

Annex A

Yiu Ping Fong & Anor v. Lam Lai Hing Lana [1998] 4 HKC 476

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

2. The plaintiff made two requisitions on the title of the property. The first concerned the validity of the Taiwan declaration as a statutory declaration under the ODO. The second concerned the identity of LIN as the passports used by LIN as documents of identification in the two assignments in 1986 and 1990 were different and bore different numbers. It then transpired that CHIU was unwilling to come to Hong Kong to make a statutory declaration. The defendant, in response, sought to rely on section 13 of the CPO and also clause 17 of the agreement for sale and purchase, which stated, inter alia, that “the Vendor shall show and give a good title to the Property pursuant to section 13 of the CPO at his own expense”. The plaintiff thereafter commenced a

vendor and purchaser summons seeking, inter alia, declarations that the defendant had failed to sufficiently answer the requisitions.

3. Judgment was given for the plaintiff for the following reasons –

- (1) The Taiwan declaration was not a valid statutory declaration under the ODO. A statutory declaration must be declared in Hong Kong and before a justice, a notary, a commissioner of oaths, or a person authorised by law to administer an oath under section 12 of the ODO. The Taiwanese declaration was declared outside Hong Kong. Further, the person called Mr Ma and described as a notary public in the declaration was not a person authorised by law to administer an oath under the ODO.
- (2) The Taiwanese declaration could not be used as a statement attested by a notary public since the authority and signature or chop of a foreign notary public should have been verified by the British consular authority in Taiwan. Even if the Taiwanese declaration were to be regarded as a public document, it would still have to be legalised, as Taiwan was not a party to the Hague Convention Abolishing the Requirement of Legalisation of Foreign Public Documents.
- (3) A vendor had an **obligation to make or give a good title unless there were express stipulations exonerating him from doing so**. The making or showing of good title involved two steps. The first was to show a good title by producing an abstract of title. The title shown by that abstract was then proved by producing the title deeds and by proving such other facts as were necessary to make a good title. In Hong Kong, as a matter of practice, the two steps of showing and proving title were telescoped into one by the vendor's solicitors sending title deeds and documents to the purchaser's solicitors for perusal of title. Therefore, the proving of title by the production of title deeds and documents was only one step in the making or giving of title,

and **proving of title was not to be equated with making or giving title.** (emphasis added)

- (4) A vendor did not make or give title simply by producing the documents referred to in section 13(1) of the CPO. **Section 13(1) referred only to the proof of title**, whereas section 13(2) expressly provided that it would be sufficient to produce certified true copies of the title documents. **The effect of section 13(2) was to facilitate the proving of title** when the vendor's solicitor sent title deeds and documents to the purchaser's solicitor for perusal after formal agreement for sale and purchase was executed. The vendor's solicitor could simply send certified true copies of title deeds and documents instead of originals. **This section did not exonerate the vendor from producing at completion the originals of such title deeds and documents.** (emphasis added)
- (5) **The vendor's solicitor could not make or give good title by handing over only certified true copies of title deeds and documents at completion without an adequate explanation as to why the originals could not be handed over.** Hence, where the vendor had given notice that the original of a title deed could not be produced on completion, it was legitimate for the purchaser to examine whether there was sufficient conveyancing evidence to explain its loss. (emphasis added)
- (6) Clause 17 of the agreement for sale and purchase could not be read as to have expressed any intention by the parties that the vendor was to be absolved from producing the original title deeds and documents.
- (7) Although a statutory declaration recording the loss of the original document would usually suffice in proving the loss of the original document, the defendant could not, by making a statutory declaration herself, satisfy the requirement of adducing sufficient conveyancing evidence to

explain the loss. **The purpose of a statutory declaration in respect of a missing title deed was to explain the circumstances in which the deed was lost and to show how the person who ought to have custody of the deed could not find it despite proper endeavours.** The defendant could only say that she personally never had the original 1986 assignment. She could not of her own knowledge explain the circumstances of the loss because she was not the person who had custody of the title document. (emphasis added)

- (8) Loss of a title deed did not just give rise to a question of possible adverse interests in the property. As ownership of the title deeds passed by the conveyance of the land, the purchaser had a proprietary right to ownership of the title deeds when the sale and purchase was completed. The purchaser was entitled to decline to complete if he was told that one of the title deeds was missing, **unless he was provided with satisfactory evidence that the missing title deed was lost and unlikely to re-emerge.** (emphasis added)

Guang Zhou Real Estate Development (HK) Co Ltd & Another v. Summit Elegance Ltd (High Court Action No 1531 of 1998) (Court of First Instance)

4. This action arose out of an agreement for sale and purchase of five lots of land, dated 4 September 1997. The purchaser (defendant) raised 15 requisitions to the vendors (plaintiff). As far as the Law Society's proposal is concerned, only requisitions numbers 10 and 14 are relevant. Therefore, the discussion below is confined to the requisitions relating to missing documents.

