

Property Law in Hong Kong

An Introductory Guide

Second Edition

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1

Introduction to Property – Generally

A. Overview

This book is about property and the general legal principles which apply to this area of law. Rather than a specialized textbook for law students, this book seeks to introduce property law to readers from different fields such as construction, accountancy, social work, and, other professions. As such, this publication will not review all aspects of property. This book will cover property topics that are, in general, governed by the common law. Areas of property that are statute-based will be reviewed but not in substantive detail. Conveyancing, because of its importance, will be reviewed in some detail.

Before continuing on this subject of property law, however, we should discuss a related matter. That matter is the common law legal system. Hong Kong and the United Kingdom, along with most Commonwealth countries and the United States, all follow the common law legal system. Continental Europe and China are examples of jurisdictions which follow the civil law legal system. The major difference between the two legal systems is that the common law legal system relies upon precedent.¹ *Common law* historically refers to the law common to all England. *Precedent* refers to prior examples found in preceding court decisions which would be followed in subsequent cases concerning the same facts and issues. Consequently, this is the reason for referring to cases and for discussing cases in this book.

Finally, in preparing this work, we assumed that the reader has some basic knowledge of contract law as most transactions concerning property involve legally-binding agreements.

B. Organization

This book is concerned with property, its definition and the general principles of property law. Both personal and real property will be examined. This publication is divided into three parts. Part 1 focuses on real property. The discussion on real property will include a review of freehold and leasehold estates, and co-ownership. Then, in Part 2, focus turns to land-related issues, such as servitudes and mortgages. Part 3 of this book provides a detailed review of Hong Kong conveyancing and follows the process of creation and transfer of interests in real property.

C. Definition

This section is the introduction to property in general. Here we will review the definition of property; what it means to own property; how property is acquired or disposed; and, some general rules about property. Later, we will discuss in more detail the aspects of what is commonly known as real estate.

The definition of *property* we use is: title to, or, rights of, ownership in goods or other valuables. *Title* means one's right to property, or the evidence of that right to property. *Ownership* means the complete and the exclusive right to control property, subject to law.²

In Hong Kong, the *Interpretation and General Clauses Ordinance* (Cap 1) also provides some definitions, which are as follows:

“immovable property” (不動產) means –

- (a) land, whether covered by water or not;
- (b) any estate, right, interest or easement in or over any land; and
- (c) things attached to land or permanently fastened to anything attached to land;

“movable property” (動產) means property of every description except immovable property;

“property” (財產) includes –

- (a) money, goods, choses in action and land; and
- (b) obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as defined in paragraph (a) of this definition.³

Ownership involves certain rights.⁴ Someone who owns property has the following rights:

- to use the property
- to enjoy the use of the property
- to enjoy the property aesthetically (e.g., works of art such as paintings or sculptures)
- to destroy the property
- to dispose of the property
 - by gift
 - by succession,⁵ through a document known as a *will* made by the testator⁶ or through intestacy⁷ where the probate court applies of the laws of intestate succession⁸
 - by sale
 - by abandonment⁹

How does a person obtain these rights of ownership? Methods by which ownership of property may be acquired include the following:

- original, i.e., taking possession of property which has never been owned¹⁰
- taking property which has been abandoned by the original owner
- creation or invention, i.e., creating property such as when a carpenter creates a piece of furniture from raw materials¹¹
- derivatively:
 - by sale/purchase of the property
 - by gift of the property
 - succession: either in accordance with a will or the laws of intestacy if the person died without a will

Notice how some methods of disposing of property by one person may also be the manner through which property is obtained by another person. For example, property may be disposed of by gift and can be acquired by gift. The sale of property by the original owner may result in the purchase of the property by a new owner. As a final example, a person may come into ownership of property abandoned by the original owner.

With ownership comes the right of control. However, ownership and possession may be exercised separately. Property may thus be controlled by a person who exercises fewer rights than an owner, but who nonetheless may control access to and use of the property. This person has possession of the property. This concept of possession of personal property is discussed immediately below.

D. Possession and Bailment

Possession is the actual physical control of that property; or, the intent to possess exclusively that property intending to prevent others from using the property. The word *possession* “may mean effective, physical or manual control, or occupation, evidenced by some outward act, sometimes called *de facto* possession or detention as distinct from a legal right to possession. This is a question of fact rather than of law.”¹²

What happens when an owner of property lawfully parts with possession of the property? Two situations may arise. In the first situation, if the owner has no intention for any other person to have exclusive control, then the other person has no rights to possess the property. This person is a custodian. *Custodian* is defined as a “person or institution that has charge or custody of property, papers, or other valuables.” *Custody* is defined as the “care and control of a thing or person for inspection, preservation, or security.”¹³

