1999, No.M.P.646

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

BETWEEN

WU WING KUEN	Plaintiff
and	
LEUNG KWAI LIN CINDY	Defendant

Coram : The Hon. Mr. Recorder Tang S.C. in Court
Date of hearing : 22nd June, 1999
Date of handing down judgment : 9th July 1999

JUDGMENT

By an Agreement dated 18th December 1998, the Plaintiff agreed to purchase Flat E on the 6th floor of Han Palace Building, Nos.441-447 King's Road, Hong Kong ("the Property") from the Defendant.

The price was $1,138,000 and a deposit of $113,000 was paid.

The sale was not completed because of a dispute over title.

The dispute arose out of the inability on the part of the Defendant Vendor, to produce the Power of Attorney pursuant to which an Assignment dated 28th June 1991 ("the 1991 Assignment") was executed.

Miss Diana Cheung, who appeared on behalf of the Defendant, has argued that the 1991 Assignment was not an intermediate root of title, although she accepts that it was part of the chain of title. I do not believe it matters.

It is obvious that, subject to the Government Lease, the root of

title starts with the Assignment dated 2nd August 1960, and the property devolved to the Defendant through the 1991 Assignment.

The Vendor acquired the Property from Restart Design Limited by an Assignment dated 1st April 1998. Restart Design Limited in turn derived its title from the 1991 Assignment from Chan Sin Fong. Chan Sin Fong acquired her title from Trade Win Development Limited by an Assignment dated 10th February 1990 who acquired its title from Root Power Co. Ltd. Root Power Co. Ltd. in turn acquired the Property from Wong Suk Yee who acquired her title by an Assignment dated 2nd August 1960.

It is obvious that the 1991 Assignment is an essential link in the chain of title. It seems to me that it makes no difference whether it is described as a link in the chain of title or an intermediate root of title.

It follows that it is critical to the devolution of good title that the 1991 Assignment should have been validly executed.

Section 13(1)(c) of the Conveyancing and Property Ordinance Cap.219 provides:

> "production of any power of attorney under which any document produced is executed where that document was executed less than 15 years before the contract of sale of that land"

Now, the Vendor was unable to produce either the original Power of Attorney, or a certified copy under s.13(2)(b) CPO.

That being the case, the Purchaser argues that he is entitled to refuse to complete. He claims, inter alia, for return of his deposit.

s.13 CPO has been the subject of a number of decisions at first instance. Before I come to deal with them, I wish to consider how the matter might be approached as a matter of principle.

In a conveyancing transaction, the vendor has to show as well as to give good title. s.13(1) and (2) are concerned with the showing of good title. The obligation to produce original documents arises at the giving of good title on completion.

In Ng Chek-bok v Kiu Wai-ming 1992 1 HKLR5 at 14, Clough J.A. in delivering the judgment of the Court of Appeal distinguished.

> "between the date when the vendor was required to show a good

title (by production of copies of all the documents relating to his good title) and the date (the completion date) by which he was required to make a good title (by proving it as a matter of evidence)"

However, when Clough J.A. spoke of showing a good title by production of copies of all the documents relating to title, I think he was referring to the Hong Kong conveyancing practice, whereby instead of an abstract of title, the vendor's solicitors would simply provide copies of documents relating to his title.

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 [1898] 1 Ch.419.

In Yiu Ping Fong and another v Lam Lai Hing [1999] 1 HKLRD793, Yuen J. said, that although the vendor had satisfied s.13(2) CAPO by the production of a certified copy of an assignment, at the showing of title stage,

"Section 13(2) does not, in my judgment, exonerate the vendor from producing at completion the originals of such title deeds and documents, at least those that relate exclusively to the property being sold" p.798

Yuen J. cited Williams on Title (4th edition) at 547 in support.

Yuen J. then went on to say that at p.799

"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 (see Emmet on Title, #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"

In Halkett v Dudley [1907] 1 Ch.590 a case concerning the purchase of real property in England under an open contract, Parker J. said at p.604

"I take the common law principle to be that when a party proves that he is not in a position to adduce primary evidence, for example, that the document in question is lost or cannot be found, or that it is of record in a foreign country the laws of which

do not admit of its production, he is at liberty to give secondary evidence of its contents"

Thus, it is clear that at common law, title could be proved by secondary evidence. Also on completion if the original is lost or destroyed, then provided that is sufficiently proved, non production would be excused.

Now the question is whether secondary evidence is permissible at the *showing* of title stage. This will involve a construction of s.13(1) and (2). What I have to decide is whether "unless the contrary intention is expressed" ... secondary evidence (apart from those provided for in s.13(2)) is admissible.

In other words, whether even if there is sufficient secondary evidence (say in the form of a sufficient statutory declaration) of an assignment which is a link in the chain of title, but in the absence of provisions to the contrary, the vendor must be regarded as having failed to *show* a good title, such that the purchaser may rescind.

Now, if this is the legal position, the effect on the marketability of the property may be substantial. It is common knowledge that in Hong Kong, it is not uncommon for properties to be contracted to be sold by a provisional agreement. Such provisional agreements are often not drafted by solicitors. A solicitor who has the task to advise a client on a purchase will be bound to advise the client to consider carefully the effect which the necessity for a contrary intention may have on the value of his property. He must advise his client that he must not enter into-a provisional agreement unless he were to add such a provision. Realistically, it will mean that no provisional agreement can be entered into. A conveyancer might say, so much the better. But a conveyancer is not concerned with the dynamics of the property market in Hong Kong. All things being equal, a purchaser will prefer to buy a property which does not come with this special requirement. Properties are often treated like commodities in Hong Kong. A flat in Taikoo Shing with such a handicap is likely to be worth less than one without.

Thus, one must not think that the requirement of contrary expression is a matter of no consequence. A solicitor will be failing in his duty not to advise the client clearly of its consequence. Such advice may abort a transaction.

That being the case, one must accept that any interpretation of s.13(1) and (2) which makes it impossible (in the absence of a contrary

expressed intention) to show title by secondary evidence may have serious consequence.

Is there any compelling reason why secondary evidence should not be admissible at the showing of title stage? Yiu Ping Fong and another v Lam Lai Hing [1999] 1 HKLRD793 is authority that on completion, secondary evidence such as a statutory declaration is admissible. Is there any reason why at the showing of title stage, the requirement should be more stringent?

Personally I can see no reason. If that is indeed required, it must be because the language of s.13(1) and (2) require no less. Now s.13(1) can be compared with s.45(1), The Law of Property Act 1925. Section 45(1) provides, where relevant:

> "(I) A purchaser of any property shall not -
>
> require the production, ... of any deed, ... or made before the time prescribed by law, or stipulated, for the commencement of the title, ...;
>
> Provided that this subsection shall not deprive a purchaser of the right to require the production, or an abstract or copy of -
>
> (i) any power of attorney under which any abstracted document is executed; or
>
> (ii) any document creating or disposing of an interest, power or obligation which is not shown to have ceased or expired, and subject to which any part of the property is disposed of by an abstracted document; or ..."

In England, secondary evidence is permissible notwithstanding s.45(1) LPA. Did the legislature intend otherwise in Hong Kong by s.13(1)?

The Vendor's Obligation at Common Law

At common law, a vendor under an open contract has the duty to show he has the right to convey the land he has contracted to sell. However, since long-held possession is prima facie evidence of good title, the practice has grown up amongst conveyancers whereby proof of title for not less than 60 years before the contract was held to be proof of a good title if nothing appeared to the contrary.

Originally, the rule merely placed an upper limit on the amount of evidence which the purchaser could require but he was not debarred from objecting to the title if he can produce evidence on a transaction more than 60 years old which shows that the title was bad. However, the Courts have since laid down the requirement that in order to constitute a defect in the Vendor's title, there must be a real danger that a third party can successfully challenge his possession. Thus in cases where the defect is very old and the third party is likely to be barred by limitation and laches, the purchaser would not be allowed to rely on an illusory risk as the basis for objecting to the Vendor's title.

In addition, upon a sale of leasehold land, the practice was to require production of the lease even if it was more than 60 years old, but after the date of the lease the title during the 60 years next before the date of the contract was all that could be required (see Frend v Buckley (1870) LR5 QB213).

Over the years, the period over which the Vendor has to prove his title has been progressively reduced by statute to fifteen years.

See the helpful discussion in Farrand. Contract and Conveyance, 4th edition, pp.95-96.

Evidence on which title may be proved

Although the best and the usual evidence of title is production of the title deeds, it has never been the law that deeds are the only evidence on which the purchaser is bound to accept (see Williams on Vendor and Purchaser, 3rd edition, at p.121). Thus in Frend v Buckley, the purchaser was said to be entitled to proof of the contents of the lease (and not necessarily sight of the indenture granting the lease) per Kelly, C.B. at p.217.

The possibility that satisfactory evidence of title might be proved by secondary means was expressly recognised in the case of Bryant v Busk (1827) 4 Russ 1 and Moulton v Edmonds (1859) 1 De GF&J246, although in Re the Halifax Commercial Banking Co. Ltd. and Wood (1898) 79 LT536 Chitty L.J. added the qualification that such evidence ought to be clear and cogent.