5. The brief facts of the case are as follows. The vendors agreed to sell five adjacent lots of land to the purchaser, with completion due on 31 January 1998. On the completion date, the purchaser refused to complete.

6. The purchaser raised requisitions on two missing documents. Requisition number 10 concerned a Crown lease of Inland Lot No. 7441. The vendors could only produce a certified copy as the original was never in the vendors' possession. The purchaser was not satisfied with the certified copy, and insisted on the production of the original or, alternatively, a statutory declaration that the Crown lease had been lost or mislaid, if that was the case.

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

8. At issue was whether the vendors could use certified copies instead of the originals in giving good title and had satisfactorily answered the requisitions raised.

9. Regarding the missing originals of the two title documents, the vendors argued that under clause 7 of the agreement they could use certified copies instead of originals in giving good title. Clause 7 reads –

“The vendors shall show and give good title to the Properties in accordance with section 13 of the CPO and prove at his own expense and at the like expense shall make and furnish to the purchaser such certified copies of any deeds or documents of title, wills and matters of public record as may be necessary to prove such title.... ”

10. The Court held –

- (i) The proving of title was but one step in the process of giving title. Section 13(2) of the CPO facilitated the proving of title, but did not exonerate a vendor from his obligation of producing original title documents at completion. Clause 7 did no more than repeating this. It enabled the vendors to

prove title, as part of giving title, by sending certified copies, as stipulated under section 13.

- (ii) The proprietary right to possession of the original title documents is an important right on the part of an owner. For a clause to absolve a vendor from producing original title documents at completion, much clearer language would have to be used. Such clear language is not present in clause 7 or other parts of the Agreement.
- (iii) It is open to a vendor to stipulate or for the parties to agree that a purchaser is not entitled to insist on the production of the originals of all or some of the title deeds and documents.
- (iv) On the contrary, clause 8 of the Agreement provides that the vendors shall deliver to the purchaser such of the documents of title as relate exclusively to the properties without in any way limiting the scope to certified copies of these documents of title.

Annex B

Dawson Properties Ltd v Hong Kong Niiroku Ltd [1997] 2 HKC 800.

The following are the brief facts of the case. By a sale and purchase agreement dated 29 July 1996, the vendor had agreed to sell a shop to the defendant. Completion was fixed on or before 12 September 1996. The vendor expressly agreed to show good title to the property and, by express incorporation of clause 9 of Part A of the Second Schedule to the CPO, to give good title to the property. In fulfilment of his duties, the vendor produced to the purchaser the Government lease dated 1843 and an assignment dated 9 February 1931. The latter document constituted the intermediate root of title document. The grantee under the Government lease was a Sin Tak Fan. The assignor named in the assignment was Fung Wo Yin. The purchaser raised a requisition asking for clarification of the relationship between Sin and Fung. The vendor responded that he had fulfilled his duty under section 13(1)(a)(ii) of the CPO.

2. After further pressure from the purchaser, the vendor replied “without prejudice to his previous correspondence” that he would try and satisfy the purchaser’s requisition and later provided memorials showing the devolution of title from the Government lease down to the intermediate root of title. The purchaser then demanded the original deeds instead of the memorials. The vendor refused to supply them and the purchaser did not complete by the date agreed. The vendor forfeited the purchaser’s deposit. The purchaser applied to the court for a declaration that the requisition had not been properly answered by the vendor and a good title had not been shown.

3. The judge held that, in an open contract, i.e. one where there was no contractual provision on the duties of the vendor, the law implied that the vendor had an obligation to show and make a good title. However, it could hardly be argued that the vendor’s obligation regarding title was the one set out in s 13(1) of the Ordinance which was subject to the contrary intention of the parties. In this case, the contract for sale and purchase provided that the vendor was to show good title by

reference to Condition 9 of Pt A of the Second Schedule to the Ordinance, and that obligation was also discharged by compliance with s 13(1).

4. Under common law, the vendor was required to produce the Crown lease, but there was no obligation for him to prove title from that point all the way down to the contract. Condition 9 of Pt A of the Second Schedule did not impose a more onerous burden on the vendor.

5. The vendor was not obliged by law to prove its title between the Crown lease and the intermediate root of title. The vendor had agreed to deal with the first requisition on a without prejudice basis. It was not obliged to disclose the memorials which were not documents of title.

***Lo Hung Bui v Lo Shea Chung* [1997] HKLRD 721, [1997] 2 HKC 723 (CA).**

6. The following are the brief facts of the case. The vendor had agreed to sell a lot of land in Yuen Long to the purchaser and provided the title deeds in compliance with section 13 of the CPO. In April 1961, i.e. during the pre-intermediate root of title period, the property had been registered in the name of Sham Shun Tsing, who executed a power of attorney giving power over all his property in Hong Kong to Sham Kwan Yiu.

