (1859) 1 Giff 500; *Garrick v Taylor* (1860) 29 Beav 79; *Beecher v Major* (1865) 2 Drew & Sm 431; *Forrest v Forrest* (1865) 11 Jur NS 317; *Tumbridge v Care* (1871) 19 WR 1047; *Marshal v Crutwell* (1875) LR 20 Eq 328 at 329; *Fowkes v Pascoe* (1875) LR 10 Ch App 343, CA (Eng); *Standing v Bowring* (1885) 31 ChD 282, CA (Eng); *Young v Sealey* [1949] Ch 278, [1949] 1 All ER 92 (where the facts showed an intention to benefit the other person and, even though the gifts were of a testamentary nature and not made according to the Wills Act 1837 (Eng), the transferee's claim was not defeated; followed in *Re Figgis, Roberts v Maclaren* [1969] 1 Ch 125, [1968] 1 All ER 999). The resulting trust may be rebutted as to part of the property or part of the interest in it and remain valid as to the rest: *Benbow v Townsend* (1833) 1 My & K 506 at 510 per Leach MR.
- 3 *Li Hung Chan v Wong Woon Heung (alias Wong Yuen)* (1950) 34 HKLR 215 at 226; *Coultwas v Swan* (1870) 18 WR 746. The court resorts to presumption only where there is no acceptable evidence of actual intention of the provider of the fund: *Re Superyield Holdings Ltd* [2000] 2 HKC 90 at 111 per Recorder Kotewall SC. See also *Lui Kam Lau v Leung Ming Fai* [1994] 3 HKC 477 at 485 per Tong QC DJ. The court needs to resolve the competing presumptions so to arrive at the purchaser's true intention: *Cheung Lily v Commissioner of Estate Duty* [1987] 3 HKC 307 at 312 per Godfrey J; *Lee Cheun Kin v Lee Chak Sum* (unreported, 18 March 1999; HCA 2684/1995) para 9-10, [1999] HKCU 285 per Burrell J; *Wong Wing Tao v Wong Wai Keung* (unreported, 12 March 2003; HCA 1213/2002), [2003] HKCU 244. If evidence supports a finding of actual intention, it is unnecessary to resort to any presumption: *Ip Man Shan Henry v Ching Hing Construction Co Ltd (No 2)* [2003] 1 HKC 256 at 299, per Lam DJ. As to transactions where one party is in loco parentis towards the other, or transactions between husband and wife, see generally [400.109]-[400.111].
- 4 *Comr of Estate Duty v Tse Hong Hung* [1991] 2 HKLR 30, [1991] 1 HKC 46, CA; *Lily Cheung v Comr of Estate Duty* [1988] 1 HKLR 517; [1987] 3 HKC 307; *Anon* (1683) 2 Vent 361; *Gascoigne v Thwing* (1685) 1 Vern 366; *Ambrose v Ambrose* (1716) 1 P Wms 321; *Ryall v Ryall* (1739) 1 Atk 59; *Lloyd and Jobson v Spillet* (1741) 2 Atk 148; *Withers v Withers* (1752) Amb 151; *Dyer v Dyer* (1788) 2 Cos Eq Cas 92; *Finch v Finch* (1808) 15 Ves 43 at 50 per Lord Eldon LC; *Mackreth v Symmons* (1808) 15 Ves 329 at 350 per Lord Eldon LC; *Murless v Franklin* (1818) 1 Swan 15 at 17-18 per Lord Eldon LC; *Field v Lonsdale* (1850) 13 Beav 78; *Pfleger v Browne* (1860) 28 Beav 391; *Haigh v Kaye* (1872) 7 Ch App 469; *Rudkin v Dolman* (1876) 35 LT 791; *Re Policy No 6402 of the Scottish Equitable Life Assurance Society* [1902] 1 Ch 282; *Re Howes, Howes v Platt* (1905) 21 TLR 501; *The Venture* [1908] P 218, CA (Eng); *Shephard v Cartwright* [1955] AC 431, [1954] 3 All ER 649, HL; *Re Vandervell's Trusts (No 2)*, *White v Vandervell Trustees Ltd* [1974] Ch 269, [1974] 1 All ER 47 (revid without affecting this point [1974] Ch 269, [1974] 3 All ER 205, CA (Eng)); *Gross v French* (1975) 238 Estates Gazette 39, CA (Eng). See also *Pettitt v Pettitt* [1970] AC 777, [1969] 2 All ER 385, HL.
- 5 *Re Vinogradoff, Allen v Jackson* [1935] WN 68; *Re Muller, Cassin v Mutual Cash Order Co Ltd* (1955) 72 NZLR 879; cf *Re Sinclair's Life Policy* [1938] Ch 799, [1938] 3 All ER 124 (where a child's endowment policy was taken out by a godfather on his own life for the benefit of his godchild, and no trust was established in favour of the godchild).
- 6 See [400.011].

