

Conveyancing – Cliffnotes

A. Introduction to Conveyancing

1. Meaning of ‘Land’

- (a) An owner of land owns the airspace and all land below the surface, but excluding:
- (i) all minerals: [s.3 Mining Ordinance](#); and
 - (ii) any treasure trove of relic(s): [s.10 Antiques and Monuments Ordinance](#), which includes any human object made before 1800 and any fossils.
- (b) **[Section 2, CPO](#)**
- (i) Land includes:
 - land covered by water;
 - any estate, right, interest or easement in or over land; and (part of) undivided shares in any such land;
 - fixtures.

2. ‘Fixtures’

(a) **Test: degree and purpose of annexation.**

(b) Cases

- (i) Greenhouse / conservatory is fixture – [Goldful Way Development v Wellstable Development 1998](#).
- (ii) Window-type air-conditioners installed for a ballroom are fixtures – [Irene Loong v Pun Wsun Hang 1959](#).
- (iii) Air-conditioners placed no floor with no annexation blowing air into room next door are only fittings – [Penta Continental Land Investment 1967](#).
- (iv) Integrated air-conditioning systems are fixtures – [Orient Leasing \(HK\) v NP Etches 1985](#).
- (v) Window-type air-conditioners for dwelling flats are fittings only – [Samuel Kong v Kobylanski 2001 ¶24](#).
- (vi) Split-type air-conditioners? **probably depends on degree of annexation**

3. Land Boundary Delineation

- (a) Where there is conflict between a plan and a verbal description of the property in a Government Lease, **the intention of the parties shall prevail** – [SoJ v Wong Lung Wai Community 1999 CA](#).
- (i) **Government description prevails** where “plan is for identification purposes only” – [Wigglington and Milner v Winster Engineering 1978](#).
 - (ii) **Plan prevails** where the land “is more particularly delineated on the plan annexed to the Government Lease – [Eastwood v Ashton 1915 HL](#).”

- (iii) Witnesses can be asked to come to testify as to what they remember to be the boundaries of the land (extrinsic evidence) – *Tam Mo Yin v AG 1996*.
- (b) Now, a plan must be deposited with the Land Survey Authority whenever land is divided by sectioning.

4. Land Division

- (a) Landowners hold a leasehold interest in the land. He may sell, gift, leave by will and divide up his land as he wants.
- (b) **Sectioning of Land (flat land)**
 - (i) Cutting up the land into sections.
 - (ii) Example:
 - Where Lot 1234 is subsectioned into 3 parts:
 - Section A of Lot 1234;
 - Section B of Lot 1234;
 - Remaining Portion of Lot 1234.
 - Where Section A of Lot 1234 is subsectioned into 2 parts:
 - Subsection 1 of Section A of Lot 1234;
 - Remaining portion of Section A of Lot 1234.
 - (iii) Carried out by *deed poll* (a single party deed).
 - (iv) Government rent will be reapportioned.
- (c) **Subdivision of Land (flats)**
 - (i) Where a landowner wants to sell flats in a high-rise, he will have to subdivide the land.
 - (ii) Each flat owner becomes a **tenant in common** of the entire land, holding a number of **undivided shares** in the land; with the **exclusive right to occupy** a particular flat.
 - (iii) DMC to control use of land.
 - (iv) Government rent will be reapportioned.

5. Land Grant by Government

- (a) **Government Leases and Block Government Leases**
 - (i) Grantee receiving land under a Government Lease receives **legal leasehold estate**.
- (b) **Conditions of Sale**
 - (i) A simple contract, *not* under seal »» equitable interest until conditions fulfilled whereupon the purchaser gets the legal interest through a deemed Government Lease: [s.14 CPO](#).

(ii) Conditions of grant used...

- where land is sold;
- where land granted is exchanged for other land;
- where land is granted for particular purpose (charity, 丁屋);
- where land is re-granted upon expiry of Government Lease or upon application for a fresh grant;
- where additional land is granted by the Government, e.g. for development purposes.

(iii) Binding Nature of Conditions

- Binding contract consists of Conditions of Sale and Memorandum of Agreement – *AG v Tong Iu 1968*.
- On grant, purchaser gets **equitable interest**: [s.14\(1\)\(a\) CPO](#).
- On *factually* fulfilling positive conditions, purchaser deemed to get Government Leases, which is **legal title**: [s.14\(1\)\(b\) CPO](#).
- Grantee should *register* his interest under the agreement in the Lands Registry.
- **Certificate of Compliance**
 - This is only evidence that the conditions have been complied with, and is **not mandatory** to get legal title.
 - The Certificate, however, deems the holder to have fulfilled the conditions thereof once registered, giving legal title: [s.14\(3\) CPO](#).
- **1 January 1970**
 - **Before** 1 Jan 1970: conditions deemed complied with: [s.14\(2\) CPO](#). Legal interest vested. No requisition as to title should be raised – *Minchest v Lau Tsui Kwai 2007 CA*.
 - **After** 1 Jan 1970: factual satisfaction of conditions required for legal interest to vest.

(c) Modification of Grant

Common to apply to modify restrictive covenants, plot ratio, etc. on payment of premium.

(i) Government Lease:

- Deed of Variation (under seal); or
- written letter of modification: [s.14A CPO](#).

(ii) Conditions of Sale:

- letter of modification.

6. Contents of Government Leases / Conditions

(a) Government Lease User Restrictions

(i) Zoning Cases

- *Wong Bei-nie v AG 1973*
 “Purchaser to only erect detached or semi-detached residential premises of a European type to be used as private dwellings.”
 HELD: Breach to erect a block of flats.
- *Incorp. Owners of Hamilton Mansion v Yu Keim Chiu 1998*
 “Limit premises to residential use”
 HELD: breach to use premises as photographer’s studio and commercial guesthouse.
- *Caradon DC v Paton 2000 CA*
 “private dwelling house only”
 HELD: breach to let occupied by paying tenants.
- * *TS Cheng v AG 1986*
 “villa residences only”
 ARGUED: many high-rises are called ‘villa’. Villa here obviously meant to include high-rises.
 HELD: DMC drafted in 1958. High-rise villas not in contemplation of the drafter.
 *COMMENT: this position may change now that the definition of ‘villa’ has changed.
- *Martin v David Wilson Homes 2004*
 “Buildings not to be used except as a private dwelling house”
 HELD: the word ‘a’ does not restrict number of dwelling houses that can be built on the site.
- * *Expressluck Development v SoJ 2007*
 “domestic houses to be erected only”
 FACTS: developer built domestic houses but then wanted to use part of them for commercial purposes.
 HELD: covenant restricted future use. “Maintenance of status” implied into covenant.
- *Donald W Shields v Mary Chan 1972*
 “user to be private and domestic premises only”
 HELD: use of 1 room for Oxfam business not breach. Degree too low.
- *AG v Lo Hoi-ming 1965*
 “private residential purposes only”
 HELD: use of basement as commercial carpark is breach.
- *Mexx Consolidated v AG 1987*
 “industrial and godown only”
 HELD: use to research, test and manufacture sample clothing permissible.
 cf. ↓

- [Raider v SoJ 2000 CFA](#)
“industrial purposes, factory to be erected only”
HELD: use for provision of paging services too big a breach.

(ii) **Offensive Trades**

- Often used in Government Leases
- Includes such things as: victuallers (sellers of food and drink); bakers and petrol stations.
- Can be used **strictly**: [Sunny Star v Au Mui 1995](#), where title for shop for sale of roast meat was held defeasible.
- Can be used **leniently**: [Green Park Properties v Dorku 2000 CFI](#), where Cheung J thought it unthinkable for Government to enforce the clause on a pizza restaurant in this day and age. There is accordingly no real risk of enforcement for the ‘offensive trade’ of victualler.

(iii) **Schedules attached to Block Government Leases Not Restrictions**

- Held in [AG v Melhado Investments 1983](#) that description of land in the Schedule to Block Government leases was a mere description of the land at the time of the grant of the lease, and **not a restrictive covenant**. This was because the schedule included ‘broken latrines’, and the court found it unthinkable that such could constitute a restrictive covenant on user.
- Note, however, that restrictive covenants usually prohibit use of agricultural land for building purposes – [Watford Construction Co. 1978 CA](#).