7. The power of attorney was registered in the Land Registry, the memorial of the power of attorney showing that it included power in respect of the property in question. The property was then assigned by way of gift by the attorney in August 1961. The property subsequently changed hands several times. The purchaser raised a requisition as to an alleged defect in the title on the grounds that the power of attorney had not authorised the attorney to assign by way of gift. The vendor refused to answer this requisition and the purchaser sought a declaration that the vendor had failed to show good title to the property.

8. The vendor contended that he had complied with his

obligations to show title required by section 13 of the CPO. Further, he was only required to answer a requisition as to an alleged pre-intermediate root defect if the purchaser could establish that there was an actual defect in the title in the pre-intermediate root period.

9. The court rejected the vendor's contention that he was not required to answer the requisition unless the purchaser could prove that there was a defect in title. Even had this been so, the purchaser had in this case established a pre-intermediate root defect so that the vendor was obliged to answer the requisition. The court made the declaration sought that the vendor had failed to do so.

10. Cheung J said that the obligation to show good title included the obligation to answer requisitions satisfactorily. If requisitions were not answered satisfactorily, it did not matter whether the vendor had a good title to the property or not.

11. Section 13(1) of the CPO did not preclude a purchaser from showing, from a source other than the vendor, that the pre-intermediate root title was defective and that the purchaser was entitled to raise requisitions as to title. The right to raise requisitions was not to be taken away except by legislation or by agreement between the parties.

12. It was also said that the burden of the purchaser to show a defective pre-intermediate root title and his entitlement to raise requisitions on the pre-intermediate root title were not mutually exclusive. The raising of requisitions might enable a vendor to remedy any defects in title.

Annex C

Land Registration System

The Land Registry maintains a computerized land register for each property. Particulars of deeds or other documents affecting a property lodged for registration are entered in the land register of that property. After registration, the land registers and imaged copies of the registered documents are open for public inspection subject to payment of prescribed fees.

2. If a person purchases a property or becomes a party to a property transaction, a deed or other document is executed. The document will normally be registered at the Land Registry.

3. Registration of a document under the present deeds registration system gives it priority over unregistered documents and other documents registered after it. However it does not give the document any validity it does not have. Registration will not create the interest sought, nor will it cure any defect in that interest. It will merely give priority pending court determination of the right of the party registering the interest, and any priority gained. By registration, a person's interest in the property is put on notice to any person who is interested in the property. Any person subsequently dealing with the property will be bound by the registered document. Unregistered documents will lose priority and be void as against any subsequent bona fide purchaser or mortgagee for valuable consideration.

Annex D

Title Registration

In 1988, it was proposed that the land registration system, one of deeds, be amended to provide for a system of registration of title. The Land Titles Bill was gazetted on 6 December 2002. It passed into law on 7 July 2004.

2. The object of the LTO is to gradually replace the present system under the LRO of registering the documents relating to land with a new system of registering the title to land and the interests in the land subject to which the title is held. The principal benefit of this new system is that it provides certainty both to ownership of land and the interests in that land because, subject to certain exceptions specified in the Bill, no matter may affect land unless the matter is registered.

3. A scheme of ‘daylight conversion’ will be adopted which has the following main features –

- (1) At the commencement of the LTO, all new land will come immediately under the title registration system. With few exceptions all land covered by a new Government lease issued after a surrender will be ‘new land’ within the meaning of the LTO.
- (2) After commencement of the LTO, all land under an existing Government lease and all properties on that land will remain under the deeds registration system laid down in the LRO for a designated period of twelve years.
- (3) Major amendments to the LRO are proposed that will introduce two new mechanisms, “namely “caveat” and “caution against conversion” whereby persons who claim interests in property can have those interests protected against the risk of their loss on conversion to the title registration system.

- (4) A person who can claim an interest in a property is given ample time and means to protect that interest. Once a purchaser for value has acquired the property after conversion, he gains the certainty that, as registered owner, his title is guaranteed. All persons dealing with the property after conversion can rely on the Title Register.

4. The whole purpose of the Title Register is to give certainty. As a safeguard against fraud and to correct unintended errors there are provisions to rectify the Register. The LTO also puts in place indemnity arrangements to protect innocent parties who suffer a loss due to an error or omission in the Register.

5. Under the scheme, two types of loss are covered, i.e. the loss caused by an entry in or omission from the Title Register as a result of mistakes or omissions on the part of the Land Registrar or public officers assisting the Registrar, and the loss of ownership caused by an entry in or omission from the Title Register as a result of fraud on the part of any person.

Annex E

**Number of vendor and purchaser summonses
taken out in the High Court**

Year	Total number of vendor and purchaser summonses	Number of cases relating to the problem
1998 (After 23.9.98)	9	2
1999	27	3
2000	18	1
2001	14	0
2002	4	2
2003	3	0
2004	3	0