

**Consultation Paper
on proposals by the Law Society
to amend section 13 of the
Conveyancing and Property Ordinance (Cap. 219)**

The purpose of this paper is to seek comments on proposals by the Law Society that section 13 of the Conveyancing and Property Ordinance (Cap. 219) (“CPO”) be amended.

The Law Society’s Proposals

2. The Law Society proposes that section 13 of the CPO be amended to the effect that a purchaser cannot require a vendor to produce any documents made before the date for the statutory commencement of title or make any requisitions in respect of such documents.

3. As proposed by the Law Society, the amendment to the CPO should be along the lines of section 45 of the English Law of Property Act 1925 (“LPA”) in order to alleviate potential problems for many property owners.

4. Section 13(1) and (2) of the CPO provides that –

“ (1) Unless the contrary intention is expressed, a purchaser of land shall be entitled to require from the vendor, as proof of title to that land, only production of the 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.”

5. Section 45(1) of the LPA 1925 provides that –

“(1) A purchaser of any property shall not –

1. require the production, or any abstract or copy, of any deed, will, or other document, dated or made before the time prescribed by law, or stipulated, for the commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; or
2. require any information, or make any requisition, objection, or inquiry, with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title, is recited, agreed to be produced, or noticed;

and he shall assume, unless the contrary appears, that the recitals, contained in the abstracted instruments, of any deed, will, or other documents, forming part of that prior title, are correct, and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, enrolment, or otherwise :

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

(iii) any document creating any limitation or trust by reference to which any part of the property is disposed of by an abstracted document.”

6. Section 44(1) of the LPA 1925 provides that –

“44. (1) After the commencement of the Act thirty years shall be substituted for forty years as the period of commencement of title which a purchaser of land may require; nevertheless earlier title than thirty years may be required in cases similar to those in which earlier title than forty years might immediately before the commencement of this Act be required.”

“Fifteen years” was substituted for “thirty years” in the application of subsection (1) above to contracts made after 1969 by the Law of Property Act 1969, section 23.

7. It is not the Law Society’s Property Committee’s intention by its proposal to amend the Land Registration Ordinance. Interests which are registered at the Land Registry would still be effective. The objective is merely to obviate the requirement to produce the originals of pre-intermediate root deeds leaving all other aspects of the existing law unchanged.

The Law Society’s proposed draft provisions

8. Since the CPO and LPA have different structures and concepts, it may not be prudent to add a provision to the CPO similar to section 45 of the LPA. Without full-scale comprehensive research of the two pieces of legislation, such an approach might have hidden pitfalls. It is considered preferable to create a locally drafted provision to the effect that a vendor is not required to produce the original pre-intermediate root title documents which relate exclusively to the

property. The Law Society has therefore suggested that the following draft provisions be incorporated into CPO as the new section 13A.

“13A Giving and Making Title

- (1) A purchaser of land shall be entitled to require from the vendor, for the purpose of giving and making title to that land, only the delivery of the original of any document that:
 - (a) relates exclusively to the land; and
 - (b) is required to be produced by the vendor as proof of title to that land.
- (2) A purchaser of land shall have no proprietary right or ownership to any original document that the vendor is not required under subsection (1) to deliver to the purchaser in giving and making title to that land.
- (3) Where any original document is not required to be delivered to the purchaser of land under subsection (1), no constructive notice by the purchaser of any matter or thing affecting the land shall arise solely from the fact that:
 - (a) the original document is not delivered to the purchaser; and
 - (b) no enquiry is or has been made by the purchaser for the original

document.”

9. The Law Society has also proposed that, on the enactment of any legislative amendments which operate to limit a vendor’s duty to give title pursuant to section 13 of CPO, clause 8 of the covenants and conditions set out in Part A of the Second Schedule, which may be incorporated into an agreement by reference (pursuant to section 36 CPO), should also be suitably amended to reflect the changed legal position. The words underlined below are the proposed amendment.

“8. Documents of Title

Such of the documents of title which relate exclusively to the property the subject of the agreement and are required for giving and making title to the property shall be delivered to the purchaser. All other documents of title in the possession of the vendor shall be retained by the vendor who shall, if so required on completion of the sale, give to the purchaser a covenant for safe custody thereof and for production and delivery of copies thereof, such covenant to be prepared by the purchaser.”

Reasons for the Law Society’s proposal

10. The Law Society’s proposals were prompted by two judgments, namely *Yiu Ping Fong & Anor v. Lam Lai Hing Lana*, HCMP No. 3617 of 1998 (“*Yiu Ping Fong case*”) and *Guang Zhou Real Estate Development (Hong Kong) Co. Ltd. & Anor v. Summit Elegance Limited*, HCA 1531 of 1998 (“*Guang Zhou case*”). The brief facts of the two cases are at **Annex A**.