B. Multi-storey Buildings and Deeds of Mutual Covenant

1. Timeline of Ownership in a High-rise

- Developer gets land under a Government Lease (actual or deemed) or from a previous owner and constructs a high-rise.
- If sale of the flats is to be subject to the Consent or Non-consent Schemes, the rules must be complied with before pre-sale and the consent of the Director of Lands will need to be obtained.
- Building then notionally divided into a number of undivided shares representing the units and the parking spaces. No shares need be allocated to common parts unless building subject to a consent scheme.
- Developer then enters into S&P with the first purchaser P1 and the property is assigned to him. P1 gets some undivided shares in the lot (*not in the flat*) with right of exclusive occupation to the designated shares.
- In the assignment documentation, Dev **reserves the exclusive right to occupy the rest of the building** for himself and his successors to the exclusion of P1. If this clause is omitted, it may be **implied** where there are a small number of flats and the owners had enjoyed a long time of undisturbed possession – [Jumbo King v Faithful Properties 1999 CFA](#); and [Goodtex Land v Lung Kwong Emporium 1993](#).
Absence of DMC does not generally render title defective – [Goodtex](#), CF. [Silver Pioneer International v Good Onwards 2004](#) where sub-DMC invalid. Judge To held

that title was defective and he did not think that *Goodtex* had established that the court must imply a right to exclusive occupation that was binding on all other co-owners.

- (f) Dev and P1 then execute the DMC for the whole development. A management company may also form party to it.
- (g) Now register the assignment and DMC. Failure to register DMC may render it unenforceable.
- (h) Dev and/or P1 then assigns the other flats to purchasers. Should be made “expressly with the benefit of and subject to the burdens and obligations set out in the DMC”.
- (i) Assignees can subdivide their allotted shares by *deed poll* unless otherwise restricted: *Kwong Ka Hung v Lai Wah Development 1996*. He must:
 - (i) draw up a new floor plan;
 - (ii) allocate undivided shares to those new units; and
 - (iii) draw up sub-DMC at least where new common parts are to be created.

The sub-DMC is subject to the head-DMC. Parties to a sub-DMC are jointly and severally liable with a right of indemnity between them if only one is sued under the DMC – *Incorporated Owners of San Po Kong Mansion v Island Management Services 2007*.

2. Typical DMC, Notable Contents

(a) Within Document:

- (i) Recital dividing whole lot into specified number of shares;
- (ii) share allocation (may link parking spaces to flats);
- (iii) apportioned share of government rent payable;
- (iv) rights and duties of owners;
- (v) appointment / retirement of manager;
- (vi) reservation of rights to Dev to name / place ads on building;

(b) In **Schedule 7, BMO**

These covenants are to *prevail over* any inconsistent terms but are subject to special exemption by the Secretary for Home Affairs unless objected to by 50% of the owners:

- (i) provisions determining amount of annual management expenses;
- (ii) duty of manager to prepare budget;
- (iii) keeping of proper accounts;
- (iv) preparation of financials;
- (v) maintenance of bank accounts exclusively for management of building;
- (vi) setting up special fund for unusual expenditure.
- (vii) requiring managers’ compliance with a Code of Practice in ordering supplies;
- (viii) manager has duty to give 3 months’ notice before resignation: §6;
- (ix) * provisions as to **termination of the manager’s appointment after incorporation + consent of owners of 50% shares: §7**. If owners are

unincorporated and there is no DMC provision, owners can only remove a manager for fundamental breach of his duties – *Incorporated Owners of South Seas Centre, Mody Road v South Seas Centre Management*.

(c) **In Schedule 8, BMO**

These covenants are *subject to* express terms in the DMC:

- (i) provisions regulating the meeting of the owners' committee;
- (ii) provisions regulating owners' meetings.

3. Nature of Flat Ownership

(a) **Tenancy in Common with Other Co-owners**

- (i) Co-owners own undivided shares. Undivided in the sense that the land in which the shares subsist has not been physically divided up and distributed among the co-owners.
- (ii) All co-owners own all the land but have exclusive right to occupation in their flat.
- (iii) Co-owners are not entitled to any right of survivorship, but can assign and mortgage their interest.
- (iv) Number of shares held normally determines his responsibility for contributing towards Government rent and management fees.

(b) **The Common Parts**

- (i) Defined in the DMC, usually includes lifts, passages, stairs, external walls and recreational facilities.
- (ii) External walls deemed common part unless otherwise specifically designated for exclusive use by owner: s.2; First Schedule, BMO – *Snowland v Topland Holdings 2006*.
- (iii) Co-owners have implied right (~~easement~~) to pass along the common parts unless otherwise provided for in the DMC – *Chiu Shu Choi v Merrilong Dyeing Works 1990 CA*.
- (iv) **Common Parts Restrictions**
 - S.34I BMO: no person may convert the common parts to his own use or otherwise **interfere with their use or enjoyment by other co-owners** unless approved by owners' committee resolution.
 - Co-owners have no right to sell or dispose of common parts to which no shares have been allocated – *Incorp. Owners of Chungking Mansions v Shamdasani 1991*.
 - Co-owners may not place signs in the common parts – *Incorp Owners of Golden Crown Court v Chow Shun Yung 1987*, where signs were erected in the entrance hall. Held: trespass, granted injunction.
- (v) Incorporated co-owners individually have no right to commence action to enforce covenants in respect of common parts. Only the owner's corporation can do that: s.16 BMO.

4. Rights and Duties of Co-owners

(a) Rights of Co-owners

- (i) Right to **exclusive occupation of a flat cannot be assigned without assigning the attached undivided shares** – *Lai Wing-ho v Chan Siu-fong 1993* (assignment of exclusive right to roof without shares assignment).
CF.
- (ii) *Jumbo King v Faithful Properties 1999 CFA* where the vendor had (through DMC) exclusive possession of the roof and store to which no shares were allocated. Court held that he could **pass that on** to the assignee provided that shares were attached to some other part. *N.b. implied exclusive possession*.
- (iii) When assigning the shares, the **number of shares must be clearly designated**, e.g. by sub-DMC (or control cards), otherwise the owner cannot give good title to the flat – *Lee Tak Chun v East Weal International 1994*.
CF.
- (iv) *Goldjet International Investment v Ling Ki Wai 1997* where there was no sub-DMC, BUT **subdivision registers** in Lands Registry had been opened based upon assignments of flats, and **control card** showed allocation.
HELD: good title shown.
- (v) No requirement for vendor to show how many shares had been allocated to *other* flats provided: *Sheenip Industries v Champion Billion Development 1995*. However, **do RAISE REQUISITION of title**.
- (vi) Owners have right to use all common parts of the building. Usually granted by the DMC, this right (not easement) will be implied: *Chui Shu-choi v Merrilong Dyeing Works 1990*.

(b) Duties of Co-owners

- (i) Usual DMC duties:
 - keep flat interior in **good repair**;
 - **no structural modifications** ('structure' interpreted more widely, in layman terms, than according to Buildings Ordinance):
 - *Incorp. Owners of Elite Garden v Profit More 2002*, where construction of window in outside wall constituted 'structural modification'.
 - *Incorp. Owners of Tuen Mun Hun Cheung Industrial Centre v United HK 1999*, where demolition of outside wall to allow use of unit as garage constituted structural alteration despite certificate from architect that alteration did not affect the structure of the building.
 - not to render insurance voidable or void (keeping dangerous substances);
 - no use for illegal purpose;
 - contribute to upkeep of common parts and contribute to relevant share of management expenses.

- (ii) Building Management Ordinance
 - S.34H: Duty to maintain flat in good repair and condition.
 - S.34I: No person may convert common parts to his own use or use them unreasonably or cause nuisance. Such would breach DMC.

5. Enforceability of Covenants in DMC Against Co-owners and their Successors in Title

(a) Contractually by Deed

- (i) Parties contractually bound are the Developer and the First Purchaser.
- (ii) However, the original parties will no longer be bound once they have disposed of their interest, save for past breaches: s.41(8), CPO.