In the second situation, if the owner, upon parting with possession, gives full control over the property to another person, a bailment is created. A *bailment* is a transaction under which property or goods are delivered by one party (referred to as the *bailor*) to another party (known as the *bailee*) with provisions which normally require the bailee to hold the goods and ultimately to return the property to the bailor or to dispose of the property according to the bailor’s instructions.¹⁴

Acts as diverse as lending a book to [a] friend, leaving luggage in a storage area at a train station, and renting a car are all bailments. . . . in a bailment one person is entitled to ownership of a chattel but a different person has lawful possession of the good. In general, the good is to be held for a purpose and to be returned or redelivered when the purpose for which it was delivered is accomplished. The quintessential characteristic of a bailment, however, is a change in possession (control) over the good with the result that two sets of property rights exist in the same object – those arising from the bailor’s title and those resulting from the bailee’s possession.¹⁵

A bailment is usually based upon a contract. Three essential concepts are linked with the creation of a bailment. First, the bailee is to take care of the goods and return them in accordance with the bailor’s instruction. The extent of the duty of care varies, depending upon whether the bailment is for payment or free. Second, the bailee is liable for the loss or damage of the property should the bailee be negligent. Finally, the bailee cannot deny the

bailor's ownership of the goods.¹⁶ Thus, the bailee is given both physical and legal possession over the goods but does not become the owner of the goods. The bailor keeps the ownership or title to the property, and, may recover possession upon the end of the bailment.

E. Possession and the Finder Doctrine

Where an owner is unintentionally separated from its property, the common law¹⁷ recognises the Finder Doctrine.¹⁸ Under this doctrine, if the owner loses or misplaces property, the finder has better rights to the found object than anyone except the owner. The case of *Armory v Delamirie* (1722) 93 ER 664 introduced this doctrine that a finder “does not by such finding acquire an absolute property or ownership. Yet he has such a property as will enable him to keep it against all but the rightful owner.” Thus a finder has a right in the found property that is good against everyone in the whole world except the owner.¹⁹ Some examples include the following:

- if someone finds an object in a public place (such as a park), that person is entitled to the object unless it is claimed by the owner
- if someone finds an item in a private place where the public is invited (such as a store, mall, restaurant), that person is entitled to the item unless it is claimed by the owner
- if an object is found in a private place where the public is not invited, the object becomes the property of the owner of the land where the object is found
- if the owner was never in actual possession of the land, then the finder will be the individual who obtains lawful possession, except against the lawful owner

Parker v British Airways Board [1982] 1 QB 1004 is a case that applied the Finder Doctrine. Parker, a passenger of the airline, found a bracelet in the airline's lounge. Parker handed the bracelet to the airline, requesting that if the bracelet remained unclaimed, it should be returned to him. British Airways sold the bracelet and kept the money from the sale. Parker sued and the court determined that he acted properly. The airline did not show an intention to exercise control over the lounge such that the bracelet was in its possession before Parker found it.²⁰

The Finder Doctrine illustrates the common law's concept of relativity of property: the law determines which claimant of particular property has better title, rather than determining the true owner. Thus, in a court case

claiming conversion,²¹ the finder only needs to prove better title than the other party who cannot rely on the defence that a third party has a better title than the finder.²² This common law rule still applies in Hong Kong. Further, at common law, possession is assumed as evidence of title.

The right to have legal and de facto possession is a normal but not necessary incident of ownership. Such a right may exist with, or apart from, de facto or legal possession, and in different persons at the same time in virtue of different proprietary rights. Thus, when an owner has been wrongfully dispossessed of his goods by theft, or has lost them, he retains the right to possess them; but, where he has bailed them for a term or by way of pledge, this right is temporarily suspended.²³

...

The presumption of law is that the person who has de facto possession also has the property, and accordingly, such possession is protected, whatever its origin, against all who cannot prove a superior title. This rule applies equally in criminal and civil matters. Thus, as against a stranger or a wrongdoer, a person in actual or apparent possession, but without the right to possession, has all the rights and remedies of a person entitled to and able to prove a present right to possession.²⁴

F. Classification of Property

Here, we review the different types of property. Property may be categorised in many ways. Some of these categories might overlap so that a particular type of property could be classified under more than one category. We discuss these categories below.

One method of classification is designating property as either *tangible* property or *intangible* property. Tangible property includes goods or other things which can be touched, that is, objects which have a physical shape or a physical being. Intangible property refers to things which do not have a physical shape or being, such as rights arising under a contract.

Another method of classification is to designate property as being *realty* (real property) or *personalty* (personal property). Realty includes all things such as freehold estates and interests in land; trees and other plants which grow in the land; and, things that are permanently attached to the land, such as buildings, structures and plants. Real property can be further sub-divided into corporeal hereditaments and incorporeal hereditaments.