The principles derived from the cases may be summarised as follows:

(1) Before secondary evidence can be relied on, the Vendor must prove the loss or destruction of the deeds concerned

(2) The Vendor must be able to make out the material terms of the lost or destroyed deed

(3) The Vendor must prove that the deed was duly executed and stamped, although the Vendor may be able to rely on the presumption of its due execution.

Section 13 of the Conveyancing and Property Ordinance Cap.219

The crucial issue in this case concerns the interpretation of s.13 CPO which reads:

"13. Proof of title and recitals

(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 and -

(a) proof of title to that land -

(i) ...

(ii) ... *extending not less than 15 years* before the contract of sale of that land commencing with an assignment ... (*emphasis added*)"

In my view, s.13 of the CAPO must be read against the pre-existing position at common law. The use of the word "only" in s.13 of the CAPO belies the clear intention of the legislature, that is, to put an upper limit on the amount of conveyancing evidence on title which a purchaser is entitled to demand from the vendor. In other words, what is set out in s.13 is the *maximum* which a purchaser is entitled to demand from the Vendor, "unless the contrary intention is expressed", but in no way prescribes against the Vendor proving his title by other means in accordance with established conveyancing practice (including, where appropriate, satisfactory secondary evidence of the Crown Lease).

Section 13 is concerned with the proof of title. According to Phipson on Evidence, 14th edition,

"... originally, at common law, no secondary evidence was allowed;

if the deed was lost, or in the possession of the adversary, the plaintiff failed. Afterwards, in cases of loss, equity relieved; then exceptions were allowed by common law also, marshalled, however, at first, strictly by degree, i.e. a counterpart, then a copy, then an abstract of recital, then parol evidence, the next best thing being let in only if the class above it were unavailable. Finally, the present rule of 'no degrees in secondary evidence' became established" 7 - 17

What is now left of the best evidence rule is that

"if an original document was available in one's hands it must be produced" 7 - 15

In my opinion, it is important not to confuse s.13(1) with e.g. a contractual right or the right at common law to the original title deeds. s.13(1) is concerned with the showing of title. The latter are concerned with the giving of title.

Nor is s.13(2) inconsistent with the admission of other secondary evidence. s.13(2) enables the vendor to produce a certified or attested copy at the showing of title stage even though the original might be available. In other words, it cuts down the best evidence rule.

Thus, if the matter were free from authorities, I will decide that secondary evidence (apart from those provided for under s.13(2)) is admissible at the showing of title stage.

In my opinion, Re The Halifax Commercial Banking Co. Ltd. and Wood (1898) 79 LT536 is a decision in support of this view.

Lindley M.R. said in his judgment (at p.539)

"The purchaser was willing to complete, but the vendors could not produce the deeds, they having been unfortunately lost by their solicitors after the contract had been signed. There is no condition providing for the non-production of lost deeds. But the mere fact of their loss does not release the purchaser from the performance of his contract. He can be compelled to complete if he is furnished in proper time with satisfactory secondary evidence of the lost documents. This was decided in Bryant v Burk (4 Russ.1) and Moulton v Edmunds (1 De G.F.&J.246)"

Chitty L.J. agreed with Lindley M.R. and added (p.539)

"The two authorities cited of Bryant v Burk (ubi sup.) and Moulton v Edmunds (ubi sup.) show that the court of equity will force a purchaser where the deeds are supposed to have been lost to take the title upon secondary evidence as to the contents of the deeds, and their having been duly executed and duly stamped. But in my opinion the secondary evidence produced ought to be clear and cogent. Without casting any reflection upon those two authorities, it is quite certain that to some extent the purchaser by this doctrine is put in a worse position than he otherwise would be if he had the deeds - either the deeds delivered to him, or a proper covenant, or acknowledgment under the Conveyancing Act equivalent to a covenant, for production. He is in a worse position, because on a sale he would have to make special conditions; and if he proposed to mortgage he would get no mortgagee who would take his title. Therefore, I must say, without in the least disputing the authority of those two cases, that the evidence ought to be clear and cogent, so that the purchaser may maintain his title against all those who may attack him when he is in possession, and so that he may pass on the title in the ordinary way in the market to a purchaser or to a mortgagee"

The passage from Chitty L.J.'s judgment is important, because according to him, if there were cogent and clear secondary evidence, the purchaser could

"maintain his title ... and so that he may pass on the title in the ordinary way in the market to a purchaser or to a mortgagee"

In "the ordinary way" means that he would not have "to make special conditions", in other words, no need for any special provision.

Williams L.J. concurred, with reluctance, with the view of the majority that although sufficient secondary evidence would have sufficed, the vendor had failed to adduce sufficient secondary evidence.

It is to be noted that in the course of Counsel's submission, Chitty L.J. asked Counsel for the vendor

"Chitty L.J. - Do you say that you can give secondary evidence of a deed where the contract of sale provides that you shall produce the deed itself?

Counsel answered - No; but the contract here is not to produce a particular deed"

It does not appear from the report that any of their Lordships agreed with Counsel's answer.

Now Re Halifax is cited in Emmet on Title no less than 5 times. However, only 2 references are relevant for the present purpose.

> "5.091 Missing documents - Where the vendor is unable to produce documents because they have been destroyed or lost, he is permitted instead to produce secondary evidence of the contents of the documents (*Re Halifax Commercial Banking Co. and Wood* (1898) 79 LT536; *Halkett v Dudley* [1907] 1 Ch.590). Here, however, the due execution of the missing documents has to be proved, not presumed (*Bryant v Busk* (1827) 4 Russ 1). Again, the loss of the documents must be proved (*Re Duthy and Jesson* [1898] 1 Ch.419), although a statutory declaration as to this will usually suffice (*Hart v Hart* (1841) 1 Hare 1). Due stamping of such missing documents will be presumed (ibid)"

> "21.017 Lost or destroyed deeds-The fact that the title deeds to property should have been lost will not release the purchaser from the performance of his contract, and he can be compelled to complete if the loss be proved, and he is furnished in proper time with satisfactory secondary evidence as to the contents of the lost documents and (for example, by statutory declaration) as to their having been duly executed (Re *Halifax Commercial Banking Co. Ltd. and Wood* (1898) 79 LT536)

I have been unable to find in Emmet any reference to the exchange between Counsel and Chitty L.J.

Re Halifax is also cited in Williams on Title. No reference was made to the exchange between Chitty L.J. and Counsel. Nor any suggestion that Counsel's answer represented the law.

In my opinion, Re Halifax is no authority that if a contract requires the production of an original document, but the original is lost, no secondary evidence is admissible.

The Case Law on Section 13 CAPO

I have considered the following cases:

(1) Chan Kam Sing v Lam Ping Ping Grace [1990] 1 HKC373 (8/3/90) Deputy Judge Findlay Q.C.

(2) Yeung Dallah Rudin v Copiluck Limited 1992 2 HKC575 (24/11/92) Woo J.

(3) Gold Check Investments Limited v Star Investment Limited (M.P.592/92. unreported) (8/4/92) Godfrey J.

(4) Gatewood Limited v Silver Noble Investment Limited [1992] 2 HKC473 (25/9/92) Barnett J.

(5) Wong Wai Ming v Tang Tat Chi [1993] 1 HKC341 (15/2/93) Patrick Chan J.

(6) Tong Yuen King v Chan Chong Emma M.P.2949/95 (31/10/95) Yam J.

(7) BMC International Limited v Star Win Co. Ltd. [1996] 2 HKC302 (16/1/96) Rogers J.

(8) Yiu Ping Fong and another v Lam Lai Hing [1999] 1 HKLRD793 (23/9/98) Yuen J.

(9) Lee Lai Sheung Karita and Wai In Fun Perseus v Wei Fei Trading Co. Ltd. M.P.1315/98 (8/3/99) Yuen J.

(10) Cheng Shu Keung v So Wing King [1998] 1 HKC495 (28/11/97) Le Pichon J.

(11) Lo Miu Ling Cindy v Tam Hung Ping [1998] 4 HKC238 (18/6/98) Sakhrani J.

(12) Liu Tak Kin and another v Chan Yiu Kai and another [1998] 4 HKC362 (23/7/98) Deputy Judge Chung

I think it is possible to say that (2), (3), (7), (8), (9) and (10) are consistent with secondary evidence being admissible notwithstanding s.13(1). The others are against.

Chan Kam Sing v Lam Ping Ping Grace [1990] 1 HKC373 is a case where in place of a lost Block Crown Lease, the Vendor produced an uncertified photostatic copy from a copy which in turn was reproduced from a copy of the lease obtained by someone else from the District Land Registry before the original went astray. Deputy Judge Findlay Q.C. (as he then was) took the view that s.13 of the CPO had the effect of incorporating into every contract, unless the contrary intention was expressed, a strict requirement that the vendor produce the deeds and

he said, at p.375C - D:

> "Where, however, the contract or, a fortiori, the law itself entitles the purchaser to require that the vendor produce the deeds, I do not think the (Halifax) case is authority for the view that the court may dispense with this requirement. At p.537 of the report of Halifax, Chitty L.J. asks counsel for the vendor in that case: 'Do you say that you can give secondary evidence of a deed where the contract of sale provides that you shall produce the deed itself?' Counsel replies: 'No, but the contract here is not to produce the particular deed'. Counsel was right. In that case, the contract required only that the vendor deliver an abstract of title to the property concerned"

The Learned Judge appears to have translated the words "the purchaser of land shall be entitled ... *only* production of the Crown lease" in s.13 of the CPO to "the defendant is entitled to require from the plaintiffs production of the Crown lease" (see p.374H - I). The proposition of the Learned Judge quoted above is not borne out by Re the Halifax Commerical Banking Co. Ltd. and Wood. It did not decide that the Vendor's obligation might have been different if the contract had provided for production of the deeds. Re Duthy & Jesson's Contract and Halkett v Earl of Dudley referred to above show that although at common law, the vendor has to deliver the original deeds on completion, secondary evidence is admissible if such deeds are lost.