(b) Enforcement of DMC Benefits by Successors in Title of the Covenantee and Persons Deriving Title Through Them, e.g. Tenants and Mortgagees (issue of *who* may sue)

- (i) Sections 41(2), (3), CPO:

The benefit of a covenant, express or implied, positive or restrictive, can be enforced by the successors in title of the covenantee and persons deriving title through them, provided that:

- the covenant relates to the land of the covenantor;
- the covenant is expressed and intended to benefit the land of the covenantee and his successors in title or persons deriving title to that land through him.

- (ii) Covenant to **relate to the land** of the covenantor

- Does the covenant affect the **nature, quality**, mode of **user** or **value** of the land? – *P&A Swift Investments v Combined English Stores Group 1989*.
- The following are land covenants:
 - Covenant to pay rent, or guaranteeing investments – *Rolling Development v Ease King 1997*.
 - Covenant to pay management expenses – *Hang Yick Management 2005 CA*.
 - Covenant not to use roof other than for erecting and placing one or more signs – *Incorp. Owners of Mirador Mansions v Tecowin Development 1999*.
- The following are *not* land covenants:
 - covenant to repay the tenant’s deposit, i.e. tenant cannot enforce deposit clause because clause to repay rent deposit is not a land covenant – *Hua Chiao Commercial Bank v Chiaphua Industries 1987*, where mortgagee was not bound; and *Crocodile Garments v Prudential Enterprise 1989*, where assignee of landlord was not bound.

- covenant of right to name a building – *Supreme Honour Development v Lamaya*.
 - (iii) Covenant to be **expressed to benefit the land** of the covenantee and his successors in title (deemed unless contrary expressed)
 - S.39(1), CPO provides that express annexation may be deemed where the covenant relates to the land, unless a contrary intention is made out. Applied in *Incorp. Owners of Mirador Mansion v Tecowin Development 1999*.
 - Alternatively, the DMC may expressly provide that the covenants “are made for the benefit of the land of the covenantee and his successors in title” – *Sky Heart v Lee Hysan Estate 1999 CFA*.
 - Even if there is no DMC, if there is a building scheme, express annexation of the covenants may occur – *Sky Heart v Lee Hysan Estate 1999 CFA*.
 - (iv) Covenant to be **intended to benefit the land** of the covenantee and his successors in title (deemed if land covenant)
 - If the covenant relates to the land, it is inferred to be intended to benefit the land – *Supreme Honour Development v Lamaya CA*.
 - (v) Covenant may only be enforced by covenantee and his successors in title. It cannot be enforced by the covenantee’s predecessors in title: s.41(3) CPO.
 - (vi) Both positive and restrictive covenants can be enforced: s.41(2), CPO.
 - (vii) Covenantee must own land in order to enforce a covenant: s.41(3), CPO and *Incorp. Owners of Mirador Mansion v Tecowin Development 1999*.
- (c) **Enforcement of DMC Burdens by Covenantees Against Covenantors and their successors in title (who may be sued)**
- (i) Sections 41(2), (3), CPO:

The burdens of a covenant, express or implied, positive or restrictive, can be passed on to the covenantor, successors in title of the covenantor, persons deriving title through them and occupiers, provided that:

 - the covenant relates to the land of the covenantor;
 - the covenant is expressed *or* intended to benefit the land of the covenantor and his successors in title or persons deriving title to that land through him.
 - (ii) Covenant to **relate to the land** of the covenantor
 - (iii) Covenant to be **expressed or intended to benefit the land** of the covenantor and his successors in title (deemed unless contrary expressed)
 - S.40(1), CPO provides that land covenants will be deemed, unless contrary intention is expressed, to be made by the covenantor for himself and his successors in title and persons deriving title through them.
 - Land covenants are deemed intended to benefit the land.

- (iv) **Only burdens of negative covenants (non-pecuniary) can be enforced** against tenants, etc. (persons deriving title through successors in title of covenantors): [s.41\(5\), CPO](#) as applied in [Discovery Bay Management v David Buxhaum 1995](#).
- Covenantors (owners and mortgagees) remain liable for all covenants.
 - Positive covenants such as the duty to pay management fees and government rent cannot be enforced against tenants, etc.
 - Negative covenants disguised as positive covenants remain enforceable, e.g. covenant to keep flat in good condition cf. covenant not to let the flat fall into disrepair.
 - This inequity might cause the rule in [Halsall v Brizell 1957](#) (academic) to apply if the benefit is closely linked with the burden so to make that tenant liable, esp. since benefits are usually linked with the payment of management fees.
- (v) **No liability for breaches committed by predecessors in title.**
- Subject to express DMC provisions, e.g. [Wise Wave Investment v TKF Services 2007](#) where DMC provided that the owner “for the time being” was to be liable for all outstanding management fees.
- (vi) **Registration of DMC**
- Once DMC is registered, successors in title are bound irrespective of notice: [s.41\(9\), CPO](#).
 - The covenants covered per above must follow the rules as per (c).
- (vii) **Enforcement against adverse possessors**
- [Incorp. Owners of Man Hong Apartments v Kwong Yuk-Ching 2001 CA](#), where squatter (occupier) bound regardless.

C. The Nature of Title

1. Giving and Showing Good Title

- (a) Vendor has duty to both show and give good title.
- (i) Showing good title involves producing required documents of title and answering any reasonable requisitions raised.
 - (ii) Making/giving good title involves remedying any title defect and providing necessary conveyancing evidence to establish that his title is not defective.

Subject to express SPA provisions.

2. ‘Good Title’

Facts and circumstances to compel the court to conclude **beyond reasonable doubt** that the purchaser will **not be at risk** of a successful assertion against him of an incumbrance (that the property will neither be held defeasible nor defective).

MEPC v Christian Edwards 1981

Good title may be given where the risk against the property is, **beyond reasonable doubt, illusory**.

Kan Wing Yau v HK Housing Society 1987

3. Duty to Give Good Title

- (a) **Express requirement in SPA**
- (i) Condition 9 of Part A, Second Schedule, CPO usually adopted:
 - “V shall give good title to the property, and at his own expense, furnish conveyancing documents of public record as may be necessary.”
- (b) **No requirement in SPA**
- (i) It will be **implied** that the vendor must give good title – *Wealth Chase v Poon Hang Yee 2002*.
- (c) **Variation of duty in SPA, Limiting Provisions**
- (i) Examples
 - “Purchaser deemed to purchase with full knowledge of all defects in title (and shall assume that the power of attorney under which assignment memorial number [•] was executed was valid and had not been revoked) (or other knowledge of a defect).”
 - “Purchaser will accept title of vendor and agrees to raise no requisitions thereon.”
 - “Vendor sells only such title as he holds.”
 - An “**As-is**” Clause is not a limiting clause and simply means that V is **not obliged to improve the property prior to sale** – *Leung Wing Fai v Onlink Investment 2000*. Further, P cannot sue on mere reliance of it to prevent V from demolishing any illegal structure that may be sited on it (cf. substantial non-performance) – *Summit Link v Sunlink Group 2000 CA*.

- (ii) Construction of such limiting provisions
- Words used must be **sufficiently precise** to cover the defect in question.
 - Any limiting clause will be ineffective if the purchaser has been **mislead** – *Jumbo King v Faithful Properties 1999 CFA*,
 - If **V had knowledge of a defect that P does not**, courts will generally hold that P was misled.
 - Vendor's knowledge can be **imputed** from his solicitors' knowledge – *Rignall Developments v Halil 1987*.
 - If **defect is obvious**, P may be deemed to have constructive knowledge of it – *Billion Profit Enterprises v Global Fly Development 1999 CA*, where offices were used as a karaoke bar.
 - P will not be misled if he is an **experienced dealer** in realty even if illegal structures as a general class are excluded as a defect – *Ip Kam Wah v Fair City Group 2005*, where the court said it was good practice to list out the illegal structures in question.
 - **Therefore if V has actual knowledge of any defect, he should bring it to the attention of P.**
 - HOWEVER, note the effect of *Kamos v Howard Chan 2000* where Reyes J. held a limited clause effective because “the parties were capable adults capable of looking after their own interests”. The purchaser was a businessman. (May be too generous)
- (iii) Where there is already a binding PSPA in which V had agreed to give good title, a limiting clause may not be added to the FSPA without the purchaser's consent – *DH Shuttlecocks v Keung Shiu Tang 1994 CA*.
- If V does limit his obligations as to title, he must also amend the covenants for title and assignments – *Butler v Mountview Estates 1951*.