Corporeal refers to something which has a physical being, in other words, tangible property. *Incorporeal* refers to rights over objects rather than the property itself. *Hereditament* means those rights which are capable of being inherited. Corporeal hereditaments thus are physical objects over which rights may be exercised and incorporeal hereditaments are intangible rights over objects. Therefore, an incorporeal hereditament means any rights attached to, arising out of, or exercisable within a corporeal hereditament, e.g., a right of way. *Personalty* is all other types of property, sometimes referred to as *chattels*.

These classifications of property resulted from historical developments. In the past, an individual's status in society depended upon that person's relationship to the land. Thus, someone who lost land should be able to recover that land rather than receiving financial compensation. Courts would protect real property by requiring that the realty be returned to the owner. Thus, a law suit concerning land is known as a *real* action, which is sometimes termed an action *in rem*.²⁵ A legal right in land is a right *in rem*. This right *in rem* attaches to the land, binding all those who come into ownership or possession of that land. This is in part because land is considered to be unique in character. On the other hand, a lawsuit against a person for loss or damage to property other than land would be an action *in personam*, that is, a court action against the wrongdoer. The claimant in an action *in personam* would generally seek monetary payment for damages resulting from the wrongdoer's acts rather than for the return of the property.

Another historical development involved the common law being more concerned with the form and the strict application of law. As a result of the harsh application of the statutes by the courts of law, equitable notions began to be applied in the courts of equity. Equity sought to lessen the severity of the common law in order to make the law more fair and just.²⁶

An equitable right is a right *in personam* which can be enforced against the whole world except a person who acquired the land in good faith,²⁷ for value and without notice of the equitable interest.

Equitable remedies apply in property law and will be discussed in further detail in the following sections. For now, as an example, equity will be discussed in terms of trusts involving land.²⁸ Equity permits the creation of a *trust* where the legal title is in one person while another person enjoys the beneficial, or equitable, interests in that property.²⁹

With a trust involving land, the common law recognises that one party owns the land. This person has the legal estate in the land. If a trust

is created allowing another person to enjoy the land and its benefits, then this other person (referred to as the *beneficiary*) has an equitable interest (also known as an *equitable estate*) in the land. Equity would protect the interests of the beneficiary against those of the legal owner (known as the *trustee*).

PART 1

Real Property

The common law definition of land includes the surface of the earth, together with all things of a physical nature above and below the land surface, such as buildings, trees, and, minerals.¹ In Hong Kong, there are several statutory definitions of real property. One set of definitions is found in the *Interpretation and General Clauses Ordinance* which was provided earlier.²

Section 2 of the *Conveyancing and Property Ordinance* (Cap 219) provides the definitions concerning conveyancing and property. As these definitions are used throughout this book, section 2 is quoted in full as follows:

In this Ordinance, unless the context otherwise requires –

“assignment” (轉讓、轉讓契) includes –

- (a) the transfer of the whole of the interest in land held under a Government lease;
- (b) a legal charge;
- (c) a lease (other than a Government lease);
- (d) a surrender;
- (e) an assent; and
- (f) every other assurance or conveyance of land by any instrument;

“bankruptcy” (破產) includes winding up;

“borrower” (借款人), where used in the First, Second and Third Schedules, includes “mortgagor”;

“encumbrance” (產權負擔) includes a legal and equitable mortgage, a trust for securing money, a lien, a charge of a portion, annuity, or other capital or annual sum; and “encumbrancer”

“產權負擔人” . . . includes every person entitled to the benefit of an encumbrance, or to require payment or discharge thereof; “equitable interest” (衡平法權益) means any estate, interest or charge in or over land which is not a legal estate or a freehold; “instrument” (文書) means any document having legal effect except a will;

“land” (土地) includes –

- (a) land covered by water;
- (b) any estate, right, interest or easement in or over any land;
- (bb) the whole or part of an undivided share in land and any estate, right, interest or easement in or over the whole or part of an undivided share in land; and
- (c) things attached to land or permanently fastened to anything attached to land;

“legal charge” (法定押記) means a mortgage expressed to be a legal charge;

“legal estate” (法定產業權) means –

- (a) a term of years absolute in land;
- (b) the legal interest in any easement, right or privilege in or over land for an interest equivalent to a term of years absolute; and
- (c) a legal charge;

“lender” (貸款人), where used in the First, Second and Third Schedules, includes “mortgagee”;

“mortgage” (按揭) means a security over land for securing money or money’s worth;

“mortgage money” (按揭金) means the money, or money’s worth, secured by a mortgage;

“mortgagee” (承按人) includes any person claiming under a mortgage;

“mortgagor” (按揭人) includes any person claiming under a mortgagor;

“sale” (售賣), in relation to the sale of land, includes the disposition of all or part of the vendor’s estate and interest under a Government lease; . . .

“term of years absolute” (絕對年期), includes a term for less than a year, for a year or years and a fraction of a year and from year to year.

Thus, under the *Conveyancing and Property Ordinance*, *land* is defined in sections (a) and (c). Intangible rights which might exist over or in the land are given in sections (b) and (bb).