11. The Law Society is concerned that these decisions are to the effect that, notwithstanding section 13 of the CPO (which limits the period for deducing title back to a good root of title at least 15 years prior to the date of the sale and purchase agreement), a vendor has the duty to

produce the “originals” of “all” title deeds and documents relating “exclusively” to the subject property to fulfil his duty to “give” a good title. This duty would theoretically include the duty to produce original title deeds that were made before the required intermediate root of title (“pre-intermediate root”).

12. The Law Society has reported that solicitors, based on their previous interpretation of section 13(2) of the CPO, had not been too concerned about obtaining the original pre-intermediate root title deeds. The practice has been to accept copies of title documents either certified by a solicitor or a Government public officer, or attested by two solicitors’ clerks.

The Current Law

Duty to show and give good title

13. Every contract for the sale of land prima facie imports a term that the vendor will show a good title or, as it is sometimes expressed, a marketable title, one which may at all times and under all circumstances be forced on the purchaser.¹

14. By the contractual completion date, the vendor must both have the title which he has contracted to give and be able to prove that fact. This obligation must be satisfied at the date for completion. The judgments in both the *Yiu Ping Fong* case and the *Guang Zhou* case seem to be consistent with the vendor’s common law obligation.

15. At common law, a vendor was required to show good title for 60 years. This was reduced to 25 years pursuant to section 13 of the CPO in 1984, and further reduced to 15 years pursuant to the Conveyancing and Property (Amendment) Ordinance 1988. A number of presumptions intended to assist in the proof of title were also introduced.

16. Under section 13(1), where the Government lease was granted less than 15 years before the sale and purchase agreement, proof

¹ *Barnsley’s Conveyancing Law and Practice*, M P Thompson p.266.

of title commencing with the Government lease must be produced. Where the land to be sold is held under an older Government lease, the vendor is required to produce the Government lease and evidence of title for at least 15 years prior to the agreement for sale and purchase, commencing with an intermediate root of title which is an assignment, a mortgage by assignment or a legal charge which deals with the whole of the vendor's interest in the land to be sold.

17. Subsection (1) refers only to the proof of title by a vendor producing the title deeds. According to the judgment in the *Yiu Ping Fong* case, this is only one step in the making or giving of title. The vendor does not make or give title simply by producing the documents referred to in subsection (1).

18. The vendor is, therefore, obliged to show title in accordance with the statutory provisions of the Ordinance for a period of at least 15 years, unless this period is either reduced or increased by the terms of the agreement for sale or the production of certain title documents is dispensed with. For example, the parties are at liberty to select the intermediate root document from which the chain of title must be proved. To establish the extent of the vendor's duty, therefore, both the statutory and contractual provisions must be read together.²

Duty to produce original title documents

19. At common law, a purchaser is entitled to the production of the original title documents. This fundamental rule, i.e. the best evidence rule, means that the court would insist on the best evidence being adduced of any fact alleged. The policy underlying the best evidence rule appears to balance the need for the protection of a purchaser and the interests of the holder of an unregistrable equitable interest.

20. If the deeds are in the hands of some person other than the vendor, or the person who ought to hold them, the purchaser is thereby placed on enquiry as to the reason for this, and he has constructive notice

² *Hong Kong Conveyancing – Law and Practice*, Judith Sihombing and Michael Wilkinson, Vol 1, VI[18]

of the facts which such enquiry would disclose³.

21. According to the principle laid down in *Re Halifax Commercial Banking Co and Wood* (1898) 79 LT 536 in respect of missing documents, where the vendor is unable to produce documents because they have been destroyed or lost, he is permitted to produce secondary evidence of the contents of the documents. If a title deed has been lost, the vendor should explain by way of a statutory declaration how it has come to be lost, and adduce secondary evidence as to its contents and due execution.⁴ It has now been settled by the Court of Appeal and upheld by the Court of Final Appeal that secondary evidence of all title deeds and documents taken within the chain of title period, including the Government lease, is acceptable by way of proof of title.⁵

22. Since the Land Registry will provide certified copies of title deeds, a person who does not own property can produce certified copies of title deeds and pass himself off as the rightful owner. The Law Society has by way of its circular nos. 95 and 170 of 1997, advised its members that, where a client instructs a solicitor to sell property in respect of which he is unable to produce the original title deeds, claiming that they are lost, the solicitor should be especially careful to ensure that the vendor is not perpetrating property fraud upon the purchaser. The Law Society has recommended that, if the vendor is not previously known to the solicitor, he should be asked to apply for a Certificate of Registered Particulars from the Immigration Department and these particulars should be sent direct to the solicitor by the Immigration Department. The application should specifically include a verification of the client's photograph and all particulars on record. Where the client is not previously known to the solicitor, he should be asked to provide additional evidence of ownership, e.g. bank mortgage statements, rate receipts, management fee receipts, etc.

³ *Spencer v Clarke* (1878) 47 LJ Ch 692

⁴ *Lai Chung Yue v Chau Shing* [1987] 3 HKC 406, [1986-88] CPR 520, HC (missing power of attorney); and *Kok Yun Kuen v Au Yeung Bik Tai* [1991] 2 HKC 522, [1989-91] CPR 565, HC (missing conveyancing document).