In any event, no evidence tracing the copy document produced back to the original that was in the custody of the District Land Registry was-offered; and in those circumstances Deputy Judge Findlay Q.C. was not satisfied that the document produced represented the true terms of the Crown Lease. It is clear that the finding can be explained on the basis of the lack of cogency of the evidence and the opinion of Deputy Judge Findlay Q.C. on s.13 CPO was strictly unnecessary for the decision.

Yeung Dallah Rudin v Copiluck limited 1992 2 H.K.C.575 is a direct authority in favour of the admission of secondary evidence notwithstanding s.13(1) CPO. However, the decision of Deputy Judge Findlay was not cited to the learned Judge. He followed Re Halifax.

Gold Check Investments Limited v Star Investment (M.P.592/92, unreported) concerns a contract which contained a clause requiring the vendor "to furnish to the purchaser such certified copies of any deeds or documents of title as may be necessary to prove title". The vendor was unable to supply the Crown Lease (which probably never existed) but

offered instead a number of documents on Government files including the records of land auction concerning the property. When Godfrey J. observed that "s.13(1) of the CPO makes it clear that a purchaser of land is entitled to production of the Crown Lease relating to the land sold. That is a matter which goes to the root of the title", it is clear that he was only dealing with the question of whether the purchaser's requisition about the absence of the Crown Lease was raised out of time. The possibility of showing good title by secondary evidence of the Crown Lease was expressly recognised when the Learned Judge went on to remark that "if (the vendor) had offered the purchaser a statutory declaration explaining (if it could) why the original Crown Lease, or contract incorporating the Conditions of sale, was not available (offering the other documents to which I have referred in this judgment as sufficient conveyancing evidence of the sale to U.U. Pun) that would have been another matter. But merely to provide these copy documents without any such condition ... as if they were, in themselves sufficient conveyancing evidence of the Crown Lease or of the contract of its grant, was not, in my judgment, enough". Again, the decision was clearly based on the ground that the secondary evidence produced was not sufficiently clear and cogent. However, Chan Kam Sing had not been cited to the learned Judge. I regard this decision to be in favour of admission of secondary evidence.

In Gatewood Limited v Silver Noble Investment Limited [1991] 2 HKC473, the vendor did not dispute that it must produce the Crown Lease if required by the purchaser to do so; and the arguments turned on the effects of the New Territories (Renewable Crown Leases) Ordinance instead. In those circumstances, the assumption of Barnett J. that s.13 CPO entitled a purchaser to production of the Crown Lease in the form of a tangible document must not be given undue weight.

The issue in Wong Wai Ming v Tang Tat Chi [1993] 1 H.K.C.341 was the use of secondary evidence as proof of the contents of a certified copy of the Crown Lease which was illegible. In his judgment, Patrick Chan J. expressed the view that the cases of Gatewood Limited v Silver Noble Investment Limited, Gold Check Investments Limited v Star Investment Limited and Chan Kam Sing v Lam Ping Ping Grace are authorities that notwithstanding the position at common law, s.13 CAPO imposes upon the vendor a statutory obligation to produce the Crown Lease unless otherwise varied by agreement.

At 345F, the learned Judge, said

"While secondary evidence may be adduced to discharge the

obligation to show good title if certain documents are lost, it cannot do away with the obligation to produce the documents if the statute so stipulates. The principle in the Halifax case therefore has no application when it comes to compliance with the statutory requirement"

Tong Yuen King v chan Chuen Chong Emma (1995, No.M.P.2949, 31/10/95) is an unreported decision of Yam J. where the learned Judge followed the decisions of Dep. Judge Findlay and Patrick Chan J. This is a direct decision that under s.13(1) no secondary evidence is admissible.

The decision of Rogers J. in BMC International Limited v Star Win Co. Ltd. left the position open. Whilst accepting the purchaser's argument that s.13 CAPO entitled it "to require from the vendor as proof of title to the land production of the Crown lease relating to the land sold", the Learned Judge appears to have recognised the possibility of proof of the Crown Lease by secondary means when he said "neither in my view can the vendor rely on the production of a statutory declaration ... as referred to Godfrey ... . In the first place, the statutory declaration which has been tendered seems to me to prove nothing save hearsay, at best, speculation as to conveyancing practice. In the second place, the conditions have not been produced".

Yiu Ping Fong and another v Lam Lai Hing [1999] 1 HKLRD793 where Yuen J. examined s.13 carefully and underlined the important difference between the Vendor's title to prove his title (which is covered by s.13(1) and (2), and the purchaser's right hence the Vendor's obligation) on completion to have possession of the original title deeds. I have already dealt with this decision earlier and will return to it later in my judgment. I think this authority can be regarded as being consistent with the admissibility of secondary evidence under s.13(1).

Lee Lai Sheung Karita and Wai In Fun Perseus v Wei Fei Trading Co. Ltd. M.P.1315/98, 8/3/99) an unreported decision of Yuen J. There, the vendor as unable to produce the Crown Lease. Nor was there any record of it at the Land Registry or the Lands Department. Yuen J. said

"The vendor's obligation under s.13 Conveyancing and Property ordinance is to produce the Government Lease. By that is meant that the vendor is obliged to produce a tangible document". Wong Wai Ming v Tang Tat Chi [1999] 1 H.K.C.341)

However, later in her judgment, Yuen J. made the further point

that the vendor was unable to prove the terms of the conditions of sale and thus the vendor was in a worse position than the vendor in Gold Check, thus I believe it is possible to regard this decision not as a direct decision against the admission of secondary evidence under s.13.

Cheng Shu Keung v So Wing King 1998 1 HKC495 at 497, Le Pichon J. held that it was unnecessary for her to decide whether the Chan Kam Sing and Wong Wai Ming cases were wrongly decided. Moreover, she regarded Dep. Judge Findlay as having drawn a distinction between a root of title document and other title deeds. 497D.

Lo Miu Ling Cindy v Tam Hung Ping [1998] 4 H.K.C.238 (Sakhrani J, 18/6/98). The learned Judge following Chan Kam Sing and Wong Wai Ming held that s.13 provided that unless the contrary intention was expressed, the vendor's obligation was to produce as proof of title the original Crown Lease relating to the land sold or as permitted by subsection (2) a certified copy. And that s.13(2) requires a true copy of the original document.

Liu Tak Kin and another v Chan Yiu Kai and another [1998] 4 H.K.C.362, Dep. Judge Chung (as he then was), followed Yeung Dallah Rudin v Copiluck. It seems that Chan Kam Sing v Lam Ping Ping Grace had not been cited to the learned Judge.

Now as will be obvious, there are conflicting authorities on the subject. I am aware of the importance of consistency. It is vital to the profession that the law on the subject should be consistent. They are otherwise in an impossible position. Whichever way I turn, it will only add to the uncertainty. The sooner the matter is settled by a higher court the better.

However, given the 2 lines of authorities on the subject, I believe I am bound to choose between them.

There is no real dispute that here, there is sufficient secondary evidence. The only issue is whether secondary evidence is admissible under s.13(1).

Now s.13(1) is silent as to the consequence of a failure to comply with s.13(1). Must the consequence be, that whatever the circumstances, the purchaser is entitled to rescind? If not, I can see no reason why the purchaser should be entitled to rescind if there is clear and cogent secondary evidence which should according to Chitty L.J. in Re Halifax, enable the purchaser to "pass on the title in the

ordinary way in the market to a purchaser or to a mortgagee".

I bear in mind Homyip Investment v Chu Kang Ming Trade Development Co. Ltd. [1995] 2 HKC458 at 466 where the distinction between the breach of a condition and an intermediate/innominate term of a contract is explained. Here, the Agreement for Sale and Purchase provides, as is usual, that "such of the muniments of title as relate exclusively to the Property will be delivered to the Purchaser ..." Clause 7. This is also what the common law requires. Re Duthy and Jesson's Contract. However, Halkett v Dudley is authority that secondary evidence is admissible.

Returning to the exchange between Chitty L.J. and Counsel in Re Halifax, can it be said that when a contract expressly provides for what the law would imply at common law, secondary evidence would not be admissible? I think not.

Nor is it possible for me to conclude that Clause 7 in this case, unlike the "as is" clause in Homyip is necessarily a condition rather than an intermediate/innominate term.

I believe the better view is that s.13(1) does not render inpermissible the production of secondary evidence at the showing of title.