These definitions include some concepts which might be unfamiliar. The following sections of this book will attempt to explain the application of these concepts to land law. The next sections, in particular, review the doctrine of estates, examining the principles involving rights and interests in land. Servitudes and mortgages will be discussed later in Part 2.

Notes

Chapter One

1. The Hong Kong Government's Bilingual Laws Information System's *The English-Chinese Glossary of Legal Terms* [hereinafter *BLIS Glossary*] translates *common law* as “普通法” and *common law jurisdiction* as “普通法司法管轄區”. See the *BLIS Glossary* website at: <http://www.legislation.gov.hk/eng/glossary/homeglos.htm>
2. For a general introduction to personal property, see, e.g., BRUCE WELLING, *PROPERTY IN THINGS IN THE COMMON LAW SYSTEM* (1996); MICHAEL BRIDGE, *PERSONAL PROPERTY LAW* (3rd ed. 2002); SARAH WORTHINGTON, *PERSONAL PROPERTY LAW: TEXT, CASES AND MATERIALS* (2000); and SIMON GLEESON, *PERSONAL PROPERTY LAW* (1997).
3. *Interpretation and General Clauses Ordinance* (Cap 1), section 3. The *Official Solicitor Ordinance* (Cap 416), section 2(6) translates *property vested in* as “轉歸予 . . . 的財產”.
4. See 20 HALSBURY'S LAWS OF HONG KONG para. 295.027 (2010) [hereinafter 20 HALSBURY'S].
5. L.B. CURZON & P.H. RICHARDS, *THE LONGMAN DICTIONARY OF LAW* 560 (8th ed. 2011) [hereinafter *Curzon*] defines *succession*:
 - (1) The order in which persons succeed to property, or some title.
 - (2) Term applied to the estate of a deceased person.
 - (3) Process of becoming entitled to property of a deceased by the operation of law or will.
6. *Wills Ordinance* (Cap 30), section 2 provides: “‘will’ (遺囑) includes a codicil and any other testamentary instrument or act, and ‘testator’ (立遺囑人) shall be construed accordingly.”
7. See generally *Intestates' Estates Ordinance* (Cap 73). *Id.* at section 2(1) translates *intestate* as “無遺囑者”.

8. The *BLIS Glossary* translates the term *succession* as “死亡繼承”. See also the Law Reform Commission of Hong Kong, Report on Law of Wills, Intestate Succession and Provision for Deceased Persons’ Families and Dependents (Topic 15) (1990).
9. “Abandonment of goods takes place when possession of them is quitted voluntarily without any intention of transferring them to another.” 20 HALSBURY’S at para. 295.025.
10. Defined as *occupancy*. See *id.* at para. 295.036.
11. See also *id.* at paras. 295.037–295.039.
12. *Id.* at para. 295.011. This section also states:
‘Possession’ may mean legal possession: that possession which is recognised and protected . . . by law. The elements . . . of legal possession are an intention of possessing together with that amount of occupation or control of the entire subject matter of which it is practically capable and which is sufficient to exclude strangers from interfering.
13. BLACK’S LAW DICTIONARY 412 (9th ed. 2009) [hereinafter BLACK’S LAW DICTIONARY]. The *BLIS Glossary* translates the term *custodian* as “保管人”.
14. JOHN N. ADAMS & HECTOR MACQUEEN, *ATIYAH’S SALE OF GOODS* 11–12 (12th ed. 2010). See CURZON at 51. The *BLIS Glossary* translates *bailment* as “委託保管”; *bailee* as “委託保管人”; and *bailor* as “受寄人”.
15. DEREK MENDES DA COSTA, RICHARD BALFOUR & EILEEN GILLESSE, *PROPERTY LAW: CASES, TEXT AND MATERIALS* para. 4.1 (2nd ed. 1990) [hereinafter *PROPERTY LAW: CASES, TEXT AND MATERIALS*].
16. JUDITH SIHOMBING, *GOODS: SALES AND SECURITIES* 2 (3rd ed. 1997).
17. *Common law* is defined in the *Interpretation and General Clauses Ordinance*, section 3: “(普通法) means the common law in force in Hong Kong.”
18. For further analysis of this topic, see 20 HALSBURY’S at para. 295.020.
19. For a detailed discussion see *PROPERTY LAW: CASES, TEXT AND MATERIALS*, chapter 3; 20 HALSBURY’S at para. 295.020. Under the *Limitation Ordinance* (Cap 347), sections 4(1)(a) and 5, the owner of goods must sue in court within six years to reclaim the goods.
20. See *Parker v British Airways Board* [1982] 1 QB at 1017–1018 discussing the finder’s rights and obligations and the occupier’s rights and liabilities.
21. *Conversion* is defined by BLACK’S LAW DICTIONARY at 356 as the: “wrongful possession or disposition of another’s property as if it were one’s own . . .”
22. This is known as the plea of *ius tertii*. As explained by 20 HALSBURY’S at para. 295.024:
If the plaintiff was in possession of goods at the time of the act complained of, the defendant in an action for wrongful interference with goods is not entitled to show that a third party, under whom he did not claim, has a better right than the plaintiff . . .