⁵ *Wu Wing Kuen v Leung Kwai Lin Cindy and Ip Foo Keung Michael v Chan Pak Kai* [1999] 3 HKLRD 738, [1999] 4 HKC 565, CA.

Pre-intermediate root defects

23. There are two relevant court cases, namely, *Dawson Properties Ltd v Hong Kong Niiroku Ltd* [1997] 2 HKC 800 (“*Dawson case*”) and *Lo Hung Biu v Lo Shea Chung* [1997] HKLRD 721, [1997] 2 HKC 723 (CA) (“*Lo Hung Biu case*”) which should also be considered to illustrate the duty of the vendor in relation to pre-intermediate root defects. The brief facts of the two cases are at **Annex B**.

24. It was held by the judge in the *Dawson case* that where a vendor has agreed to show a good title, that obligation will be discharged upon compliance with the provisions of section 13 of the CPO. Section 13 did not require the vendor to prove his title between the Government lease and the intermediate root of title. It was also the view of the judge that section 13(1) was a statutory provision as to how the vendor’s duty was to be discharged. It did not affect the concept of showing and making a good title.

25. In the *Lo Hung Biu case*, the Court of Appeal judge held 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.

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

27. It was also held in the case that the burden on 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.

Background to the CPO

28. The Conveyancing and Property Bill 1983 was published as a discussion bill. A Working Party comprising representatives of the Law Society, the Registrar General's Department and the University of Hong Kong was formed to consider this bill and the comments received upon it. The result was a revised Conveyancing and Property Bill 1984 which, after only slight amendment, became law as the Conveyancing and Property Ordinance (Cap. 219) on 26 July 1984. The CPO largely codified the law of real property and simplified conveyancing practice and documentation. The Ordinance came into effect on 1 November 1984.

29. In order to find out the reason why section 45 of LPA was not incorporated in the CPO, a detailed search was conducted of the documents relating to the work of the Working Party on the enactment of the CPO. It appears that a query was raised in passing as to whether, given the wording of section 13, there was a need to produce pre-intermediate root title documents. The matter was briefly discussed by the Working Party, which concluded that the production of pre-intermediate root title documents should be based on the terms of contract made by the vendor and purchaser. There did not seem to be any indication from the available records in hand that section 13 of CPO was intended to limit both the proving and giving of title to 15 years. The Working Party did not seem to have gone into much detail in discussing the common law obligation of the vendor to **prove** good title after the signing of the contract and to **give** good title upon completion.

30. It appears from the available records that the omission from the CPO of a provision similar to section 45 of the LPA was not an oversight. The fact that some parts of section 45(1) of the LPA has been incorporated into section 13(3) also seems to support the deduction that it was intended that the need for original pre-intermediate root title deeds should be determined by the contracting parties.

31. The Law Society's Property Committee considers that the policy intent behind the amendments it has suggested has already been decided by the Administration at the time the CPO was passed, but the

CPO unwittingly did not implement this position fully. It is also of the view that Professor Willoughby⁶ and Sarah Nield⁷ have implied that there was no longer an obligation to provide title deeds prior to the pre-intermediate root of title. Furthermore, a former member of the Property Committee, and who was co-opted to help the Working Party and attended most meetings also believed, so far as he can recollect, that this was the intention.

Implications of the Law Society's Proposals

32. It is possible to examine the impact of the Law Society's proposal by first considering whether the outcome of the *Yiu Ping Fong* case and the *Guang Zhou* case would be different if the proposed amendment were implemented.

Impact of the proposed amendment on the result of the *Yiu Ping Fong* case

33. It seems that the proposed amendment would not affect the outcome of this case. The missing original 1986 assignment fell within the 15-year period required under section 13 of CPO for the purpose of proving and giving of good title, irrespective of changes to the law. However, had the missing original document been a pre-intermediate root document, the proposed amendment to the law would mean that the purchaser (in future) could not refuse to complete because of the failure to deliver the original document.

34. As for the secondary evidence, namely the Chinese statutory declaration that was produced in the case, it failed to assist the defendant in the case for the purpose of providing satisfactory secondary evidence to prove that the missing title deed was lost and unlikely to re-emerge.

35. The common law position is that a purchaser is entitled to production of the original title documents but, if a title deed is lost, clear and cogent secondary evidence is acceptable in its place. The Court in this case did not exclude the admissibility of secondary evidence. In fact, the practice of accepting a statutory declaration in respect of a lost

⁶ *The Conveyancing and Property Ordinance 1984: An Introduction Parts I-II*, Peter G Willoughby

⁷ *The Conveyancing and Property Ordinance 1984: Questions and Solutions!*, Sarah Nield

title deed has not been denied in *Yiu Ping Fong*. The Court rejected the statutory declaration made by the vendor, not for the reason that it was not acceptable in law, but because the vendor was not the person who lost the deed. The vendor, as the Court put it, could only say that she personally never had the original 1986 assignment (i.e. the lost title deed). She could not of her own knowledge explain the circumstances of the loss because she was not the person who had custody of it. This is a logical conclusion which cannot be faulted. In other words, the practice of accepting a statutory declaration in respect of a lost title deed is confirmed by the case. Whether or not a particular document is sufficient secondary evidence depends on the facts of the individual case.