I return to the issue before me.

The Vendor is unable to produce the Power of Attorney pursuant to which the 1991 Assignment was executed. Under s.13(1)(c) the purchaser is entitled to require its production or a certified copy (s.13(2)). Is secondary evidence acceptable? Now, if the Vendor had the original 1991 Assignment at the showing of title stage so that s.13(1) was satisfied, but the original was lost prior to completion and a certified copy could not be provided, Yiu Ping Fong and another v Lam Lai Hing is authority that sufficient secondary evidence will suffice. That will be so even though at common law, the Vendor is obliged to provide the original 1991 Assignment.

But if that is so, is it fair to the purchaser? Because, if at the showing of title stage, the original or a certified copy is necessary, the purchaser will not in turn be able to comply with s.13(1). How does that stand with Chitty L.J.'s insistence that the secondary evidence should be clear and cogent "so that he may pass on the title in the ordinary way in the market to a purchaser or to a mortgagee". It seems to me illogical to conclude that secondary evidence is admissible on

completion but not at the showing of title stage. Though on the facts of Yiu Ping Fong, it would not arise because the vendor was able to produce a certified copy. But it seems to me the logical effect of Chan Kam Sing v Lam Ping Ping Grace is that secondary evidence is not admissible (apart from under s.13(2)) at the showing as well as the giving of title stage. Were it otherwise, then the purchaser will not in turn be able to comply with s.13(1).

Bearing in mind the judgments of Woo J, Godfrey J., Yuen J. and Dep. Judge Chung, I am of the view that I am entitled to find that secondary evidence of the Power of Attorney is admissible.

I have come to this conclusion with regret. That is because the consequence is that the purchaser plaintiff will not be able to recover the deposit paid. On the existing state of the authorities, the Plaintiff's legal advisers had no choice but to advise the Plaintiff that acceptance of secondary evidence may affect the title. As it is, I have come to a contrary decision. I hope this judgment will explain to the Plaintiff how the law on the subject is uncertain. Unfortunately, it will provide little consolation to the Plaintiff that although the requisitions were rightly raised, he should have to bear the consequence of an adverse decision by me. I can only hope that the uncertainty will be cleared up by a higher court as soon as possible.

The Plaintiff's claim is dismissed. I regret to say that costs must follow the event. I made an Order Nisi accordingly.

(Robert Tang Ching)
Recorder of the Court of First Instance

Chung Boey instructed by Messrs. Lam & Lau for Plff.
Diana Cheung instructed by Messrs. Chong, So & Co. for Deft.

CACV 240/1999

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 240 OF 1999

(ON APPEAL FROM HCMP 646/1999)

BETWEEN

WU WING KUEN	Plaintiff
and	
LEUNG KWAI LIN CINDY	Defendant

CACV 273/1999

CIVIL APPEAL NO. 273 OF 1999

(ON APPEAL FROM HCMP 5179/1998)

BETWEEN

IP FOO KEUNG MICHAEL and CHAN LING WEN ELAINE	Plaintiffs
and	
CHAN PAK KAI	Defendant

Court : Godfrey and Keith, JJ.A and Ribeiro, J.

Hearing : 26 October, 1 and 2 November 1999

Judgment : 23 November 1999

JUDGMENT

Godfrey, J.A.:

Introduction

These are conjoined appeals from Mr. Robert Tang, S.C. (sitting as a Recorder of the Court of First Instance of the High Court), who gave the judgments under appeal, in the two cases which he had to decide, on 9 July 1999. In one case, to which I shall refer as "the first case", he had to decide whether the inability of a vendor to produce to his purchasers the original of an agreement (for the grant of a Crown Lease) dated 5 October 1889, entitled the purchasers to call off their contract. In the other case, to which I shall refer as "the second case", he had to decide whether the inability of a vendor to produce to her purchaser the original (or a properly attested or certified copy) of a power of attorney, pursuant to which an assignment dated 28 June 1991 (on which the vendor's title depended) had been executed, similarly entitled the purchaser to call off his contract. The Recorder, accepting that the secondary evidence produced by the vendor in each case was sufficient evidence, in the first case of the contents and due execution of the agreement and in the second case of the contents and due execution of the power of attorney, resolved both cases against the purchasers, who now appeal to this court. Their appeals raise questions of considerable importance to conveyancers, and I wish, at the outset of this judgment, to express my gratitude to counsel for the wide-ranging arguments which they presented to us.

The first case

In this case, the agreement of 5 October 1889 was the root of the vendor's title. The Recorder said of it:

> "The Agreement cannot be found. Neither the District Lands Office nor the Land Registry has any record of the Agreement ... [but] if secondary evidence is admissible, there is sufficient secondary evidence of the Agreement. Its contents can be found in Praya Reclamation Ordinance of 1889 ... Moreover the Agreements relating to other sections of the Praya Reclamation ... are still available ... The Parties to the Agreement can be found in the Assignment ... dated 1 October 1972."

We have to decide whether the purchaser was bound to accept this secondary evidence as proof of the agreement, as the Recorder held, or whether the inability of the vendor to produce the original agreement entitled the purchaser to throw up the contract. (Since, for reasons which will appear, I am of the opinion that the purchaser *was* bound to accept the secondary evidence offered as proof of the agreement, I need not deal with other arguments which were advanced to us on the footing that the purchaser was *not* so bound.)

The second case

In this case, the assignment of 28 June 1999 was, as the Recorder held:

> "... an essential link in the chain of title ... It follows that it is critical to the devolution of good title that the 1991 Assignment should have been validly executed ... There is no real dispute that here, there is sufficient secondary evidence [of the contents and execution of the power of attorney]."

We have to decide whether the purchaser was bound to accept that secondary evidence as "proof of the power of attorney", as the Recorder held, or whether the inability of the vendor to produce the original power of attorney, or a properly attested or certified copy of it, entitled the purchaser to throw up the contract. (However, although the Recorder thought "there was no real dispute" about the sufficiency of the secondary evidence, we permitted the purchaser to argue in this court that, even if the purchaser *was* bound to accept sufficient secondary evidence of the power of attorney, the secondary evidence tendered by

the vendor was *not* in fact sufficient to prove either its contents or its due execution, and I shall have to deal with this argument later in this judgment.)

Section 13 of the Conveyancing and Property Ordinance (Cap. 219)

Much of the argument before us focused on this section. It will be convenient now to set out its provisions in full; but I would first remark that we have to construe the section in the context of the practice of conveyancers with which it is concerned. We should not give the words used by the legislature the meaning they might have "to a non-lawyer who was unacquainted with their history" : see the speech of Lord Hoffmann in *Southwark LBC v. Mills* [1999] 3 W.L.R. 939 at p. 945B.

"13. **Proof of title and recitals**

(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 Government lease relating to the land sold and-

(a) proof of title to that land-

(i) where the grant of the Government lease was less than 15 years before the contract of sale of that land, extending for the period since that grant; or

(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;

(b) production of any document referred to in the assignment, mortgage or charge mentioned in paragraph (a) creating or disposing of an interest, power or obligation, which is not shown to have ceased or expired and subject to which any part of that land is disposed of; and

(c) production of any power of attorney under which any document produced is executed where that document was executed less than 15 years before the contract of sale of that land.

(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.

(3) Subject to subsection (1), where any document produced as proof of title to any land contains a recital of any document dated or made before the date from which a vendor is required to prove title, the purchaser of that land shall assume, unless the contrary is proved, that-

(a) the recital is correct;

(b) the recital gives all the material contents of the document recited; and

(c) the document recited was duly executed and perfected.

(4) A recital, statement, and description of any fact, matter or party contained in any document of title, mortgage, declaration or power of attorney relating to any land and dated or made not less than 15 years before the contract of sale of that land shall, for the purposes of any question as to proof of title concerning the parties to that contract and unless the contrary is proved, be sufficient evidence of the truth of that recital, statement and description.

(4A) Where any document is or has been produced by a vendor as proof of title to any land and that document purports to have been executed, not less than 15 years before the contract of sale of that land, under a power of attorney, it shall for the purposes of any question as to the title to that land be conclusively presumed-

(a) as between the parties to that contract; and

(b) in favour of the purchaser under that contract as against any other person,

that the power of attorney-

(i) was validly executed;

(ii) was in force at the time of the execution of that document; and

(iii) validly authorized the execution of that document.

> (5) This section affects only the rights and obligations of the parties to a contract for the sale of land entered into after the commencement of this section."

For my part, I have no doubt that this section was not intended to make, nor did it make, any change in the law as to the *quality* of the evidence which a purchaser of land is entitled to require from the vendor as proof of title to that land.

Before section 13 was enacted, the law was that:

> "... when a party proves that he is not in a position to adduce primary evidence, for example, that the document in question is lost or cannot be found ... he is at liberty to give secondary evidence of its contents."

(see *Halkett v. Earl of Dudley* [1907] 1 Ch. 590 per Parker J. at p.604, cited by the Recorder).