23. *Id.* at para. 295.016.
24. *Id.* at para. 295.022.
25. Real property evolved because historically enforcement was by real actions which were only available to holders of freehold estates. Thus, leasehold estates are personal property, as they were regarded as a personal right and enforced by the leaseholder bringing a personal action against the lessor. As there is no freehold estate in Hong Kong (except St. John's Cathedral), there is virtually no realty. Nevertheless, in order to distinguish leasehold interests from other types of personal property, leaseholds are described as *chattels real*, as opposed to other personal property which are called *chattels personal*. Today, the distinctions between chattels real and realty have disappeared, and it is accepted in Hong Kong to describe land as real property. For further historical information see, e.g., 20 HALSBURY'S at para. 295.001 where it states in part:

In England, the distinction between personal and real (or freehold) property was manifested in the early rule that freehold estates and interests in land were specifically recoverable, by a 'real' action, from a wrongful taker, whereas no action lay to compel restitution of other forms of property, the appropriate remedy for such cases being a mere 'personal' action for damages . . .

26. *Common law* and *equity* are conceptually two separate and parallel sets of law. In Hong Kong, there is a unified court system which applies both the common law and equitable rules. The UK's parallel but separate system was not introduced here. There are thus no separate courts of common law and courts of equity (i.e., Chancery) in Hong Kong. The rules and remedies of both are available from the same judiciary in Hong Kong.

The *BLIS Glossary* translates *rules of the common law* as “普通法規則” and *rules of equity* as “衡平法” or “衡平法規則”. See also explanation at *supra* note 17.

27. That is, without any evil intent or purpose, fraud, conspiracy or collusion.
28. JUDITH-ANNE MACKENZIE & MARY PHILIPS, *TEXTBOOK ON LAND LAW* 18–19 (14th ed. 2012) [hereinafter MACKENZIE & PHILIPS]. The essential characteristic of the trust is the separation of the property's title from the right to use and enjoy the property. The trustee is the owner of the property but holds this property for the beneficiary. *Id.* at 271. See also, SARAH NIELD, *HONG KONG LAND LAW* 28 (2nd ed. 1997) [hereinafter NIELD].
29. The law of trusts may be considered as a separate area of law due to its complexity. Thus, the law of trusts will not be discussed further. See, e.g., S.H. GOO AND ALICE LEE, *LAND LAW IN HONG KONG* chapter 4 (Trust) (3rd ed. 2010) [hereinafter GOO & LEE]; 26(2) HALSBURY'S *LAWS OF HONG KONG* (2009); JOHN THURSTON & DEBORAH ANNELLS, *A PRACTITIONER'S GUIDE TO TRUSTS – HONG KONG EDITION* (2007); LAWRENCE MA, *EQUITY AND TRUSTS LAW IN HONG KONG* (2nd ed. 2009).

Part 1

1. See, e.g., 16 HALSBURY'S LAWS OF HONG KONG para. 230.043 (2010) [hereinafter 16 HALSBURY'S].
2. *Interpretation and General Clauses Ordinance*, section 3.

Chapter Two

1. MACKENZIE & PHILIPS at 590. See also GOO & LEE at chapter 1 (Tenures, Estates, Land and Property).
2. The *BLIS Glossary* translates *grant*, *grantor* and *grantee* as “授予”, “授予人” and “承授人” respectively.
3. MACKENZIE & PHILIPS at 588.
4. *Id.* at 162.
5. *Id.* at 163; See also MEGARRY'S MANUAL OF THE LAW OF REAL PROPERTY 42 (A.J. Oakley, ed., 8th ed. 2002) [hereinafter MEGARRY'S MANUAL]; SIR ROBERT MEGARRY & WILLIAM WADE, THE LAW OF REAL PROPERTY para. 3–056 (8th ed. 2012) [hereinafter THE LAW OF REAL PROPERTY].
6. See M.P. THOMPSON, CO-OWNERSHIP (1988); MEGARRY'S MANUAL at chapter 8 (Co-Ownership). See also GOO & LEE at chapter 10 (Co-Ownership).
7. See NIELD at 228.
8. The *BLIS Glossary* translates the term *joint tenancy* as “聯權共有”.
9. NIELD at 230. See also GOO & LEE at 532–534.
10. NIELD at 230.
11. *Id.* at 231.
12. (1861) 1 John & H at 557.
13. *Conveyancing and Property Ordinance* (Cap 219), section 8 provides:
 - (1) A joint tenancy of an estate or interest in land may be severed at law only by –
 - (a) a notice served by a joint tenant on the other joint tenants;
 - or
 - (b) an instrument.
 - (2) A joint tenancy of an estate or interest in land may be severed in equity by a notice served by a joint tenant on the other joint tenants or by any other method that is effective in equity or that would, but for subsection (1), be effective at law.
14. The notice must be served by a joint tenant on the other joint tenants. However, the case of *re 88 Berkeley Road, London NW9, Rickwood v Turnsek* [1971] 1 All ER 254 held that written notice of severance is effective once delivered even if not received by the addressee(s). See also the case of *Ho Nga Sheung v Ma Fook Leung* [1993] 2 HKC 647 (joint tenancy severed by divorce proceedings).