36. The decision on the validity of a statutory declaration (in respect of a lost deed) in *Yiu Ping Fong* was the subject of concern by the Law Society. Since the statutory declaration was not a pre-intermediate root document in the case, the inadmissibility of the statutory declaration would not be changed even if there is a proposed amendment to the law.

Impact of the proposed amendment on the result of the *Guang Zhou* case

37. With regard to the *Guang Zhou* case, the implementation of the proposed amendments would not change the effect of the decision in the case.

Advantages

38. There are a number of advantages to the Law Society's proposal.

- (1) (i) From the perspective of the vendor, it is expected that a large number of properties, mainly older properties, which currently have doubtful titles, may be made good or marketable as a result of the proposed amendment to the CPO. It would increase the marketability of properties and help to realize the developmental potential of properties in old areas.
- (ii) It is likely that there are thousands of property owners

who, unless the law is changed, will not be able to comply with their duty to make and give title (in accordance with the judgment in *Yiu Ping Fong case*) if they are to sell their properties in the years before Hong Kong will acquire a registered title system.

- (iii) Furthermore, in the event that the property market experiences a substantial and sudden downturn before the Land Titles Ordinance (“LTO”) comes into full operation, many purchasers may be tempted to use this inability of the vendors inability to produce pre-intermediate root title documents as their exit doors. This will lead to a massive number of lawsuits and claims both between vendors and purchasers and between clients and solicitors. Amending the law will avoid such massive number of lawsuits and claims.
- (2) (i) From the perspective of purchasers, the proposal would assist them to purchase a property of their choice without any future concern about doubts in the title caused by, in some cases, technical defects appearing in pre-intermediate root title documents beyond the statutory requirement of 15 years.
 - (ii) Purchasers of the properties which are subject to third party rights based on a pre-intermediate root document, such as an equitable mortgage by deposit of title deeds, would not have constructive notice of those rights, nor be bound by them. For such purchasers and future purchasers of the property, the title of their property will be free of such third party rights.
- (3) From the perspective of solicitors who act for both vendors and purchasers, their everyday conveyancing work might be facilitated and simplified since any documents that are pre-intermediate root would no longer need to be traced for

the purpose of proving and giving good title. The work of the vendor's solicitor, involving correspondence with previous solicitors acting for the vendor, or the solicitors acting for previous owners of the property and developers of the property, for the purpose of tracing pre-intermediate root documents might no longer be required. This is however subject to the requirement of the vendor to answer any requisitions raised by the purchaser on pre-intermediate root title documents (*Lo Hung Biu* case). Purchasers' solicitors also would have a simplified job by not having to peruse the pre-intermediate root title deeds.

- (4) Due to the simplified conveyancing procedure, legal costs for both the vendor and the purchaser should, in theory, be reduced since less time would be spent on dealing with pre-intermediate root title documents. This would be in the interest of consumers.
- (5) Due to the simplified conveyancing procedure of not requiring the production of pre-intermediate root title documents, solicitors would be less susceptible to the risk of being sued by their purchaser and vendor clients for negligence for failing to obtain a good title to the property or to deduce a good title respectively. This is however subject to the requirement of the vendor to answer any requisitions raised by the purchaser on pre-intermediate root title documents (*Lo Hung Biu* case).
- (6) It will be in the interest of Hong Kong financial institutions to increase the marketability of the properties charged or mortgaged to them. Financial institutions may find themselves in a difficult position if a sharp downturn in the market leads simultaneously to massive defaults in mortgage payments and refusal by property purchasers and their solicitors to accept any title with missing pre-intermediate root title documents.
- (7) The Law Society considers that the impact of the proposed

legislative amendments on third party rights is minimal. This minimal risk should be balanced against the magnitude of the problem that the proposed legislative amendments aim to address.

Disadvantages

39. One possible disadvantage of the proposed amendment is the risk that third party rights may be adversely affected. The following circumstances may be considered.

- (1) Equitable mortgage by deposit of title deeds
 - (i) An equitable mortgage by deposit of title deeds may exist prior to the 15-year period for proving and giving of title. An example of an equitable mortgage by deposit of title deeds would be one in favour of a mother who has lent money to her son more than 15 years ago. The only form of security she may have is the possession of the title deeds of her son's property. It is possible that she may not enforce the loan throughout this period of more than 15 years. During this period, the son may have sold the property without disclosing the existence of his mother's equitable interest in the property.
 - (ii) If the son sold his property more than 15 years after the deposit of the title deeds, the purchaser would still require him to produce the original title deeds which relate exclusively to the property, such as the previous assignment which forms the intermediate root of the title. In such circumstances, the son would not be able to give a good title to the property pursuant to section 13 of the CPO. The same outcome would apply if the law is changed as proposed.
 - (iii) However, if the son sold the property shortly after the deposit of the title deeds, the purchaser (A) would be

placed on enquiry as to the reason for the absence of the original title deeds. He would therefore have constructive notice of the equitable interest and, under the current law, would take the property subject to her interest.