(d) Duty to give good title = legal or equitable title?

- (i) Probably legal title subject to secondary evidence – *Chen Paul v Lord Energy 1999 CFA* and *Tin Shui Wai Development v Polykin 2006*.

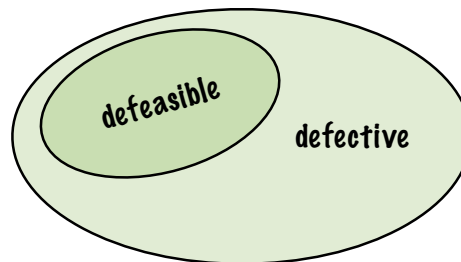
4. Waiver of Defective Title by Purchaser

- (a) Express or implied waiver of title by accepting V's title notwithstanding any defect.
- (b) Must be **unequivocal act to accept V's title despite defect**
- (i) *Chan Kin Leung v Lok Kar Cheong 1998* where waiver was held on the clear words between the parties' correspondence.
- (ii) Or perhaps where P, with full knowledge of a defect, sends V a draft SPA for execution – *Chan Kam Hung v Light 1993*.
- (c) P will need to **understand the legal consequences of the facts** that might give rise to a requisition. Mere knowledge of those facts insufficient – *Regent Summit (HK) v Smart Business (Asia) 1998*. As such, lay persons may generally not be found to have understood the legal consequences of facts known to him.

- (d) Mere failure to raise requisition within reasonable time is not waiver – *Flywin v Strong & Associates 2002 CFA*.
- (e) Summary provided in *The Kanchenjunga 1990 HL*, where waiver was found when:
 - (i) a state of affairs came into existence in which one party became entitled to exercise a right and he had to decide whether to do so;
 - (ii) the party making the decision had to be aware of the facts which gave rise to the existence of that right;
 - (iii) the party making the decision probably had to be aware of his legal right (in affirming or rescinding a contract where there had been repudiation by the other party);
 - (iv) party exercising his right had to communicate his election to the other party in clear and unequivocal terms.

5. Factors Vitiating Good Title

- (a) **Defeasible:** vitiation of **legal title**.
 - (i) Breach of DMC, government lease, sale to recoup expenses incurred in removing illegal structures, etc.
- (b) **Defective:** vitiation of **equitable title**.
 - (i) Encumbered title by resulting/constructive interest or occupier interest.
 - (ii) Limited to that it poses no real risk to the purchaser that title will be taken away.
 - (iii) Usually simply worth less by reason of the defect.
- (c) **Title must be in the vendor**
 - (i) Title must be with the vendor or with some other person whom the vendor can compel to convey accordingly.
 - (ii) No title with V where he requires the consent of a third party, e.g. the Director of Lands, for pre-sale activities – *Enway Development v Light Ocean Investments 1994 CA*.
 - (iii) If ownership is with a company under sole control of V, then it is still OK – *Harold Elliott v Pierson 1948*.
- (d) **V to assign unencumbered, whole interest**
 - (i) Defeasibility aside, V must assign non-defective (unencumbered) property, unless (4):
 - **They are registrable encumbrances which are unregistered**
 - because unregistered registrable encumbrances are void against bona fide purchasers or mortgagees for valuable consideration *with or without notice*: s.3(2) Land Registration Ordinance. Save where fraud is involved – *Keep Point Development v Chan Chi Yim 2000*.



- **Cases**

- Right to exclusive possession of roof omitted from registration application (memorial). When property sold to another with exclusive occupation of roof, first purchaser lost right – [Fast Forward v MagicSound 1991](#).
- Option to renew, though registrable, was not registered. The new landowner, being a bona fide purchaser, thus takes free of such option and the tenant is disfavoured – [Wellmake Investments v Chan Yiu Tong 1996 CA](#).
- **SPA expressly subject to encumbrances**
 - such are usually laid out in the schedule to sale and the SPA.
- **Encumbrances obvious to the eye**
 - Such as certain rights of way and illegal structures – [Kensel v Charmfast Investment 2001](#).
- **Purchaser aware of encumbrances**
 - Applies only where contract is silent as to title obligations (aka. open contracts).

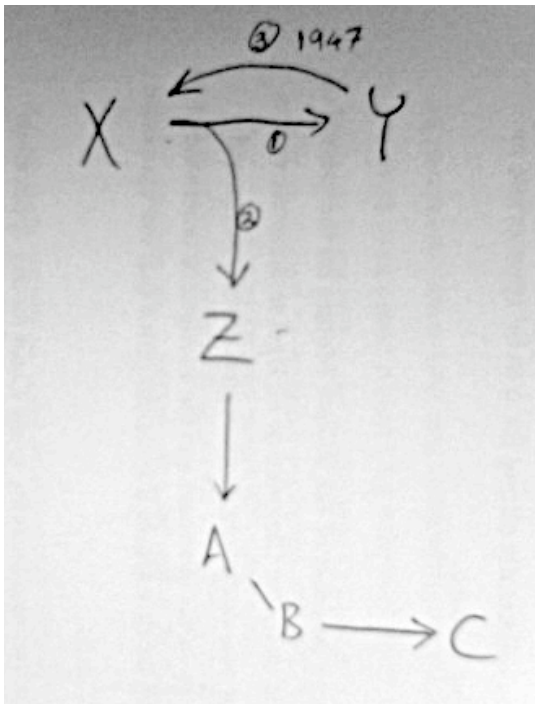
(e) Examples of encumbrances include:

(i) **Mortgages and charges**

<----- mortgage----[1984]---- charge ----- - - ->

- A very old mortgage (>12 years limitation period), such that it must have been paid off already might not constitute an encumbrance – [Fung Kam Cheung v Kwok Yiu Wing 1991](#).
- If the encumbrancer’s whereabouts are unknown or out of the jurisdiction, [s.12A CPO](#), the Court may, on the application of the party entitle to redeem the encumbrance, direct payment into court a sum enough to redeem the encumbrance and any interest thereon.
- The court may then declare the land free of encumbrances and make an order for conveyance while giving directions for the retention of the payment-in.
- Application to be made ex-parte with evidence to show the circumstances of the encumbrancer.
- See [Re Cheung Chi Wang 2002](#).

- **Feeding the estoppel**



Here, X assigned his land to Y by way of mortgage in 1940. Without first discharging the mortgage, X purported to assign the land to Z free from encumbrances in December 1946.

In December 1947 Y re-assigned the land to X free from the mortgage.

Z assigned the land to A absolutely in 1980.

In January 1986, A's successor in title, B, agreed to sell the land to C, it being a condition of the agreement that B was to show a good title to the property.

C objected that B's title was defective because the land was not free from encumbrances when X purported to sell and the effect of the re-assignment in 1947 would have been to re-vest the title in X with the result that Z had no title to pass on to A.

HELD: X was estopped from denying he had passed title free from encumbrances to Z, and

the effect of the re-assignment by Y to X was to feed the estoppel. B had a marketable title which C was obliged to accept.

(ii) **Occupiers' Interests**

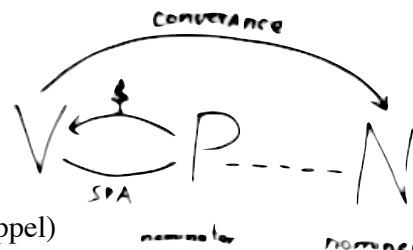
- **Giving rise to interests**

- Contribution to purchase price (clear)
 - Resulting trust in the same proportion as the contribution – *Pettitt v Pettitt 1970*.
- Mortgage repayments or common intention with detriment (less clear)
 - Resulting trust created only if there are strong grounds to infer a common intention that the person paying instalments (or suffering detriment) should acquire a beneficial interest in the property – *Tong Kwai Ying v Poon Kwok Sin 2001* and *Lloyds Bank v Rosset 1991 HL* respectively.
 - Detriment may very arguably include family services per Australian and Canadian approaches – *Peter v Beblow 1993*.
- Substantial contribution to repairs
 - Constructive trust where spouse/lover made repairs – *Lloyd's Bank v Rosset 1991 HL*. This will require substantial repairs, e.g. only possible for a detached house on the Peak.