Unless his contract with the vendor provides that the purchaser shall be entitled to *primary* evidence of the document (i.e., the production of the original), a provision I have never seen, or even heard of, in 40 years' conveyancing experience, the purchaser must, when primary evidence is not available, accept sufficient secondary evidence in its stead, though such evidence will *be* sufficient only if it is "clear and cogent" (as Chitty L.J. remarked in *In re The Halifax Commercial Banking Co. Ltd. and Wood* (1898) 79 LT 536, at p.539, also cited by the Recorder). What is required, in the case of a document of title which is lost or cannot be found, is (clear and cogent) secondary evidence of the contents of the instrument and of its having been duly executed : see *Bryant v. Busk* (1827) 4 Russ 1.

That, in my judgment, is still the law, as well after as before the enactment of s.13. Section 13(1) was intended simply to facilitate conveyancing by reducing the length of time for which the vendor has to prove his title. He must start with the Crown (now Government) Lease from which he derives his title. It if is lost, or cannot be found, he must produce clear and cogent secondary evidence of its contents and due execution (the same applies to an agreement for a Crown Lease which is to be treated as a Crown Lease : see section 14 of the Ordinance). But, having done that, he need not show a chain of title from the date

of the Crown Lease; it is sufficient for him to show a chain of title from a good intermediate root of title to the leasehold interest created by the Crown Lease. And that root of title (being an assignment, a mortgage by assignment or a legal charge) will be a *good* root of title if it is over 15 years old. In the case of any subsequent instrument, forming a link in the chain of title, executed (1) less than 15 years before the date of the contract; and (2) by an attorney acting under a power of attorney, it will be sufficient proof of the contents and due execution of the power of attorney to produce a copy attested or certified as mentioned in section 13(2). This enabling provision does not, in my judgment, exclude *other* clear and cogent evidence of the contents and due execution of the power of attorney from consideration in a case in which neither the original, nor such an attested or certified copy, is available.

The authorities

There is no authority in this court which falsifies any of this; but there is a plethora of relevant decisions at first instance which have unsettled it. The Recorder listed and carefully reviewed no less than twelve such decisions. Of some of them, he thought it "possible to say that they were consistent with secondary evidence being admissible notwithstanding s.13(1). The others are against." Those against are :

(1) *Chan Kam Sing v. Lam Ping Ping Grace* [1990] 1 HKC 373;

(2) *Gatewood Limited v. Silver Noble Investment Ltd* [1992] 2 HKC 473;

(3) *Wong Wai Ming v. Tang Tat Chi* [1993] 1 HKC 341;

(4) *Tong Yuen King v. Chang Chong Emma*, 31.10.95, unreported;

(5) *Lo Miu Ling Cindy v. Tam Hung Ping* [1998] 4 HKC 238; and

(6) *Liu Tak Kin and Anor. v. Chan Yiu Kai and Anor* [1998] 4 HKC 362.

I agree with the Recorder that these six cases, insofar as they decided that secondary evidence of a document of title was, because of section 13(1), not admissible, were all wrongly decided and, in my judgment, we should now

overrule them. They all proceed on the unspoken assumption that s.13(1) was calculated to make life harder for vendors, not easier. The opposite is the case.

The quality of the evidence

So far as the first case is concerned, it was accepted on behalf of the purchasers that if secondary evidence tendered by the vendor of the agreement of 5 October 1889 was not excluded from consideration by virtue of section 13(1), the quality of the secondary evidence available here was sufficient to satisfy the vendor's obligations as to proof of his title.

So far as the second case is concerned, the purchaser does now contend that the secondary evidence of the contents and due execution of the power of attorney pursuant to which the assignment of 28 June 1991 was executed was not sufficient evidence of those matters. It is the case that no copy of the power of attorney, attested or certified so as to satisfy s.13(2), was offered to the purchaser. But, as I have already indicated, I do not think this is fatal to the vendor's case. It remains to consider the sufficiency of such other evidence as *was* offered. This consisted of two statutory declarations, one made by Chiu Sai Fong Margaret, the solicitor attesting the execution of the assignment of 28 June 1991, and the other made by Law Siu Shing Peter, a director of the purchaser under the assignment of 28 June 1991.

The solicitor declared as follows :-

"1. I was the attesting solicitor for the Assignment of the Property prepared by the now dissolved law firm of Messrs. Chan, Tse, Tang & Co. A copy of the Assignment is now produced and shown to me as Annexure hereto.

2. I confirm that prior to execution of the Assignment on 28th June 1991 by Madam Wong Ching ('the Donee') as the lawful attorney of Madam Chan Sin Fong ('the Vendor') named in the Assignment, I had perused a duly executed General Power of Attorney which was given under Section 7 of the Power of Attorney Ordinance, Cap. 31 by the Vendor in favour of the Donee and which was dated within a period of one year prior to the date of the Assignment.

3. I verily believe and was satisfied that the Donee had power to enter into and execute the Assignment of the Property as the lawful attorney of the Vendor pursuant to the said Power of Attorney with full binding force and effect."

The director declared as follows:

"1. I was appointed as a director of the Bestart Design Limited ('the company') on 22nd May, 1997.

2. The company is the registered owner of Flat E on the 6th floor, Han Palace Building, Nos. 441-447 King's Road, North Point, Hong Kong ('the premises').

3. When I was engaged as a manager of the company on 1st December, 1991, the relevant title deeds and documents in respect of the said premises all contained in a brown paper envelope were handed to me for safe custody by Chan Chui Ping, a former director of the company. Seeing that the brown paper envelope was old and torn, I removed the said title deeds from it and after having checked them with a List of Documents attached therewith to be correct, I secured the said title deeds as well as the said List together with a piece of rubber band. The said title deeds and documents had since been kept inside the drawer of my writing desk located at Flat A on the 20th floor, Han Palace Building, Nos. 441-447 King's Road, North Point, Hong Kong (hereinafter called 'my old residence').

4. On the 1st March, 1997, I moved all my personal belongings as well as my furniture including the said writing desk from my old residence to No. 83 Blue Pool Road, 3rd floor, Happy Valley, Hong Kong through the services of a removal company (hereinafter called 'my present residence').

5. On 15th December, 1997, when taking the said title deeds and document to the company's solicitors to enable them to act for the company in the sale and purchase of the said premises in compliance with an Order made by Master Kwan in Chambers dated 8th October, 1997, I found that the rubber band applied to the said title deeds and documents was broken rendering the said documents of title lying loosely insider the drawer of my writing desk. Upon checking them with the said List, I found that the Assignment Memorial No. 4365902 and the Power of Attorney executed by Chan Sin Fong in favour of Wong Ching were missing. I verily believe that the two said documents must have been lost in the course of the removal from my old residence to my present residence.

6. I confirm that I have never removed or deposited the two aforesaid documents elsewhere for safe keeping."

At the conclusion of the argument, I was disposed to think that this evidence did offer sufficient proof of the power of attorney to satisfy a purchaser,

beyond reasonable doubt, both as to its contents and as to its due execution. I remain of that opinion so far as the contents of the power of attorney are concerned. But I have now had the opportunity of reading in draft the judgment prepared by Ribeiro, J. and for the reasons he gives, I am now compelled, with some reluctance, to the conclusion that the evidence tendered is *not* sufficient to prove due execution of the power of attorney. As a matter of law, the rule was that the execution of a deed had to be proved by an attesting witness; but as a matter of practice, conveyancers did not in fact insist on evidence of due execution of the documents of title, however recent, if produced from proper custody, i.e., the custody in which they may reasonably be expected to be found. In the absence of any ground for suspicion, it is presumed by conveyancers that every document of title was executed as appears on the face of the document: "... a seller is never required to ... prove the execution of deeds however modern, which appear to have been regularly executed" : see Sugden on Vendors and Purchasers, 14th edition (1862), at pp. 417, 418. Conveyancers act, in this respect, on the presumption that everything is rightly done, until the contrary be shown; a presumption which is, of course, greatly strengthened by the fact of the title-deeds being produced from proper custody. (In my judgment, s.23 of the Conveyancing and Property Ordinance to which Ribeiro, J. refers does no more, and no less, than clothe this presumption with legislative authority.) But all this is predicated, as it seems to me, on the assumption that the vendor *can* produce to the purchaser the deed the due execution of which the purchaser is being asked to accept. It has no application at all when the deed has been lost or destroyed. "Where the loss or destruction of a deed can be proved, secondary evidence may be given of its contents; *but proof must also be given of its due execution*" (emphasis added): see Dart, Vendors and Purchasers, 6th edition (1888), Vol. I, p.353. I am unable to accept that the presumption of due execution can operate so as to avoid the requirement of such proof in a case in which the original deed cannot be produced to the purchaser.

Result

For the reasons I have given, I would dismiss the appeal in the first case and allow the appeal in the second case. I would add only this; that I share the Recorder's regret that the purchasers in the first case have lost their deposit through no fault of their own. We cannot order that their deposit be returned to them; for we have no power to make such an order. Section 49(2) of the Law of Property Act, 1925 gives the court such a power in England and Wales. I have previously urged the incorporation of such a power in local legislation, but my

urgings have fallen on deaf ears. Once again, I commend it to the legislature here to confer such a power on the court. This would enable the court to do justice in cases like the present, in which the system operates unfairly against purchasers. The courts need to be able to stem the flood of cases in Hong Kong in which vendors are able to achieve windfall profits at their purchasers' expense. The sooner something is done about this disgrace, the better.