- (iv) Let us assume that, fifteen years later, A wants to sell the property to a prospective purchaser, B. Under the existing law, he can require A to produce the original pre-intermediate root title documents, which are still held by the equitable mortgagee. He would be put on enquiry if the original pre-intermediate root title documents were not produced by A. He could refuse to complete the transaction and recover his deposit. If he did complete the transaction, he would take the property subject to the equitable mortgage.
- (v) If the law is changed as proposed, purchaser A, by producing the assignment between himself and the son as the intermediate root of title, would no longer need to produce the pre-intermediate root title documents. B will suffer as a result of the change of the legislation since he will not be able to back out of the transaction and have his deposit back. In this situation, A will benefit from the proposed change in the law even though he has constructive notice of the equitable interest. Purchaser B cannot request the vendor to produce pre-intermediate root title documents. As a result of the change in the law, B would be left with only a contractual right, such as an action against A for misrepresentation if a false statement of fact had been made by A to B which induced him to enter into the contract, or fraudulent misrepresentation, if A was found to have made the false statements knowingly. B may be able to obtain damages from A.
- (vi) If the law is not changed, the equitable mortgagee would probably have a personal right against her son

and, possibly, A, who has constructive notice of her equitable interest and would therefore be taking the property subject to her interest. B may also have constructive notice of the equitable interest and take the property subject to it. If the law is changed and drafted as proposed, B will not have constructive notice of the mother's equitable interest. The equitable mortgagee's only remedy would be against the party who first assigned the property without disclosing that interest, that is, against her son. It could be argued that this would give inadequate protection to such a person like the mother in this case.

- (vii) However, it is possible that the right of the equitable mortgagee would have already become statute-barred by virtue of section 7 of the Limitation Ordinance (Cap. 347). If that were so, the proposed change in the law would not prejudice the equitable mortgagee.

Section 7(2) of the Limitation Ordinance provides that

—
“No action shall be brought by any other person to recover any land after the expiration of 12 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person, ...”

It may well be the case that an equitable mortgagee's right would be statute-barred after so many years of non-exercise of her rights. However, this may not always be the case. Section 7 of the Limitation Ordinance refers to the expiration of 12 years **from the date on which the right of action accrued** to him. The right of action of an equitable mortgagee may have accrued many years after the deposit of the title deeds. For instance, one of the terms for the loan may be that it would be repaid, say, five years from

the deposit of the title deeds. In such a case, the right of action would only accrue when the money became due five years from the deposit of the title deeds. If so, the right of the equitable mortgagee may not necessarily be statute-barred by way of the operation of section 7 of the Limitation Ordinance. The proposed amendment to the law could therefore be prejudicial to such a person.

Analysis put forward by the Law Society

- (viii) The above is however subject to the analysis and counter-arguments put forward by the Law Society. The Law Society's Property Committee considers that the above example, although theoretically possible, is highly artificial in practice. In order to confer the benefits of the fraud in these circumstances, the fraudsters would have to wait at least 15 years before disposing of the property to a third party. In practice, pure deposits of deeds without any documentary evidence which would require registration under the Land Registration Ordinance ("LRO") are extremely rare and not encountered in practice. Generally, the Property Committee believes that one should not be so keen to protect "off the register" transactions. The Law Society considers that the proposed legislative amendments do not in any way seek to alter or change any substantive rights of third parties (in the sense of changing the substantive **contents** of any third party right or interest), there can be no question of any existing third party rights being **substantively** affected by the proposed legislative amendments.

- (ix) Consideration should however be given to the impact of the proposed amendments on the **priority** of any existing third party rights. This is because, although the substantive contents of third party rights are not in any way affected by the proposed amendments, their

priority vis-à-vis the subsequent purchaser may be affected.

- (x) Under the land registration system in Hong Kong, the priority of any right or interest over land which is registrable under the LRO is governed by the provisions of the LRO. A brief description of the deeds registration system under the LRO is at **Annex C**. As the land registration system created by the LRO is one of documents registration, only documents are registrable under the LRO. Accordingly, rights and interests that are not created by documents but, say by operation of law, are unregistrable.
- (xi) As the proposed legislative amendments do not in any way affect the operation of the LRO, where the third party's right or interest is one which is registrable under the LRO, it will not be affected by the proposed legislative amendments. The provisions of the LRO will continue to govern the priority of such registrable right or interest.
- (xii) Thus, any third party's interest which is registrable and has been duly registered with the Land Registry under the LRO will not be affected by the proposed legislative amendments as the priority of such registered interest is, and will continue to be, governed by section 3(1) of the LRO.
- (xiii) Where the third party's interest is registrable but is **not** registered, section 3(2) of the LRO will continue to operate and generally, subject to fraud, such unregistered interest is void against a subsequent purchaser even with notice (section 4 of the LRO). That is the position under the existing law and will not be changed in any way by the proposed amendments.
- (xiv) In the case of unregistrable third party rights or