- **Presumption of advancement (sexist)**
 - It is presumed that assignments from:
 - husband to wife;
 - father to children
 will be ‘advancements’ or gifts whereby the assignor will retain no beneficial interest.
 - This presumption is now very weak – *Lily Cheung v Commissioner of Estate Duty 1988*, especially in light of forthcoming secondary evidence.
- **Equity’s Darling prevails** over occupier’s interest
 - A bona fide purchaser of the legal estate will take free of an equitable interest of which he has no actual or constructive notice.
 - If the interest is one he would have discovered as a reasonable purchaser through reasonable inquiries, the purchaser will take *subject* to that interest.
 - However, **constructive notice has been deemed** in many cases where the purchaser merely purchases property.
 - *William v Glyn’s Bank v Boland 1981*;
 - *Wong Chim Ying v Cheng Kam Wing 1991 CA*;
 - *China & South Seas Bank v Ma Koon Ah 2001*;
 - *Kingsnorth Finance v Tizard 1986*, where mortgagee was bound by the wife’s interest even though she was not in actual occupation. It was held sufficient that her car was in the garage.

(iii) Nominations

- In the case of this nomination, N would hold the property on trust for P, because P provided the purchase price. (Unless P had affixed the seal of N Co. himself – *Fulltrend v Longer Year Development 1990*, estoppel)



- If N tries to sell to X, X would get encumbered title. (Unless the relationship between P and N is one that raises a presumption of advancement – *Lion Will Investment v Triple Will 1992*, where husband nominated wife, presumed husband disposed of all)
- To prevent the problem, P has to renounce his interest in the nomination as to any retained interest.

(iv) Liability under a notice, order from an authority or other action

- Resumption notice under the Lands Resumption Ordinance or removal/closure/demolition order under the Buildings Management Ordinance:
 - property »» encumbered if encumbrance **exceeds anything that a reasonable purchaser would have in contemplation** when agreeing to purchase the property.

- encumbrance would only vitiate title if it were so wholly exceptional and called for **wholly exceptional measures well outside the ordinary ‘wear and tear’ remedies** that common owners of HK buildings have to meet from time to time – *All Ports Holdings v Grandfix 2001 CA*.
 - Examples:
 - remedial order for dangerous slopes – *Lam Mee Hing v Chiang Shu Yin 1995*;
 - remedial notice for retaining wall – *Wah Ying Properties v Sound Cash 1994*;
 - Warning Notices
 - These are notices issued by the Building Authority under s.24C BO to compel property owners to demolish UBW by certain times.
 - If these are not complied with, the document will be **registered** in the Land Registry and will **constitute an encumbrance** of the liability is of such a magnitude beyond what a reasonable purchaser would have in contemplation when agreeing to purchase the property – *Chi Kit v Lucky Health International Enterprise 2000*.
 - If the notice, being registrable, **is not registered, it will be void** against any BFP with or without notice (see above).
 - If the notice does not threaten remedial measures by the authorities, it might not encumber the title – *Polyset v Panhandat 2002 CFA*.
 - **Personal claim against V** which might lead to execution by imposition of a charge in the future
 - **Generally insufficient** *unless* the action, however unrelated, lies against the owner’s corporation.
 - A judgment creditor can apply to the Lands Tribunal to enforce the judgment against any co-owners of the building under s.17(1)(b), BMO.
 - See *Lucky Health International Enterprise v Chi Kit Co 2000 CFA*, where a personal injuries action had been commenced against the incorporated owners for \$20M. Title was held defective because liability against any co-owner was beyond reasonable contemplation.
- (v) **Liability to contribute towards repairs or management fees**
- Encumbrance only if they exceed reasonable contemplations – *Luk Ho Chang v Fook Man Finance 2006*, where V warranted to pay for replacement of lifts and other major repairs, but refused to pay.
HELD: that V was mandated to pay because such extensive liabilities constituted encumbrance on title that P was entitled to have removed before completion.

- Re: management charges, see [AIE v Kay Kam Yu 1996 CA](#) where it was held that a memorandum of outstanding management fees constituted an encumbrance on the property.

(f) Title Cannot be Defeasible

(i) Breach of government least / conditions » right of re-entry

- Failure to pay government rent / comply with covenants, *subject to* amount of government rent, etc. outstanding (OK if low) – [New Jade Enterprises v Jing Ying She 2000](#), where it was held that a small outstanding sum did not give rise to a real risk of re-entry, applying the basic test.
- **Nontrivial unauthorised building works** may render title defeasible if the G.Lease compels compliance with the Building Ordinance regulations – [Woomera v Provident Centre 1984](#). Significant UBW may be subterranean levels built in detached house to override limit on number of storeys – [Giant River v Asie Marketing 1990](#).
 - Even if occupation permit issued that conflicts with G.Lease, G.Lease prevails and government can re-enter for breach of lease – [Lee To Ming v William Tam 1999](#).
- Exceeding **plot ratio** – [Regent Summit HK v Smart Business 1998](#).
- **Unauthorised carrying out of building works** – [Century Legend v Chu Chung Shing Investment 1999](#).

(ii) Substantial enforcement by Building Authority

- Aside from breach of G.Lease and encumbrance by remedial notices, UBWs can cause enforcement action by the BA if they are constructed in a manner which fails to comply with the BO or regulations – [Luk Kwan Hung v Victoria Mark Investment 2003](#).
- There can be no substantial enforcement if: (i) the building works do not involve (affect) the structure of the building; *and* (ii) are in the building – (“**Exempted Works**”) under [s.41\(3\) Buildings Ordinance](#).
 - TEST FOR EXEMPTED WORKS: whether construction undermines the ‘load bearing propensities’ of the building – [MTR v Sherry Hwang 2002](#).
 - In respect of expert evidence by architects or surveyors, it will be accepted if unchallenged.
 - See [Mariner International Hotels v Atlas 2007 CFA](#), where it was held that building works *involving* a building were not limited to those which held the building up. It was held that gondola supports on the roof of the building were not exempted structures because they were both outside the building and involved the structure of the building.
- Even if there are UBWs, it may still be questioned whether the Building authority will take action.

- TEST: If P asks his solicitor “**Can I be sure that I can safely disregard the risk?**”, then only if his solicitor (being prudent and experienced) can answer him that he can, P is not obliged to accept the vendor’s title even if supplied with legal opinion evidence that BA action was unlikely – *Spark Rich (China) v Valrose 2006 CA*.

This is a strict test.

- There is no legitimate expectation to non-enforcement even if the BA issued a guidance note on the subject – *Tsui Koon Tin v Building Authority 2006 CA*.

- Notice pertaining to a single house or flat will not affect the title of the co-owners – *Active Keen Industries v Fok Chi Keong 1994 CA*, unless it pertains the common parts of a building AND exceeds the reasonable contemplations of a purchaser.

- **Removal of illegal structures prior to completion by V**

- Not OK if:
 - property is sold on an ‘as is’ basis even if V had agreed to give good title – *Max Smart v First Super Investment 1999* (destruction of illegal structure would substantially deprive purchaser of bargain)) *CF.* *All Ports Holdings v Grandfix 2001 CA* (a provision for sale on the “as is” basis and referring to its physical state and condition is not capable of extending to illegal structures).
 - removal would mean P would not be receiving what he had bargained to accept – *Sun Great International v Polly Hui 1996*.
See also *Grandco v Harbour Wealth 2000*, where it was held that V could not revert an illegal flat garden to the original sloping garden since there would be no substantial performance.
 - COURT WILL CONSIDER the size of the affected area together with the difference in value to the purchaser and effect of removal of illegal structure on sale prospects – *Cashew Holdings v Pacific Success Enterprise 2004*.