*Burns v Burns* [1984] Ch 317, [1984] 1 All ER 244, CA (Eng); *Sekhon v Alissa* [1989] 2 FLR 94. See also *Passee v Passee* [1988] 1 FLR 263, CA (Eng).

6 *Harris v Fergusson* (1848) 16 Sim 308; *Pettitt v Pettitt* [1970] AC 777, [1969] 2 All ER 385, HL; *Gissing v Gissing* [1971] AC 886, [1970] 2 All ER 780, HL.

7 Conveyancing and Property Ordinance s 9(1). This section does not apply to a property vesting in trustees or personal representatives: s 9(3).

**[400.109] Advancement or gift to a child** Where a father, or a mother<sup>1</sup> or other person in loco parentis<sup>2</sup> purchases property in the name of a child or transfers property into the name of a child, the transaction does not create a resulting trust for the purchaser or transferor, but is an advancement or gift to the child<sup>3</sup>, unless there is evidence of a contrary intention at the time of the transaction<sup>4</sup> or the circumstances are such as to raise a presumption against the advancement or gift<sup>5</sup>. The rule is the same where a purchase, investment or transfer is made in the joint names of purchaser or transferor himself and a child<sup>6</sup>, or in the joint names of a child and a stranger<sup>7</sup>, or in the name of an illegitimate child towards whom the father has placed himself in loco parentis<sup>8</sup>. However, the rule does not apply to transfers or purchases in the name of a child-in-law<sup>9</sup> or child's fiancée<sup>10</sup>.

In absence of adequate rebuttal evidence, the presumption of advancement bars the presumption of a resulting trust<sup>11</sup>. However, a mere moral obligation to provide for the other person is, however, not sufficient to rebut the resulting trust<sup>12</sup>.

1 *Lee Tso Fong v Kwok Wai Sun* [2008] 4 HKC 36, [2008] 4 HKLRD 270. There used to be generally no presumption of advancement between mother and daughter: *Watson v Smith* [1998] 3 HKC 461, CA; *Bennet v Bennet* (1879) 10 Ch D 474; Deputy Judge To in *Lee Tso Fong v Kwok Wai Sun*, supra, recognized the change in our socio-economic circumstances and the development of the law in other common law jurisdictions, and chose not to follow *Watson v Smith*, supra. Although *Watson v Smith* has not been overruled, nevertheless, the current position should now be that the presumption of advancement should apply to a purchase or transfer of property by a mother, even though not widowed or divorced, although, if a resulting trust were presumed, it would be capable of rebuttal by slight evidence: see *Re De Visme* (1865) 2 De G J & Sm 17; *Down v Ellis* (1865) 35 Beav 578; *Sayre v Hughes* (1868) LR 5 Eq 376; *Bennet v Bennet* (1879) 10 ChD 474 at 479, 480; *Re Orme, Evans v Maxwell* (1885) 50 LT 51; *Gross v French* (1975) 238 Estates Gazette 39, CA (Eng); *Sekhon v Alissa* [1989] 2 FLR 94.

2 See *Yau Kwong-Chiu, Yau Sek-Man v Yau Kwong-Ha* (unreported, 20 February 2001; CACV 448/2000) para 6, [2001] HKCU 147; *Wong San Mui v Ha Pa Yang* (unreported, 8 January 1996; 1993 No A6027), [1996] HKCU 215; *Re Silkease Investments Ltd* [2007] HKEC 2275, [2007] HKCU 2100 (stepson); *Currant v Jago* (1844) 1 Coll CC 261 (nephew of wife); *Ebrand v Dancer* (1680) 2 Ch Cas 26 (grandfather).

3 *Li Po Kwai v Tsang Chuen* (1950) 24 HKLR 61 at 62; *Scroope v Scroope* (1633) 1 Cas in Ch 27; *Lord Grey v Lady Grey* (1677) 2 Swan 594; *Baylis v Newton* (1687) 2 Vern 28; *Taylor v Taylor* (1737) 1 Atk 386; *Stileman v Ashdown* (1742) 2 Atk 477 at 480 per Lord Hardwicke LC; *Rumboll v Rumboll* (1761) 2 Eden 15; *Dyer v Dyer* (1788) 2 Cox Eq Cas 92; *Finch v Finch* (1808) 15 Ves 43; *Dummer v Pitcher* (1835) 2 My & K 262 at 272 per Lord Brougham LC; *Sidmouth v Sidmouth* (1840) 2 Beav 447; *Re*