Keith, J.A.:

Introduction

I have had the advantage of reading the judgments of Godfrey J.A. and Ribeiro J. in draft. For the reasons which Godfrey J.A. gives, I agree that, in the absence of the expression of a contrary intention, secondary evidence may be given of the contents and the due execution of the documents required by section 13(1) of the Conveyancing and Property Ordinance (Cap. 219) ("the Ordinance") to be produced by the vendor for the purpose of proving its title, provided that the loss or destruction of the documents is also proved. In expressing my agreement with that view, I wish to pay tribute to the comprehensive and well-argued judgment of Mr. Recorder Tang S.C., with whose conclusion on the topic it follows I also agree.

In CACV 273/99, it had been common ground before the judge that there was sufficient secondary evidence of the missing document. It follows that I agree that the appeal in that case must be dismissed. In CACV 240/99, the judge did not address the sufficiency of the evidence of the missing document either. It had not been submitted to him by counsel for the Plaintiff (who was not Ms. Cissy Lam who represented the Plaintiff on the appeal) that the secondary evidence relied upon by the Defendant was insufficient. Moreover, the written submissions of Ms. Diana Cheung (who represented the Defendant before the judge as well as on the appeal) proceeded on the basis that the sufficiency of the evidence was not in dispute. Understandably, therefore, the judge said that there was no "real dispute" between the parties on the issue. However, on the hearing of the appeal, the sufficiency of the secondary evidence of the missing document in CACV 240/99 has been hotly contested, and it is that issue which this judgment primarily addresses.

The Defendant's title to the flat in question depended on the assignment of the property to Restart Design Ltd. ("Restart"), which was the Defendant's immediate predecessor-in-title. The flat had purportedly been assigned to Restart by Chan Siu Fong by an assignment dated 28th June 1991. However, that assignment had not been executed by Madam Chan. It had been executed by Wong Ching, who purported to be Madam Chan's lawful attorney. The missing document, which was an intermediate (though essential) link in the chain towards establishing the Defendant's title, was the instrument by which that power of attorney had purportedly been conferred.

The contents of the power of attorney

The secondary evidence relied upon to prove the contents of the missing power of attorney was primarily that of the solicitor, Ms. Margaret Chiu, who had witnessed the signing of the assignment. She had made a statutory declaration on 3rd March 1998 for the purpose of enabling the Defendant to prove her title to the flat. In the statutory declaration, Ms. Chiu declared that prior to the execution of the assignment on 28th June 1991, she "had perused a duly executed General Power of Attorney which was given under Section 7 of the Power of Attorney Ordinance, Cap. 31 by [Madam Chan] in favour of [Madam Wong] and which was dated within a period of one year prior to the date of the Assignment."

The circumstances in which that power of attorney had gone missing were explained in a statutory declaration from one of Restart's directors made on 12th March 1998. He declared that all the relevant title deeds, with a list of them, had been held together by an elastic band. That list contained a reference to the power of attorney executed by Madam Chan in favour of Madam Wong. When he came to retrieve the documents when Restart was about to assign the flat to the Defendant, he found that that elastic band had broken, the documents which the band had been holding together had scattered, and the power of attorney was missing. Although Ms. Cheung relied on this evidence for the purpose of establishing the contents of the power of attorney, I do not think that it does any such thing. The declarant did not declare that he had ever actually read the power of attorney. The effect of his declaration is simply that an instrument which purported to be the power of attorney had been included in the list of documents of title, and that that instrument had not been among the documents of title later on.

The Defendant has not proved to my satisfaction that the evidence of Ms. Chiu is the best evidence available of the contents of the power of attorney. There is no evidence that the Defendant's solicitors attempted to locate Madam Chan or Madam Wong (respectively the donor and donee of the power of attorney), or to find out which firm of solicitors drew up or attested the power of attorney. The taking of any of these steps might well have resulted in better evidence of the contents of the power of attorney (and its due execution for that matter) becoming available. In these circumstances, two questions arise in relation to the contents of the power of attorney:

(i) For secondary evidence to be capable of proving the contents of a missing document, must that evidence be the best available secondary evidence? Or can the contents of a missing document be proved by such evidence which, although not the best secondary evidence available, is regarded by the court as clear and cogent proof?

(ii) If all that is required is clear and cogent proof, is Ms. Chiu's evidence clear and cogent proof of the contents of the power of attorney purportedly executed in favour of Madam Wong?

The common law originally required the production of a document to prove its contents. If the document was lost, the action failed. In due course, exceptions were permitted, though these exceptions were permitted only by degree. In other words, the "best evidence rule" in relation to the contents of a missing document was converted to the "best secondary evidence rule", i.e. the best secondary evidence available of the contents of the document had to be produced. However, in time, even this requirement was abandoned. The best secondary evidence rule was replaced by the present rule that there are no degrees of secondary evidence when it comes to proving the contents of a missing document. As is stated in *Phipson on Evidence*, 14th. ed., para. 36-23:

> "The general rule is that there are no degrees in secondary evidence; and that a party is at liberty (subject to comment if more satisfactory proof is withheld) to adduce any admissible description he may choose. The reason assigned is the inconvenience of requiring evidence to be strictly marshalled according to weight; and of compelling a party, before tendering inferior evidence, to account for the absence of all which is of superior value, but the very existence of which he may have no means of ascertaining."

I turn, then, to the clarity and cogency of Ms. Chiu's evidence about the contents of the power of attorney. I accept, of course, that when Ms. Chiu made her statutory declaration in 1998, she would not have been able to recall the actual language of the power of attorney which she had seen in 1991. But she was in effect saying that as the attesting solicitor she would not have witnessed Madam Wong's signature on the assignment unless she had at the time been satisfied that Madam Wong had been duly empowered to sign the assignment on Madam Chan's behalf. So when she had perused the power of attorney in 1991 for that purpose, she would have been checking whether its language was such as to confer that power on Madam Wong. The fact that she witnessed Madam Wong's signature on the assignment with that in mind is, in my judgment, clear and cogent proof that the language of the power of attorney had been such as to amount to a valid authorisation by Madam Chan to Madam Wong to sign the assignment on her behalf.

The due execution of the power of attorney

According to Ms. Chiu, the power of attorney purported to have been executed by Madam Chan. There was no direct evidence, secondary or otherwise, that it had in fact been executed by Madam Chan. But what about circumstantial evidence? After all, if she had not executed it, the forging of her signature on it could only realistically have been to procure the assignment of the flat in 1991 without her knowledge or consent. If that is what happened, one would have expected Madam Chan to have come forward by now and say that she had known nothing about the sale of the flat. It is said that the fact that she has not done that, despite the lapse of so many years, is strong circumstantial evidence that she duly executed the power of attorney. I see the force of that argument, but I cannot go along with it in its entirety. The argument proceeds on the assumption that there would have come a time when Madam Chan would have discovered that she no longer was the owner of the flat. Although most owners of property have a sufficiently modest portfolio to know that a property has been sold, that may not have been the case with Madam Chan, and I simply cannot assume (without any evidence about Madam Chan, of which there was none) that she was indeed aware that her flat had been sold.

However, although the due execution of the power of attorney cannot be proved by direct or circumstantial evidence, whether of a primary or secondary

nature, its due execution can nevertheless be "proved" by operation of a statutory presumption. Section 23 of the Ordinance provides:

> "An instrument appearing to be duly executed shall be presumed, until the contrary is proved, to have been duly executed."

I accept that the instrument has to appear to the court to have been duly executed for the presumption in section 23 to arise. But in my view, an instrument can still appear to the court to have been duly executed within the meaning of section 23, even if the instrument is missing and cannot be produced to the court, provided that there is clear and cogent evidence that, while it was in existence and could be inspected, it appeared then to have been duly executed. True, its non-production to the court prevents the court from observing for itself whether the instrument appears to have been duly executed, but I do not see why the court should be prevented from reaching that conclusion if there is clear and cogent evidence, which the court is prepared to accept, that an examination of the instrument at a time prior to its loss showed that it appeared to have been duly executed. In particular, I do not regard the language of section 23 as making it necessary for the instrument to be produced on the occasion when it is sought to rely on the presumption. That would prevent section 23 from applying to missing documents altogether. I see no warrant for the language of section 23 to be given so restrictive a construction.

Unlike Ribeiro J., I do not regard this construction of section 23 as either dispensing with the need to prove due execution of an instrument, or as being in any way inconsistent with the common law rule that the secondary evidence required to prove due execution of an instrument must be clear and cogent. The evidence which must be clear and cogent (so as to trigger the presumption) is the evidence that the instrument appeared to have been duly executed. Putting it another way, I acknowledge that proof of the due execution of a missing document by the operation of the presumption in section 23 involves relying on both (a) secondary evidence that the document appeared to have been duly executed and (b) the presumption that in those circumstances it had been duly executed. But I have not discerned any reason at all for holding that such form of proof is less than what the common law requires.