(iii) Sale ‘as is’

- Where SPA is on an ‘as is’ basis, that only refers to the physical condition of the property and does not prohibit the vendor from demolishing illegal structures – *All Ports Holdings v Grandfix 2001 CA*.

(iv) Material change in user

- Breach of occupation permit in respect of user, contravening s.25 Buildings Ordinance – *Worldfull Investments v Young King Asia 1996*, where title was held defeasible when building was used as shop premises though its occupation permit prescribed user as a garage for 10 vehicles.

- ★ •Where no structural alterations are involved, there may be no material change in user – *Summit Investment v Shia Ning Enterprise 1999*, but that does not prevent the BA from issuing an order under [s.25\(2\) of the BO](#) requiring discontinuance of use and the threat of fines that may attach to the occupier of the property.

- (v) Where boundaries correspond with plan
- See *Fan Tony v Incorp. Owners of Kung Lok Building 2006*, where a mandatory injunction was granted to reinstate a parking space whereupon a guard post had been built on its original location.
- (vi) **Breach of DMC**
- May lead to enforcement action by management committee including having the manager impose a charge over the property (a usual term): [s.41 CPO](#); and – *Arthur Lo v Wilfred Liu 1983* where a parking space was sold separately from the flat in breach of DMC. Held: real risk of action by other parties to the DMC.
- (vii) Other grounds
- Fraudulent conveyance under [ss.60, 61 CPO](#);
 - Transaction at undervalue by person subsequently adjudged bankrupt: [s.49\(1\) Bankruptcy Ordinance](#);
 - Unfair preference by person adjudged to be bankrupt under [s.50 Bankruptcy Ordinance](#) and unfair preference by insolvent company: [s. 266 CO](#).
 - Illegal assignment by way of security for loan under [Money Lenders Ordinance](#);
 - Breach of fiduciary duty owed by P to V;
 - Sale of property to mortgagee to himself – *Tang Ying Ki v Maxtime Transportations 1996*;
 - Gift or sale by attorney to himself – *Lo Hung Bui v Lo Shea Chung 1997 CA* (gift); and *Yook Lu Fong v Lau Po Ching 2002* (sale by attorney to himself to hold as trustee for another who was aware of the attorney’s duty);
 - Personal representative selling estate property to himself – *Feerni Development v Daniel Wong (a firm) 2001*, HELD; sale voidable at instance of any person interested in property sold.
 - Duress, undue influence – *Bank of China v Wong King Sing 2002*.
- (g) **Vendor must give originals of certain documents (in addition to giving good title)**
- (i) Common law duty for V to give **originals** of all title deeds **relating exclusively to the property** – *Yiu Ping Fong v Lana Lam 1999*.
- (ii) If original title deeds relating exclusively to property **missing**, vendor can provide **statutory declaration** to explain how they came to be missing, but it is generally inadequate for a solicitor to simply say that the originals were never in his possession – *Choi Kar Yin v Wong Siu Hung 2007, Re Halifax*.

6. Matters of Mere Conveyance Excluded

- (a) Matter of mere conveyance are defects **removable independently** without the agreement of any other person, e.g. discharge of mortgage prior to completion, removal of licensees and trespassers, etc.
- (b) *Sharneyford Supplies v Edge 1985*; *City Chain Properties v Speedy Port 2001* – vendor to give vacant possession but licensees and trespassers on land. Since the vendor was entitled to remove them, that was a matter of mere conveyance (cf. tenants).

D. Proof of Title

1. Vendor to Show Good Title

- (a) Statutory requirements under [s.13\(1\) CPO](#):
 - (i) Government lease / conditions of sale (title root).
 - (ii) If the period before the SPA is <15 years, proof of title to that land for that period.
 - (iii) If the period before the SPA \geq 15 years,
 - proof of title to that land 15 years from the date of the SPA (intermediate root); and
 - all documents referred to in any assignment, mortgage or legal charge within the intermediate root.
 - (iv) All powers of attorney under which any document is produced has to be produced throughout the intermediate root or 15 year period.
 - (v) No duty to produce documents prior to the statutory period – *Dawson Properties v HK Niuroku 1997*.
- (b) Subject to contract, so if the SPA wants V to prove title ‘according to s.13’ but ‘commencing with the government lease’, then pre-intermediate root documents have to be produced – *C&W Watch v Chu Kwok Tai 2005*.

2. The Ultimate Root of Title

- (a) Means the original / certified copy of the Government Lease or Conditions of Sale.
- (b) If illegible or missing, it must still be produced and cogent secondary evidence adduced as to its contents – *Wong Wai Man v Tang Tat Chi*; *Cindy’s Case*. That is subject to contract, so if a legible copy is needed by the SPA, secondary evidence will not be admitted – *Karl Mak v Ho Chi Ming 1998*.

3. The Intermediate Root of Title

- (a) Includes any assignment, mortgage or charge dealing with the whole of the estate in the land \geq 15 years from the SPA.
- (b) If none are known to exist, the vendor should limit his obligations under the SPA – *Arden Chan v Man Yun Sau 1997*.

4. Chain of Title

(a) Transmission on Death

- (i) V must produce: probate, letters of administration and subsequent assent to P plus proof that estate duty was paid/exempt.
- (ii) If property sold by personal representatives, V must **prove that PR had power to sell and pass good title**.
 - Purchase from personal representatives means that **purchaser does not have to inquire as to whether sale was necessary** for purposes of administering the estate – *Chun Hon Wai v Junichi Takashima 2000 CA*.
 - Presumption fails where evidence shows that sale was for an **improper purpose** – *Chan Yat Wah v Moonland Enterprises 2000*. In *Sun Sek Haw v Au So Kum 1999 CA*, the administrators assigned the property to themselves in prima facie breach of the self dealing rule. The Court held that that the purchasers could properly raise a requisition. Similarly, a sale by a personal representative to himself may render title defeasible under [s.55 Probate and Administration Ordinance](#), since the sale is voidable at the instance of any interested person – *Feerni Development v Daniel Wong 2001*.
 - This is often provided in recitals. If not so provided, RAISE A REQUISITION.

(b) Leases, Tenancy Agreements

- (i) Allowed only if property is assigned subject to a tenancy.
- (ii) Else, vendor must show that all leases have expired.
- (iii) For leases < 3 years which are not registered, purchaser takes constructive notice and will take subject to the tenancy – *Hunt v Luck 1902*.
 - Good idea for P to check the premises early on.
- (iv) P generally entitled to see a ‘surrender agreement’ to establish that the tenant has not further rights in the property, unless of course, the ‘tenant’ is at the mercy of the vendor, e.g. licensees and squatters.

(c) Mortgages

- (i) V must show that all mortgages registered on the property have been reassigned or otherwise discharged.
- (ii) 3 ways to discharge a mortgage:
 - by deed sealed and attested under [s.4\(1\) CPO](#);
 - written receipt annexed to or written on mortgage deed itself: [s.56\(1\) CPO](#) and *Ko Lan v Martin Hoo 1999*; and
 - court declaration under [s.12A CPO](#) for old mortgages.

(d) Trusts

- (i) V ought to show that any equitable interests in the property have ceased to bind the property.