interests over land, the priority of these rights and interests are governed by the rules of common law and equity. “As a rule, both at common law and equity, where there are competing interests in property, they will rank for priority according to their order for creation (*Cave v. Cave* [1980] 15 Ch.D.639)”. This is however subject to one important exception, namely, the well-known doctrine of bona fide purchaser without notice (*Emmet and Farrand on Title*, 19th ed., at para.5.141.) The effect of the doctrine is that a bona fide purchaser for value of a legal estate generally takes free from all existing equitable interests of which he has no notice (*Pilcher v. Rawlins* [1972] 7 Ch App 259).

- (xv) Conceivably therefore, insofar as the proposed amendments may alter the operation of the common law doctrine of bona fide purchaser without notice, the priority of **some** existing third party interests (that are equitable in nature and unregistrable under the LRO) may be affected.
- (xvi) In order to consider what are those third party interests which may be so affected, one would have to analyse the ambit of the proposed amendments.
- (xvii) As pointed out above, the only change that the proposed amendments make to the duty of the vendor is to relieve him from delivering to the purchaser pre-intermediate root documents. If the law is amended as proposed, on completion the vendor would no longer be required to hand over original documents that are not required for proof of title. These are generally pre-intermediate root documents which are not required for proof of title by virtue of section 13 of CPO. Hence if those pre-intermediate root documents are in the possession of a third party, and if such possession could give rise to some

equitable right or interest in the property in favour of the third party, the proposed legislative amendments may potentially affect such third party right or interest.

- (xviii) As the proposed change of the law is limited only to cutting down the title documents that are required to be delivered on completion, any third party rights or interests that do not arise from possession of title documents would not be affected in any way.
- (xix) It follows from the above analysis that it is possible to narrow down the nature of the third party interests that may be potentially affected by the proposed amendments. To be so affected, the third party right or interest must satisfy **all** of the following requirements:
- (a) the third party right or interest must be unregistrable under the LRO. Accordingly, it must not be a right or interest that is created by a document registrable under the LRO;
 - (b) the third party right or interest must be an equitable interest. If it is a legal interest it is not subject to the doctrine of bona fide purchaser without notice at all, and whether the subsequent purchaser has notice of the third party interest or not would become irrelevant;
 - (c) the third party right or interest must arise from his being in possession of the title documents; and
 - (d) those title documents possessed by the third party must be documents that are not required for proof of title.
- (xx) It can be observed, following the analysis above, that

the third party rights which may be affected by the proposed legislative amendments are necessarily very limited. Indeed, the only type of third party right or interest that would satisfy all the requirements set out above would seem to be that of an equitable mortgagee whose interest arises from the deposit of the title deeds with him or her. That is also the only type of third party interest mentioned in the *Yiu Ping Fong case* by Yuen J.

- (xxi) Moreover, in order to be affected by the proposed amendments, the equitable mortgage should normally be one which was created **before** the intermediate root of title. This is because the proposed amendments would not relieve the vendor from delivering to the purchaser the original title documents which are required for proving title. Accordingly, normally speaking, only the equitable mortgages that were created in favour of third parties before the intermediate root would be affected by the proposed amendments. That would make the impact on third party rights even more limited.
 - (xxii) The rights of a mortgagee by deed made (whether made before or after the intermediate root) would not be affected by the proposed amendments. The mortgagee's rights being rights created by the deed are registrable in that the deed is a registrable document under the LRO. If it is registered, its priority falls to be governed by section 3(1) of the LRO. If it is not, section 3(2) applies. Nothing in the proposed amendments would affect the operation of the LRO in this respect.
- (2) Registered pre-intermediate root equitable interest
- (i) Another scenario to be considered is that where a pre-intermediate root equitable interest has already

been registered in the Land Registry. The question whether a purchaser may be affected by matters or defects which are ascertainable only from documents which he cannot demand from the vendor has been discussed in *The Hong Kong Conveyancing and Property Ordinance*, by Sarah Nield, pp. 42 and 43. It is stated that, in the United Kingdom, some protection is afforded to a purchaser by section 44(8) of the LPA, which provides that a purchaser shall not be deemed to have any notice of any matter evident from a pre-intermediate root document. Accordingly, a bona fide purchaser for value of the legal estate is not bound by pre-intermediate root equitable interests. A purchaser will not be bound by an unregistered pre-intermediate root document (under section 3(2) of the LRO) but he will be bound by any registered documents from his Land Registry search and fuller information from the Land Registry memorial of the document.