15. See the following section on the creation of co-ownership.
16. The *BLIS Glossary* translates the term *tenancy in common* as “分權共有”.
17. *Estate* in this sense refers not to an estate in land, but, rather, to the assets of a deceased person’s total property, the realty as well as the personalty. See BLACK’S LAW DICTIONARY at 586. The *Intestates’ Estates Ordinance*, section 2 provides that: “*estate* (遺產) means real and personal estate.”
18. *Conveyancing and Property Ordinance*, section 9.
19. The *BLIS Glossary* translates the term *vest in* as “歸屬”.
20. In the case of *Mole v Ross* (1951) 24 ALJ 356, the court decided that it was unnecessary to use the precise words as *joint tenants* to create a joint tenancy, but that any clear and plain language expressing an intention to do so will suffice. See GOO & LEE at 542–545; MEGARRY & WADE at paras. 13-015–13-021. The *BLIS Glossary* translates the term *legatee* as “受遺贈人”.
21. GOO & LEE at 532–542; MACKENZIE & PHILIPS at 284; MEGARRY’S MANUAL at 308; THE LAW OF REAL PROPERTY at para. 13–017.
22. GOO & LEE at 544. See, e.g., *Lake v Gibson* (1729) 1 Eq Ca Abr 290, 291.
23. MEGARRY & WADE at para. 13–022; MEGARRY’S MANUAL at 314.
24. In the case of *Bull v Bull* [1955] 1 QB 234, the claimant and his mother, the respondent, together purchased a house with the son contributing a larger part of the purchase price than his mother. The property was taken in the son’s name. The parties agreed that the mother should occupy two rooms of the house and that the son and his wife occupy the rest of the house. Differences arose between the parties and the son sued for possession of the rooms occupied by the mother. The court decided in favour of the mother, an equitable tenant in common who should be entitled to share the proceeds of sale of the property. The court ordered that the house be sold and the proceeds be divided between them in the proper proportions:

The son is, of course, the legal owner of the house; but the mother and son are, I think, equitable tenants in common. Each is entitled in equity to an undivided share in the house, the share of each being in proportion to his or her respective contribution . . . My conclusion, therefore, is that, when there are two equitable tenants in common, then, until the place is sold, each of them is entitled concurrently with the other to the possession of the land and to the use and enjoyment of it in a proper manner: and that neither of them is entitled to turn out the other.

[1955] 1 QB at 236–238.

NIELD at 241–242 states that:

while co-owners may be joint tenants at law, they may hold that legal estate on trust for themselves as either joint tenants or tenants in common in equity. The reverse result does not, however, follow. Co-owners who hold as tenants in common at law will hold as

tenants in common in equity, for equity leans in favour of a tenancy in common and will follow the law in this respect.

25. *Morley v Bird* (1798) 3 Ves Jun 628, 631. See GOO & LEE at 545.
26. GOO & LEE at 545. The Privy Council held in the case of *Malayan Credit Ltd v Jack Chia MPH Ltd* [1986] 1 All ER 711, 715 that there was an equitable presumption in favour of a tenancy in common where the co-owners held for their various business purposes: “where premises are held by two persons as joint tenants at law for their several business purposes, it is improbable that they would intend to hold as joint tenants in equity.”
27. See, e.g., the preceding section on joint tenancy and MACKENZIE & PHILIPS at 296–300; GOO & LEE at 547–559.
28. The *BLIS Glossary* translates the term *partition* and *partition of property in land* as “分劃” and “分劃土地財產” respectively. See GOO & LEE at 559–575.
29. *Partition Ordinance* (Cap 352), section 4.