Thus, where before an instrument has gone missing, it is seen by a solicitor who is checking whether it was purportedly executed by the person who was supposed to execute it, and that solicitor sees that it was indeed purportedly executed by the person who was supposed to execute it, the court (or whoever the

due execution of the instrument has to be proved to) should conclude that the instrument appears to have been duly executed. That is what happened in this case. There is nothing to suggest that the instrument was not in fact duly executed, and in those circumstances the power of attorney in the present case should be presumed to have been duly executed by Madam Chan.

In reaching this conclusion, I have not overlooked what is said in *Emmett on Title*, 19th. ed., para. 5.091, namely that "the due execution of the missing documents has to be proved, not presumed". However, the case cited in support of that proposition - *Bryant v. Rusk* (1827) 4 Russ. 1 - in my opinion does no such thing. It did no more than confirm that the due execution of a missing document has to be proved. I do not read any passage in the judgment of the Master of the Rolls to the effect that proof by presumption is insufficient. Indeed, although the presumption in section 23 of the Ordinance is the statutory enactment of the Latin maxim *omnia praesumuntur rite esse acta*, no such presumption was relied upon in that case.

Nor have I overlooked what was said in *Goldenfix Properties Ltd. v. Cheer Hope Investments Ltd*. [1993] 1 HKC 360. At p.364C-D, Godfrey J. (as he then was) said:

> "... where a vendor is bound to provide proof of due execution (i.e. a case where, as I hold, there is no presumption which is of assistance), the purchaser is entitled either to the best evidence, or to such an explanation why the best evidence is not available as, in effect, to make the secondary evidence tendered the best available evidence."

However, section 23 of the Ordinance was not referred to by Godfrey J.A. in his judgment and it may be that he thought there was no presumption which could have been of assistance because section 23 had not been cited to him. In any event, to the extent that the *Goldenfix* case represents an attempt to resurrect the "best secondary evidence rule" in cases in which the proof of the due execution of an instrument is required, I would respectfully not go along with it, on the footing, as I have said, that it does not lie well with the well-established principle that there are no degrees of secondary evidence.

Doubts as to the Defendant's title

My conclusion that there was clear and cogent evidence of both the contents and the due execution of the power of attorney makes it necessary for me to address a particular argument deployed by Ms. Lam which Godfrey J.A. and

Ribeiro J. did not have to consider. The argument went like this. The judge himself recognised that, on the issue of the admissibility of secondary evidence, there were "conflicting authorities on the subject", and that whatever he decided uncertainty would still remain. Since the uncertainty in the law meant that there was a doubt over the Defendant's title, the Plaintiff should not have been required to accept it.

This argument is fallacious. It is important to remember that the question is whether the Defendant had proved her title to the flat. I would have declared that the Defendant had proved her title to the flat. The conveyancing evidence provided by the Defendant's solicitors to the Plaintiff's solicitors was sufficient proof of the Defendant's title. I can well understand why, having regard to the state of the authorities at the time, the Plaintiff's solicitors would have had understandable doubts as to whether the conveyancing evidence was sufficient proof of the Defendant's title, but since those doubts have proved in my opinion to be unfounded, it cannot be said that the Defendant's title was not sufficiently proved.

Conclusion

For these reasons, but with considerable diffidence in the light of the different conclusions reached by Godfrey J.A. and Ribeiro J., I would have dismissed the appeal in CACV 240/99.

Ribeiro J:-

I fully agree with the construction of section 13 of the Conveyancing and Property Ordinance adopted by Godfrey JA. In particular, I agree that where a document of title, including a document in one of the classes mentioned in section 13 itself, has been lost or destroyed, the common law rule which allows resort to secondary evidence of that document has not been abrogated by the section.

However, in my judgment, in the second case, the secondary evidence tendered in relation to the missing power of attorney is insufficient in that it does not include evidence of the due execution of such power of attorney.

For the common law rule to be successfully invoked, the secondary evidence relied upon must prove the contents of the missing document, its due execution and the fact of its loss or destruction. The evidence of these matters must be clear and cogent: *Re The Halifax Commercial Banking Company Limited and Wood (1898) 79 LT 536.*

In the present case, it was allegedly pursuant to the missing power of attorney that a deed of assignment dated 28 June 1991, which forms a link in the vendor's chain of title, was executed. Godfrey JA has set out in full the secondary evidence of that missing document produced by the vendor. This consisted of two statutory declarations, one by a director of the vendor company and one by a solicitor who had attested execution of the said deed of assignment by the donee of the power.

The director's statutory declaration deals with the circumstances of the loss of the power of attorney. He says nothing about its execution. The solicitor's statutory declaration states that prior to execution of the assignment, she perused "a duly executed General Power of Attorney which was given under section 7 of the Power of Attorney Ordinance, Cap. 31, by the Vendor in favour of the Donee and which was dated within a period of one year prior to the date of the Assignment." It then goes on to state a belief that the Donee had power to execute the assignment pursuant to that power of attorney.

It follows that the secondary evidence relied on comprises evidence (i) that the solicitor in question witnessed the existence, at the time of the execution of the assignment, of an instrument which purported to be a duly executed power of attorney; (ii) that she noted that it was a general power in a statutory form; and (iii) that such document has been lost. However, no evidence was provided that the power of attorney in question had been duly executed by the donor of the power. It is therefore prima facie the case that the secondary evidence is deficient since an essential element, namely, proof of due execution, is lacking.

At the hearing, it was argued that section 23 of the Conveyancing and Property Ordinance supplied the want. Section 23 provides as follows:-

> "An instrument appearing to be duly executed shall be presumed, until the contrary is proved, to have been duly executed."

It was argued that this rebuttable presumption of due execution was applicable since the solicitor has provided a statutory declaration saying that she had seen the document and that it appeared to her to be duly executed. It follows, so the argument runs, that section 23 comes into play and, unless and until the contrary is proved, that the purchaser must take the power of attorney to have been duly executed with no further proof of that fact being required.

I am unable to accept that argument. In my view, the section 23 presumption is not applicable where the instrument in question has been lost or destroyed and cannot be produced. This conclusion appears to me necessary because of the language of section 23 itself. The presumption only arises where there is "an instrument appearing to be duly executed". This presupposes the ability to produce the relevant instrument and to show that it appears to have been duly executed on any occasion when it is sought to rely on the presumption. Where no instrument purporting to be validly executed can be produced, the fundamental requirement for the presumption to operate is lacking. Merely producing a statutory declaration by a solicitor stating that she had perused a power of attorney which appeared to her to have been validly executed does not trigger the presumption on the language of section 23.

In my view, the abovementioned construction is consistent with the logic of the rules on secondary evidence and missing documents. It must in principle be questionable whether a rebuttable presumption can be allowed to take the place of evidence where one is concerned with adducing sufficient secondary evidence to make good the absence of a material instrument. As I have stated, the common law rule is that clear and cogent secondary evidence of, inter alia, due execution is required. A presumption, such as that contained in section 23, is a mechanism whereby evidence of the thing presumed (i.e., due execution) is dispensed with upon proof of certain other matters (i.e., production of the instrument appearing to be duly executed). Reliance on such a substitionary device to dispense with proof of due execution appears inherently inconsistent with the requirements of the common law rule. A construction of section 23 which excludes that section's operation where the relevant instrument cannot be produced avoids any inconsistency with the common law rule.

As I have concluded that section 23 does not come to the rescue, it is my view that the secondary evidence relied upon in relation to the missing power of attorney remains deficient regarding proof of due execution. On that ground

alone, I would allow the appeal in Civil Appeal No 240 of 1999. I respectfully concur in Godfrey JA's conclusion that the appeal in Civil Appeal No 273 of 1998 must be dismissed.

Godfrey, J.A.:

The appeal in the first case is accordingly dismissed and the appeal in the second case is (by a majority) allowed.

As to costs, we will order, pursuant to Order 42 rule 5B(6) of the Rules of the High Court (1) that the costs in this court of the vendor in the first case be taxed (if not agreed) and paid by the purchasers to the vendor; (2) that the costs in this court of the purchaser in the second case be taxed (if not agreed) and paid by the vendor to the purchaser. (We will not disturb the order for costs made by the Recorder in the second case, since the purchaser has succeeded in this court on a point not argued below.)

(Gerald Godfrey) Justice of Appeal	(Brian Keith) Justice of Appeal	(R.A.V. Ribeiro) Judge of the Court of First Instance

Miss Cissy K.S. Lam (M/s. Lam & Lau) for the Plaintiff in CACV240/1999

Miss Diana Cheung (M/s. Chong So & Co.) for the Defendant in CACV240/1999

Mr. Albert Yau (M/s. Y.S. Lau & Partners) for the Plaintiffs in CACV273/1999

Mr. Horace Y.L. Wong (M/s. S.Y. Chu & Co.) for the Defendant in CACV273/1999

1998, No. M.P.5179

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

BETWEEN

	IP FOO KEUNG MICHAEL and CHAN LING WEN ELAINE and CHAN PAK KAI	Plaintiffs Defendant

Coram : The Hon. Mr. Recorder Tang S.C. in Court
Date of hearing : 25th June, 1999
Date of handing down judgment : 9th July 1999

JUDGMENT

Flat A on 6th floor of Fung Shing Building, No. 168 Connaught Road West, Hong Kong, is built on the Remaining Portion of Praya Extension of Section A of the Eastern Moiety of Marine Lot No. 198, the Remaining Portion of Praya Extension of Section B of the Eastern Moiety of Marine Lot No. 198, the Remaining Portion of Praya Extension of Section C of the Eastern Moiety of Marine Lot No. 198, the Remaining Portion of Section A of Praya Reclamation of Marine Lot No. 198 Half Private Street and the Remaining Portion of the Praya Reclamation of Marine Lot No. 198 Half Private Street.