- (ii) The question then arises as to whether a purchaser can refuse to complete the sale and purchase of the property if he discovers a pre-intermediate root defect in title from the Land Registry record. Under the existing law, the purchaser may refuse to complete if the vendor has in the contract agreed to prove and give good title and has not expressly precluded the purchaser from raising any objection to any pre-intermediate root defect for giving and proving good title. Should the law be changed as proposed, the effect would be that the purchaser would be precluded from demanding pre-intermediate root title deeds from the vendor. It would not also necessarily go so far as to preclude a purchaser from pursuing any contractual rights (such as action for damages based on misrepresentation or fraudulent misrepresentation) he may have against the vendor. In such a case, as the vendor has not actually breached the contract, a

purchaser will be unable to recover his deposit⁸. At the same time, the vendor would still be subject to the requirement of the vendor to answer any requisitions raised by the purchaser on pre-intermediate root title documents (*Lo Hung Biu* case).

(iii) The Law Society's Property Committee put forward the argument that under existing law, a vendor proves title under section 13. He is therefore only required to deliver pre-intermediate root deeds on completion, so the purchaser does not get a chance to examine them beforehand. Furthermore, it considers that it is well established that courts will not impose a bad or doubtful title on a purchaser even if the defect relates to pre-intermediate root documents (*In Re Scott & Alvarez Contract*).

(3) There would be the danger regarding equitable mortgage by deposit of title deeds as discussed in paragraph 39(1). These cases may be remote, but the danger still exists. There is also a possibility that large numbers of equitable mortgagees would emerge after the legislation is changed.

Non-legislative means

40. We also need to consider whether there are non-legislative means to resolve the problem. These are discussed below.

(1) Land Titles Ordinance

41. The implementation of the title registration system may help to solve the problem relating to the title. A brief description of LTO is at **Annex D**.

42. By virtue of the new title registration system, the problems

⁸ *The Hong Kong Conveyancing and Property Ordinance*, Sarah Nield p. 43; *Re Scott and Alvarez's Contract* [1895] 1 Ch 596 and on appeal [1895] 2 Ch 603 and *Re National Provincial Bank and Marsh* [1895] 1 Ch 190 at 192

caused by the absence of pre-intermediate root original title documents and the Government lease will be cured in twelve years' time after the commencement of the LTO. The LTO however is unable to provide an immediate solution to the present problem.

(2) Special Condition in the Sale and Purchase Agreement

43. The proposed amendment to the CPO, similarly to section 45 of the LPA, would operate as a special condition in the sale and purchase agreement which limits the purchaser's right to seek pre-intermediate root title documents. Instead of resorting to legislative amendments to achieve this effect, the problem could be overcome in practice if the vendor's solicitors were to include a special condition in the sale and purchase agreement. Since binding agreements are commonly made on the basis of the standard preliminary sale and purchase agreement prepared by the Society of Hong Kong Real Estate Agents Ltd, a special condition would also need to be included in that standard form in order to be generally effective. The Law Society's Property Committee considers that this is no different to the way section 13 of the CPO operates.

44. A limiting clause may be relied upon by a vendor where, as a matter of construction, the words used are sufficiently clear to cover the defect in question and the purchaser has not been misled.

45. Where the vendor has knowledge of a defect affecting his title of which the purchaser has no actual or constructive knowledge, the vendor should draw the attention of the purchaser to the defect to ensure that he can rely upon any limiting clause in the sale and purchase agreement. The Law Society's Property Committee considers that this is the position under the general law and will not change.

46. It is therefore important for both the solicitor representing the vendor and purchaser to check the pre-intermediate root title before the contract is signed, since the interests of both their clients may be affected adversely.⁹ However, this does not seem to be the current

⁹ *Hong Kong Conveyancing – Law and Practice*, Judith Sihombing and Michael Wilkinson, Vol 1, V[168]

practice adopted by vendor and purchaser solicitors. One of the reasons may be that the title documents are often still in the hands of the mortgagee bank and unavailable to the parties when the contract is signed.

47. Although a vendor's duty to produce pre-intermediate root title documents could, in theory, be modified by a contractual provision, purchasers may not be willing to accept such a condition. And, in the absence of any statutory modification of that duty, the Society of Hong Kong Real Estate Agents Ltd. may be unwilling to incorporate a provision that appears to favour vendors over purchasers.

48. Another point of concern raised by the Law Society is that to rely on solicitors to adopt this "pragmatic approach" by not insisting on the production of original title deeds outside the statutory period for proving title may not be able to resolve the problem. Such "pragmatic approach" involves solicitors acting in departure from what is required by the law, and in a falling market purchasers' solicitors can no longer afford to be "pragmatic" because their purchaser-clients are likely to insist their solicitors to jump on every possible ground to get themselves out of their bargain. At best, all it could do is merely to have the problem deferred to a later date.

(3) Discharge of encumbrances by the court

49. Section 12A of the CPO may assist in some cases where vendors have pre-intermediate root encumbrances. This section is similar to section 50 of the LPA.