Chapter Three

1. DANIEL P. MCLOUGHLIN, *PRINCIPLES OF REAL ESTATE LAW* 30 (1992). See also 17(1) HALSBURY’S LAWS OF HONG KONG para. 235.483 (2007) [hereinafter 17(1) HALSBURY’S] as to the definition of *tenancy*. See also GOO & LEE at chapter 9 (Licences).
2. 17(1) HALSBURY’S at para. 235.001.
3. [1985] AC at 818. See also 17(1) HALSBURY’S at para 235.001; MALCOLM MERRY, *HONG KONG TENANCY LAW* 1–10 (5th ed. 2010) [hereinafter MERRY]. 17(1) HALSBURY’S at para. 235.008 provides that:

. . . an agreement creates the relationship of landlord and tenant and not that of licensor and licensee where there is the grant of exclusive possession for a fixed or periodic term at a stated rent.
4. 17(1) HALSBURY’S at para. 235.007 states that there:

. . . can be no tenancy without the grant of exclusive possession. Exclusive possession enables the tenant to exclude strangers and to exclude also the landlord unless the landlord is exercising rights to enter the land granted to him under the tenancy agreement.
5. NIELD at 487.
6. Chancery Practice, Inns of Court 1990/91.
7. See I.J. DAWSON & ROBERT A. PEARCE, *LICENCES RELATING TO THE OCCUPATION OR USE OF LAND* (1979) [hereinafter DAWSON & PEARCE], for a detailed discussion. See also MERRY at 4–10.
8. (1673) Vaugh at 351. See also 17(1) HALSBURY’S at para. 235.010.
9. NIELD at 487.
10. See also the case of *Attorney General v Chiu Pak Yue* (No. 2) [1963] HKLR 544.

11. *Hounslow London Borough Council v Twickenham Garden Development Ltd* [1971] Ch 233, 243.
12. DAWSON & PEARCE at 44. See also 17(1) HALSBURY'S at para. 235.014; GOO & LEE at 492.
13. NIELD at 489. See also 17(1) HALSBURY'S at para. 235.011; GOO & LEE at 493–511.
14. As discussed in more detail later in this section, a lease is considered to be a transaction affecting land. See 17(1) HALSBURY'S at paras. 235.050–235.054. See also GOO & LEE at chapters 7 (Leases) and 8 (Leasehold Covenants).
15. The *BLIS Glossary* translates the term *exclusive possession* as “獨有管有”.
16. 17(1) HALSBURY'S at para. 235.007. See also GOO & LEE at 386–408.
17. [1977] 1 WLR at 1185.
18. *Id.* See also GOO & LEE at 378–384.
19. [1944] KB at 370. *Lace v Chantler* is frequently quoted as authority. A more recent case is *Ashburn Anstalt v Arnold* [1988] 2 WLR 706.
20. E.g., yearly, quarterly or monthly. See also GOO & LEE at 410–412; THE LAW OF REAL PROPERTY at para. 17–072 and MEGARRY'S MANUAL at 346–349.
21. 17(1) HALSBURY'S at para. 235.160 observed:

A tenancy from year to year arises either by express agreement or by implication of law. It differs from a tenancy at will in that it may be determined only by notice duly given except where there is a stipulation for determination without notice. The appropriate words for the express creation of the tenancy are 'from year to year' . . .

See also MERRY at 43–44; MEGARRY'S MANUAL at 347. The *BLIS Glossary* translates the term *tenancy from year to year* as “按年計算的租賃”.
22. See *Conveyancing and Property Ordinance*, section 6 which provides:
 - (1) All interests in land created by parol and not put in writing and signed by the persons creating the same, or by their agents thereunto lawfully authorized in writing, have, notwithstanding any consideration having been given for the same, the force and effect of interests at will only.
 - (2) Nothing in section 3 or 5 or in subsection (1) shall affect the creation by parol of leases taking effect in possession for a term not exceeding 3 years (whether or not the lessee is given power to extend the term) at the best rent which can be reasonably obtained without a premium.
23. For further information, see 17(1) HALSBURY'S at paras. 235.166, 235.169, 235.176–235.178; GOO & LEE at 411, 425.
24. The *BLIS Glossary* translates the term *tenancy at will* as “隨意終止的租賃”.
25. 17(1) HALSBURY'S at para. 235.003; NIELD at 277.

26. NIELD at 277. See also GOO & LEE at 412–413; 17(1) HALSBURY'S at para. 235.003; MERRY at 41–43.
27. [1952] 1 KB at 296.
28. THE LAW OF REAL PROPERTY at para. 17–075; MEGARRY'S MANUAL at 349.
29. An implied tenancy is addressed in 17(1) HALSBURY'S at para. 235.151:
 A tenancy at will is implied where a person is in possession by the owner's consent, and his possession is not as employee or agent or as a licensee holding under an irrevocable licence, and is not held in virtue of any freehold estate or of any tenancy for a certain term. Such a tenancy is implied accordingly in cases of mere permissive occupation without payment of rent.
30. As explained in *id.* at para. 235.153, this situation arises when:
 A tenant who, with the landlord's consent, remains in possession after his lease has expired is a tenant at will until some other interest is created, either by express grant or by implication by the payment and acceptance of rent. . . . The terms of a tenancy at will which arises in this way will be those of the expired lease unless inconsistent with the nature of a tenancy at will and unless there is evidence of a contrary intention.