- (ii) See also the rights of occupiers, etc, who may compel constructive notice by the purchaser (*above*).
 - (iii) Breach of trust renders title defective.
- (e) Charging Orders / Lis Pendentes**
- (i) Where charging orders or lis pendentes < 5 years old are registered in the Land Registry, V must show that they have been discharged under [s.20B\(4\) HCO](#): see [s.17 LRO](#).
 - (ii) Settlement properties orders such as a Form 8 Notice under the Matrimonial Causes Ordinance constitute a blot on title.
 - (iii) *Lis pendens* (pending suit) may happen where a person, having paid the purchase price for the property under an aborted SPA, holds a lien over the property, rendering the title defeasible – [Liu Chi Keung v Law Sum Yuk 2006](#).
 - (iv) The malicious registration of *lis pendentes* may cause the court to order damages – [Fung Kan Wai v Leung Shui Fat CA](#).
- (f) Foreign Judgments and Orders**
- (i) Although foreign judgments (save judgments for money) cannot be registered, the fact that there is a real risk of an action being brought in HK to enforce the interest claimed might render title defective – [Cova Enterprises v Tjanaka 2003](#) where a Singapore court order not properly answered on requisition rendered title defective.
- (g) Registered SPAs Remaining**
- (i) V must show that any SPAs registered but not vacated in the Land Registry no longer affect title – [Guang Xin Enterprises v Leung Kwai Mui 1996](#) where the court held that one way would be to show that the prior purchaser had already recovered damages for breach of contract.
- (h) Government and Management Committee Notices, Orders, etc.**
- (i) These will constitute encumbrances if they exceed a reasonable purchaser’s contemplations – [Lucky Health Enterprise v Chi Kit 2000 CFA](#).
 - (ii) Complaints by the management committee for breach of the DMC (memorandum of arrears for management fees) may constitute title encumbrance – [AIE v Kay Yam Yu 1996 CA](#).
 - (iii) Compliance letters should be shown when available. See [Modern Sino v Art Fair 1999](#) – temporary withdrawal of demolition order is not compliance. A withholding ‘for the time being’ in light of partial compliance by the Building Authority is not a compliance letter.
- (i) Company winding up, sale by liquidator**
- (i) Any assignment or other deed executed by a liquidator should be exercised by affixing the company’s common seal in accordance with the AA.
 - (ii) However, it might still be OK if the liquidator affixes his own seal – [Standford House Publication v Win Capital Industries 2006](#).

(j) Other matters, name changes, etc.

- (i) Where parties changed names, proof of such may be necessary – *Tsang Bing Kwan Andes v Korea Marvel 1997*, where a Korean business changed its name and V supplied ‘proof’ by solicitors claiming the same. Court held that such affidavit evidence is not the best evidence (rule), preferring instead notary evidence.

5. Subsisting documents referred to in intermediate root document

- (a) All documents referred to in the intermediate root document must be disclosed so far as they continue to be effective, subject to any expressed contrary intention: [s.13\(1\)\(b\)](#). E.g. if IR-doc refers to a deed creating an easement or DMC, that must also be disclosed.
- (b) Failure to do so means that V has failed to prove good title – *Greatek Investments v Lam Kit Sum 2000*.

6. Powers of Attorney

- (a) For documents executed within 15 years of SPA under a power of attorney, that power must be shown to P: [s.13\(1\)\(c\) CPO](#).
- (b) Conditions (of sale / grant / exchange executed) under powers of attorney do not compel V to show that the power was duly executed because title does not flow from the conditions of sale. It flows from the factual realisation of the conditions or the execution of a government lease / certificate of compliance.

7. Ensure Certain Title Deeds Are Registered

- (a) Title deeds that directly affect the passing of title to V must be registered, otherwise V will have failed to show a good title because subsequent encumbrances, etc. may be registered to gain priority over the assignment in question – *Chan Wing Nga v Chung Chi Wai 2006*.
- (b) If such deeds are not registered, RAISE A REQUISITION.
- (c) If V has properly shown his SPA and assignment to be registered, then any prior non-registration will probably not have any bearing on title at all.
- (d) It will be prudent to register other documents to ensure enforceability (DMC). Certificate of compliance needs to be registered to effect deemed conversion of equitable interest into legal estate * *Tai Wai Jin v Cheung Wan Wah 2004*, applying [s.14\(3\)\(a\) CPO](#).

8. Defects predating intermediate root

- (a) V only has a duty to show title up to the intermediate root (*Dawson Properties v HK Niuroku 1997*), however, **if the purchaser discovers that there is a pre-intermediate root defect, he is entitled to raise requisitions on it and the vendor is obliged to answer** – *Lo Hung Biu v Lo Shea Chung 1997*.

9. Document Authenticity (showing and giving good title, *see also other rule*)

- (a) Under [s.13\(2\) CPO](#), the following are allowed:
- (i) original copy (for all title deeds relating exclusively to the property, for giving good title. Title deeds not relating exclusively to the property do not have to be produced – [Goldmex v Edward Wong Finance 2006](#)); *or*
 - (ii) certified copy (Land Registry or solicitor, not copies of uncertified copies); *or*
 - (iii) attested copy, if pre 1 Nov. 1984.
 - (iv) [S.23 CPO](#) may be used to presume due execution where the title deeds are produced from their proper custody or where there is nothing going against what appears to be duly executed – [Cindy's Case](#).
 - (v) If document is missing, **statutory declaration** required for **explanation for disappearance** – [Yiu Ping Fong v Lam Lai Hing 1998](#) to ensure no equitable mortgage by deposit of title deeds. Furthermore, cogent secondary evidence of its contents and of its due execution is required – [Cindy & Michael's Case 1999 CA](#).

10. Production of Other Documents

- (a) Where there is an instrument registered under the Land Registration Ordinance against a property and it is not apparent from the land search that it had ceased to affect the property, that document should be disclosed to P, whatever its nature – [Wong Bok Ching v Yu Hon Cheung 1997](#), approved in [Chen Paul v Lord Energy 1999 CFA](#).
- (b) Documents such as occupation permits, certificates of compliance and other documents demonstrating that V was entitled to the legal estate and that his title was not defeasible ought to be produced if P asked for them – [Chen Paul v Lord Energy 1999 CFA](#).
- (c) List of documents that probably relate exclusively to title:
- (i) DMC, sub-DMCs;
 - (ii) certificate of compliance (if after 1 Jan 1970);
 - (iii) occupation permit

11. Use of Recitals in Proving Title

- (a) These are introduced by the use of 'whereas ...'.
- (b) Recitals to pre-intermediate root documents
- (i) [S.13\(3\) CPO](#) provides: documents which are recited and which are dated before the intermediate-root period (15 years) shall be presumed to be correct, validly executed and that the recital gives all material facts relevant to the document.
 - (ii) Unless the contrary is proved by the purchaser.
- (c) Recitals of fact in pre-intermediate root documents
- (i) [S.13\(4\) CPO](#) provides that facts recited by pre-intermediate root documents will be presumed true.

- (ii) Sufficient to show title even where crown lease is missing – *Chan Kin Leung v Lok Kar Cheong 1998*.

12. Dealing with Missing Title Deeds

- (a) **Original or certified copies** of title deeds must be given in order for the vendor to show good title. If such cannot be found, the vendor may follow this procedure – *Re the Halifax Commercial Banking and Wood 1898 CA*:
- (i) **prove loss**: make statutory declaration as to *how* the documents came to be lost;
 - (ii) **prove contents**: produce ‘clear and cogent’ secondary evidence as to its contents; and
 - (iii) **prove due execution**. *Cindy’s Case 2001 CFA* showed that **s.23 CPO** (instrument appearing to be duly executed presumed duly executed) could be used provided that someone had previously examined the missing document and it appeared, at that time, to have been duly executed.

13. Proving Due Execution of Documents

- (a) **Execution of deeds by natural persons**
- (i) Signed, sealed (symbolic and deemed: **s.19(2) CPO**) and delivered (intention to be bound).
 - (ii) Attestation by solicitor is prudent but not required – *Champon Industrial v Hight Projects Industrial 1992*.
- (b) **Execution of deeds by companies**
- (i) Metallic seal with legible name required (**s.93 CO**)
 - Strict interpretation: rubber seal insufficient – *On Hong Trading v Bank of Communications 2000*.
 - Liberal interpretation: incorrect name on seal may be redeemed because purpose of legislation is not to render documents void – *OTV Birwelco v Technical and General Guarantee 2002 (English Case)*.
 - (ii) Affixation as per articles of association.
 - Affix to execution part of the deed though not fatal if put on the receipt clause – *Man Kwok Lam v Keung Yeuk Chun 1998* where the court held that the receipt clause formed part of the deed and that it had been the *intention* of the vendor to execute the document as a deed.
 - Generally, **Table A** applies, so signature by 2 directors or 1 director and a secretary will suffice. If **Table A** is excluded and there are no sealing provisions, the presence of the seal will suffice under common law – *Grand Trade Development v Bonance International 2000*.
 - See → flowchart for a comprehensive scenario breakdown.