50. Section 12A (1)-(3) of the CPO provides that –

- “ (1) Where land is subject to any encumbrance, whether immediately realizable or payable or not, and the encumbrancer is out of the jurisdiction, cannot be found or is unknown, or if it is uncertain who the encumbrancer is, the court may, if it thinks fit, on the application of the party for the time being entitled to redeem the encumbrance, direct or allow payment into court of a sum of money sufficient to

redeem the encumbrance and any interest thereon.

- (2) Upon payment into court of the sum referred to in subsection (1), the court may, if it thinks fit, and either after or without any notice to the encumbrancer, as the court thinks fit, declare the land to be free from the encumbrance, and make any order for conveyance or vesting order as appropriate, and give directions for the retention and investment of the sum of money paid into court and for the payment or application of the income thereof, and for the payment of an amount certified by the court to be the reasonable costs of the applicant in making the application, such amount to be deducted from the sum of money paid into court.
- (3) On application by the encumbrancer or any person entitled to the money or fund in court, the court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.”

51. This provision, which allows the court to declare the land to be free from encumbrances and make an order for conveyance upon payment of money into court, may offer a useful solution in some cases. However, it does not assist in situations where the vendor is unaware of any encumbrance, but is unable to produce pre-intermediate root documents.

52. The Law Society’s Property Committee has expressed the view that section 12A is intended to deal with old New Territories mortgages. Reference to section 12A is not particularly helpful as this only relates to incumbrances which are known about. The type of incumbrances which are being referred to are by definition undisclosed and unascertainable.

The Administration’s consideration

53. If the law were to be amended, the objective would be to

render a doubtful title, caused by technical defects, good, or at least marketable.

54. In examining how widespread the problem is, the Administration has tried to obtain statistics from the Law Society. However, statistics in respect of the number of properties affected by the problem are unavailable from the Law Society. Nevertheless, according to the Law Society, the problem is very widespread.

55. The Administration has tried to assess the scope of the problem by roughly estimating the number of vendor and purchaser summonses¹⁰ filed in the High Court relating to the problem taken out by the parties since 1999, i.e. the year after the two judgments. It was found that there were eight relevant cases (see **Annex E**).

56. The obvious limitation of this method of assessing the scope of the problem is that not all parties to conveyancing transactions who come across this problem would resort to the courts. Parties may resolve the problem in a number of ways. They may proceed to complete the sale and purchase; proceed to complete the sale and purchase with conditions, such as with a reduction in the purchase price; or allow the transaction to fall through with the deposit to be returned to the purchaser. The circumstances which gave rise to the parties seeking a judicial remedy probably included cases where the vendor had forfeited the purchaser's deposit as a result of the purchaser's refusal to complete the sale and purchase, or where the vendor sought specific performance to compel the purchaser to complete the sale and purchase.

57. Even if there are at present comparatively few cases where the problem arises, this may not always be so. Purchasers are sometimes motivated to rescind their agreements when property prices fall or the economy is bad. The number of problem cases may surge as a result of a bad economy and may drop as a result of a booming property market, when purchasers and mortgagee banks are less mindful of uncertainties or technical defects in the title. Therefore the number of vendor and purchaser summonses may only provide a general profile of the matter, but may not serve as conclusive evidence of the seriousness of

¹⁰ Pursuant to section 12 of the CPO

the problem.

58. One important question for the Administration is whether or not it would be in the public interest to introduce an amendment that would relax the established formal requirements for giving of good title. This relaxation would apply to all transactions, even though the problem cases are of an uncertain number. It can be argued that the law should continue to give purchasers a reasonable assurance of good title, and that it is in the interest of purchasers that the present formalities should not be diluted. Where a doubtful title occurs, it may be preferable to deal with these in the circumstances of each case rather than by placing a legislative restriction on the production of title documents which would reduce the minimum formal requirements in the CPO and at common law.

59. The present system of land registration in Hong Kong is a deeds registration system governed by the LRO. The system provides a record of the instruments affecting a particular property, but gives no guarantee of title. Even if a person is registered in the Land Registry as the owner of a property, he may not be the legal owner because there may be uncertainty or defects in his title to the property. Under the present land registration system, the perusal of title deeds serves an important function of providing assurances of the title and protecting the interests of the purchaser.

60. The presence of equitable mortgages by deposit of title deeds might seem to be rare. However, it is reasonably possible that aggrieved equitable mortgagees would emerge if the law is changed. The Law Society's Property Committee considers that this is an extremely remote scenario. If there is only a remote risk that a third party will be affected by the proposed amendment, it may be in the interests of the public and solicitors that the proposed amendment should be made.

Comments sought

61. Comments on this paper, and in particular on the following issues, by **31 May 2006**, would be greatly appreciated –

- (1) Should section 13 of the CPO be amended to the effect that a

purchaser cannot require a vendor to produce any documents made before the date for the statutory commencement of title or make any requisitions in respect of such documents?

- (2) If so, should a provision similar to the one set out in paragraph 8 above be added to the CPO and clause 8 in Part A of the Second Schedule to the CPO be amended as set out in paragraph 9 above?

62. Comments should be addressed to –

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April 2006