This action involves the title to the Praya Extension of Marine Lot 198. There is no doubt about the title to the other Lots. The requisition was raised by the Plaintiff's solicitors in their letter of 25th June 1998 as follows:-

"1. Assignment Memorial No.930839

The Vendor was entitled to the grant of Crown Lease or Crown Leases of the subject lots under and by virtue of the following Agreements:-

.....

(e) Agreement dated 5th October 1889 and made between Bruce Shepherd acting for the on behalf of the Governor of Hongkong of the one part and Lee Shee and Leung On of the other part being the Reclamation Agreement relating to the Reclamation to Marine Lot No. 198 (Half Private Street):

... kindly let us have prior to completion certified copies of the same to enable us to approve your client's title"

The Agreement cannot be found. Neither the District Lands Office nor the Land Registry has any record of the Agreement.

The requisition was rightly raised because beginning with the judgment of Deputy Judge Findlay (as he then was) in Chan Kan Sing v Lam Ping Ping Grace [1990] 1 HKC373 the Courts have on a number of occasions held that under s.13(1) of the Conveyancing and Property Ordinance ("CPO"), secondary evidence of a Crown lease (apart from an attested or certified copy under s.13(2)) is not admissible as proof of title unless "the contrary intention is expressed" by the parties in their agreements.

However, there is another line of authorities beginning with the judgment of Woo J. in Yeung Dallah Rudin v Copiluck Limited [1992] 2 HKC575, which permits other secondary evidence to be used as proof of title under s.13(1).

In Wu Wing Kuen v Leung Kwai Li Cindy MP646 of 1999, the judgment of which will be handed down at the same time as this judgment, I have decided secondary evidence is admissible under s.13(1) in the absence of an expressed contrary intention. I adopt but will not repeat the reasons given in that decision.

There is no dispute that if secondary evidence is admissible, there is sufficient secondary evidence of the Agreement.

Its contents can be found in Praya Recolamation Ordinance of 1889 ("PRO"). In particular s.7(iii) and the Schedule to PRO. Moreover, the Agreements relating to other sections of the Praya Reclamation (namely, s.A, s.B and s.C are still available).

The parties to the Agreement can be found from the Recitals in the Assignment Memorial No.930839 dated 1st October 1972.

It follows that the Plaintiff's (the purchaser's) claim must fail.

In case I am wrong about s.13(1) it is necessary for me to deal with the other arguments of Counsel for the Defendant vendor (Mr. Horace Wong).

Mr. Wong accepts that the Agreement is an agreement for a Crown lease. However, he argues that an agreement for a Crown lease does not come within the definition of Government lease under s.13(1).

The definitions of Crown lease and Government lease can be found in the Interpretation and General Clauses Ordinance Cap.1.

> "Crown lease means any lease granted by the Crown before 1 July 1997, any instrument whereby the term of a Crown lease may have been extended or the provisions thereof varied and any agreement for a Crown lease"
>
> "Government lease means a lease of land granted by or on behalf of the Government, and includes -
>
> (a) an instrument whereby -
>
> (i) the term of the lease has been extended; or
>
> (ii) the provisions of the lease have been varied;
>
> (b) an agreement for such a lease; and
>
> (c) a Crown lease;"

In my opinion, there is nothing in the context of s.13(1) which excludes an agreement for a Crown lease from the expression Government lease.

Mr. Wong's argument requires a finding that under no circumstances can a Crown lease under s.13(1) include an agreement for a Crown lease. With respect, that cannot be right. A person who holds land from the Government under an agreement for a Crown lease subject to conditions precedent surely derives title from such prior to the fulfillment of the conditions precedent. I can see no reason why in a sale by such an owner, the agreement for a Crown lease should not form his root of title and be regarded as being covered by the expression

Government lease under s.13(1).

Mr. Horace Wong's second argument raises a more difficult issue. He agues that insofar as all the conditions stipulated in the Agreement, which are conditions to the grant of a Crown lease have been or are deemed to have been complied with (s.14(2) of CPO), a Crown lease is deemed to have been issued upon compliance with those conditions (s.14(1) CPO).

Since such a Crown lease is a statutory fiction and is not a tangible document, he argues it cannot, and need not be produced.

He argues further that with the deemed issuance of the Crown lease by s.14(1) of CPO, the lesser equitable estate created by the Agreement would have merged in the legal estate created by the deemed Crown lease. The Agreement itself would have lost all relevance.

Gatewood Limited v Silver Noble Investment Limited [1992] 2 HKC473 is authority that a tangible Crown lease must be produced, even if it has expired.

There, Barnett J. had to deal with a submission that as the relevant "Crown lease" had expired and a new Crown lease was deemed to have been granted by operation of the New Territories (Renewable Crown Leases) Ordinance, the vendor was not obliged to produce the expired Crown lease. At p.476, the learned Judge said

> "Mr. Chow (Counsel for the vendor) asked me to consider the situation if Cap.152 had not been enacted, a right of renewal under an existing Crown lease had been exercised and a new Crown lease actually granted and issued. He asked whether the vendor would be obliged to produce the existing Crown lease as well as the new Crown lease. The answer, as Mr. Leong for the plaintiff agreed, must be no. There would be a Crown lease conferring title upon the vendor and containing in itself all the terms, covenants and conditions upon which the land was held.
>
> Under s.13 of Cap.219, a purchaser is entitled to production of the Crown lease. It is implicit that he is entitled to a sight of a tangible document. A new Crown lease granted by operation of Cap. 152 does not exist as a separate physical entity. There is no new Crown lease for a vendor to produce or a purchaser to sue. Cap.152 came into force in 1969 and Cap.219 in 1984. The legislature cannot be taken to have enacted the provisions of s.13 of the latter Ordinance in vain.

I am persuaded, therefore, that Mr. Leong is right when he contends that a purchaser is entitled to see the document which, subject to s.13, contains complete particulars of the terms upon which he will hold the land. that document is the existing Crown lease which effectively confers title to the land although by effluxion of time and operation of law is superseded by a new Crown lease"

Gatewood Limited v Silver Noble Investment Limited does not stand alone. Wong Wai Ming v Tang Tat Chi [1991] 1 HKC341 a decision of Patrick Chan J. (as he then was), and Lee Lai Sheung Karita and Wai In Fun Perseus v Wei Fei Trading M.P.1315/1998, 8/3/99, Yuen J. are to the same effect.

If I may summarise Mr. Wong's arguments, they are that:-

(1) the deemed Crown lease under s.14(1) is a statutory fiction and cannot be produced

(2) the Agreement has been superseded by the deemed Crown lease and is irrelevant

(3) furthermore, the land in the Praya Reclamation was granted to the original Crown lessees of M.L.198 with the intent that they should hold the additional land as part of M.L.198. There is no doubt about the title to M.L.198.

I see the force of Mr. Wong's argument. It may be that the requirement that the Agreement be produced, just as expired Crown leases are required to be produced, can be justified on the basis that they are the best evidence of the renewal extension or addition. But, of course, if they are required merely as best evidence, then secondary evidence may be admitted if the circumstances are right. Moreover, if they are required to be produced merely as best evidence of the renewal extension or addition, then it does not follow that they would fall within the definition of Government lease under s.13(1).

However, bearing in mind the weight of authorities in favour of the view that a tangible Crown lease, even if it has expired, has to be produced under s.13(1), I feel obliged to come to the conclusion that the Agreement, which falls within the definition of Government lease in s.13(1) has to be produced because it is the latest tangible Government lease.

It is basic to our law that like cases should be decided alike.

This area of the law provides a good illustration of the importance of consistency in decisions. The rights and obligations of vendors and purchasers depend on it. If the law is uncertain, vendors and purchasers may take a contradictory view on a matter. In that case, litigation may result. The loser has to bear the costs of the proceedings. In the case of a purchaser, such as the Plaintiff here, he may also lose the deposit, which very often he can ill afford to lose. That being the case, I feel it is my duty to follow any long established and consistent first instance decisions.

Here, because I have come to the conclusion that secondary evidence is admissible under s.13(1) CPO, the Plaintiff's claim must be dismissed. I know it will be a great disappointment to him. If it is any consolation, I will add that the Plaintiff's legal advisers acted properly in raising and insisting on their requisition. It is the uncertainty in the law relating to the proper construction of s.13(1) CPO which has led to this unsatisfactory state of affairs. I can only hope that the uncertainty can be resolved by a higher court as soon as possible.

I also make an Order Nisi that the Defendant is to have the costs of the proceedings.

(Robert Tang Ching)
Recorder of the Court of First Instance

Benjamin Chain instructed by Messrs. Y.S. Lau & Partners for Plff.
Horace Wong instructed by Messrs. S.Y. Chu & Co. for Deft.