14. Execution by Power of Attorney

- (a) A donor of a power of attorney thus grants the donee (the attorney) the power to execute documents both in the donee’s name and in the name of the donor.

(b) Proof of due execution by power of attorney**(i) Documents ≥ 15 years from SPA**

- Power of attorney conclusively presumed to: (i) have been duly executed; (ii) at force at time of execution; and (iii) to have authorised the execution of that document: [s.13\(4A\) CPO](#).
- Generally not required to be produced as proof of title, but if purchaser finds inconsistency, vendor has to answer the requisition satisfactorily: [s.13\(1\)\(c\) CPO](#).

(ii) Documents < 15 years from SPA

- Power of attorney must be produced if authorising vendor's attorney. Not required for purchaser because purchaser does not generally have to be party to an assignment – [Lau Kwok Cheong v Tse Ming Chiu 2001](#).
 - Instrument creating power of attorney may be proved by photocopy certified on every page by donor or solicitor to be true and complete copy: [s.3\(1\) PoAO](#).
- Vendor to prove power of attorney was valid at date of document's execution – [Wong Kwai Fun v Li Fung 1994](#) where power of attorney was given as security for loan that was illegal under the Money Lender's Ordinance. That security was therefore invalid.
- Vendor to prove power of attorney **authorised the attorney** to do the act in question:
 - **General power** of attorney following [Schedule to the Powers of Attorney Ordinance](#) allows attorney to do most lawful things unless attorney was acting in bad faith. Special restricting provisions may nullify the general power, e.g. "deal with my properties".
 - **Special powers** of attorney must be drafted so as to allow the action in question. A power to sell property implies a power to execute an assignment in respect of that property – [Bernadette Wong v Lau Wai Pui 1987](#).
Where there is a breach of trust or self dealing by the attorney, the assignment will be voidable – [Lo Tai Yam v Simon Hu 1997](#). Since it will only be voidable, if the donee ratifies the power of attorney, there will be **no real risk of assertion** – [Ip Fung Yee v Norwegian Missionary Society 1998](#).
- Vendor to prove power of attorney **had not been revoked**, e.g. by bankruptcy, death or other incapacity of the donor.
 - A power may be stated to be **'irrevocable'**, which generally protects the person dealing with the attorney: [ss.4, 5 Powers of Attorney Ordinance](#) and [Enduring Powers of Attorney Ordinance](#).
 - If power is not stated as 'irrevocable', a person without notice of the power's revocation can deal as if the power was in existence: [s.5\(2\) PoAO](#).

- The person following (the Purchaser) the person dealing with the power (the Dealer) must ensure that the Dealer dealt without notice of any revocation: [s.5\(4\) PoAO](#). There will be a conclusive presumption in favour of the purchaser that the Dealer dealt without notice if:
 - transaction between Dealer and Attorney completed within 12 months when power came into operation; or
 - the Dealer makes a statutory declaration that he knew of no revocation 3 months after the transaction (or subsequent transaction – [Kung Wing Chuen v Antony Louis Marden 1990](#)) was completed. The Attorney cannot make that statutory declaration – [WOC Finance v Wing On Cheong Investment 2000](#).
- The Dealer ought to establish his own ignorance of any revocation for 2 purposes: (i) to protect his own title under [s.5\(2\)](#); and (ii) to protect the title of any subsequent purchaser under [s.5\(4\)](#).

15. Defects and Confirmatory Assignments

(a) Undertaking to cure defect after completion

- (i) Defective title cannot *generally* be cured by undertaking to cure later – [Chan Fung Lan v Lai Wai Chuen 1997](#) where court held that P was not bound to accept any offer of indemnity however reasonable it might be.
- (ii) *However*, cf. [Lam Mee Hing v Chiang Shu Yin 1995](#) where P held not entitled to rescind after V had given *fortified* undertaking to be responsible for costs of slope repairs.
- (iii) In [Hu Mei Yu Anastasia v King Best Enterprises 2000](#) the court held that, applying [Mexon Hodings v Silver Bay International 2000](#) and the **principle of the willing purchaser and vendor**, a purchaser could not merely refuse an undertaking to cure defective title since a willing purchaser would request the undertaking to be fortified.

(b) Confirmatory Assignments

- (i) Where the defaulting vendor (ex-vendor) can either:
 - reassign legal/equitable title to party with whom he had previously transacted; or
 - join in the assignment of the property to the current purchaser.
- (ii) Best where:
 - seal is missing;
 - sealing of deed defective;
 - mortgage improperly reassigned or discharged;
 - wrong number of shares assigned;
 - purchaser contributed to mortgage or price thereby retaining equitable interest;

- (iii) If the defaulting vendor cannot be found, the Registrar of the High Court has the power to execute a deed to cure defective title under [s.25A HCO](#). If that vendor is a company that wound up, the Company Registrar has a similar power under [s.291B CO](#).

(c) Vesting Orders: a good solution

- (i) Principle: every vendor who executes an SPA becomes trustee of that land for the purchaser / beneficiary.
If that vendor cannot be found or is incapacitated, it becomes expedient to vest the land back to the purchaser.
- (ii) Court empowered under [s.45 Trustees Ordinance](#) to make a vesting order where land is vested in a person as trustee (vendor) and court finds it expedient to make a vesting order to vest the land in the beneficiary – [Wong Shuk-Ying v AG 1987](#) (ineffectual assignment by co. which subsequently liquidated); and [Cheung Ka Leung v Secretary for Justice 1999](#) where co. failed to attest seal according to articles.

16. Stamping does not affect title

- (a) See [Town Bright Industries v Bermuda Trust 1998](#) since defect can be cured by counsel giving court an undertaking to stamp.

17. Attestation

- (a) Not required as a matter of law – [Champhon Industrial v Hight Projects Industrial 1992](#) but is good practice.
- (b) Attestation of documents in HK for use in PRC and attestation of documents overseas for use in Hong Kong: [Lawsoc Circular 226/1997](#).

18. Identity Discrepancies

(a) Examples

- (i) [Ma Chun Man v Yung \(a firm\)](#) – conspicuous signature discrepancies, title defective, solicitors found negligent.
- (ii) [Many Wise Investments v Tech Profit Development 1993](#) – long period of time between signatures (held reason for difference, but OK), brush v pen, title not defective because signatures quite similar.
- (iii) [Free Focus v Fels China 1989](#) – different passport numbers no real risk since names and signatures otherwise similar, cf. HKID numbers.
- (iv) [Liu Moon Ping v Wong Kwok Tung 2006](#) – held common occurrence for Chinese persons to have identical names in Chinese and English, HKID important to function of identification. Power of attorney required as identification evidence, none provided, V failed to show good title.

(b) Remedying the Defect

- (i) Executor may make a **statutory declaration** to verify that both signatures / names are his – [Lam Kin I v Tsui Ming Yee 1989](#).
- [Chuda Development v Portia International 1992](#) where signatory's statutory declaration confirmed subsequent use of alias.

- (ii) Alternatively a solicitor who acted for the signatory on the two occasions may suffice – *GB Industries v Yu Chung Kwok 1994*.

19. Property Description Discrepancies

- (a) Where land boundaries cannot be ascertained, secondary extrinsic evidence can be adduced – *Tam Mo Yin v AG 1996*.
- (b) Allocation of shares relating to purchaser must be shown, either by DMC – *Lee Tak Chun v East Weal International 1994*; or by control cards lodged with Registry – *Goldjet International Investment v Ling Ki Wai 1997*.
- (c) There is no duty to show how unrelated shares were allocated – *Sheenip Industries v Champion Billion Investment 1995*.
- (d) Non-correspondence of actual site with building plans may render title defective– *Tony Fan v Incorporated Owners of Kung Lok Bldg. 2006* where a guard post was put up on a car-parking space. The court granted a mandatory injunction requiring the carpark to be reinstated.

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Process flow for letters of undertaking