Note the effects of the amendments in the *Landlord and Tenant (Consolidation) (Amendment) Ordinance 2004* which came into effect 9 July 2004. These amendments removed the security of tenure provisions from the *Landlord and Tenant (Consolidation) Ordinance*.

31. See 17(1) HALSBURY'S at para. 235.154 states:
 A tenancy at will is determinable by either party on his expressly or impliedly intimating to the other his wish that the tenancy should be at an end. Until the intimation is thus given, the tenant is lawfully in possession . . . the landlord may not recover the premises . . . without a previous demand of possession or other determination of the tenancy. A demand for possession by the landlord which determines the tenancy at will is not a notice to quit. The issue of a writ claiming possession is a sufficient demand for possession to bring the tenancy to an end.
32. *Id.* at para. 235.004; GOO & LEE at 413 (citations omitted).
33. NIELD at 278. See also MERRY at 45–47.
34. As explained by one authority:
 A person who enters on land by a lawful title and, after his title has ended, continues in possession without statutory authority and without obtaining the consent of the person then entitled, is said to be a tenant at or on sufferance, as distinct from a tenant at will who is in possession with the landlord's consent. This is so whatever the nature of the tenant's original estate, whether he was tenant for

years, or the subtenant of a tenant for years, or a tenant at will. A tenancy at sufferance arises by implication of law and may not be created by contract between the parties.

There can be no tenancy at sufferance against the Government. In such a case, the person holding over is a mere trespasser. . . .

17(1) HALSBURY'S at para. 235.158.

35. See, e.g., Tenancy (Notice of Termination) (Exclusion) (Consolidation) Order (Cap 7A), para. 2:

Tenancies held from—

- (a) the Hong Kong Housing Authority,
- (b) the Hong Kong Housing Society, and
- (c) (Repealed L.N. 164 of 1992)
- (d) the Hong Kong Settlers Housing Corporation Limited,

are excluded from the further application of Part V of the Landlord and Tenant (Consolidation) Ordinance (Cap 7).

36. The *BLIS Glossary* translates the term *deed* as “契據”.
37. See *Landlord and Tenant (Consolidation) Ordinance* (Cap 7), section 6(1).
38. See *Stamp Duty Ordinance* (Cap 117), Schedule 1. The *BLIS Glossary* translates the term *ad valorem* as “從價費” and *stamp duty* as “印花稅”.
39. *Land Registration Ordinance* (Cap 128), section 5, the text of which is set out *infra* Chapter Eleven note 121.
40. *Land Registration Ordinance*, at section 4.
The *BLIS Glossary* translates *bona fide purchaser* as “真誠買方” and *bona fide purchaser for value* as “付出價值的真誠購買人”.
41. For more details on options to renew, see, e.g., 17(1) HALSBURY'S at paras. 235.106–235.107.
42. *Conveyancing and Property Ordinance*, section 3(1).
43. Tenancies where the premises are let wholly or primarily as a residence. MERRY at 45. See also *Landlord and Tenant (Consolidation) Ordinance*, section 2.
44. See Note 9 of Form CR109; *Landlord and Tenant (Consolidation) Ordinance* (Cap 7), section 119L.
45. Covenants may be *positive* (e.g., a covenant to repair), or *negative* (e.g., a covenant not to assign). See 17(1) HALSBURY'S at para. 235.424.
The *BLIS Glossary* translates *covenant* as “契諾”.
46. See *Conveyancing and Property Ordinance*, sections 4(1) and 4(2)(d) which state:
- (1) A legal estate in land may be created, extinguished or disposed of only by deed.
 - (2) This section does not apply to—
- ...

- (d) the grant, disposal or surrender of a lease taking effect in possession for a term not exceeding 3 years (whether or not the lessee is given power to extend the term) at the best rent which can be reasonably obtained without a premium;

...

47. The *BLIS Glossary* translates the term *condition* as “條件”.
48. This includes even the most fundamental of covenants, including the one to pay rent.
49. For further analysis on the topic of remedies for breaches of covenant or condition, see 17(1) HALSBURY’S at para. 235.100.
50. *Hamlyn & Co v Wood & Co* [1891] 2 QB 488, 491. In the Hong Kong case of *Hang Tak Co Ltd v Attorney General*, unreported, (1986) HCA 2567/83, the court applied the business efficacy test. See also JUDITH SIHOMBING & MICHAEL WILKINSON, *A STUDENT’S GUIDE TO HONG KONG CONVEYANCING* 91–100 (6th ed. 2011) [hereinafter *STUDENT’S GUIDE*] on Government leases.
51. *GOO & LEE* at 436–437. See *Landlord and Tenant (Consolidation) Ordinance*, section 119V which provides in part:
- (1) Any person who unlawfully deprives a tenant or sub-tenant of occupation of any premises commits an offence . . .
 - (2) Subject to subsection (3), any person who, in relation to any premises–
 - (a) either–
 - (i) does any act calculated to interfere with the peace or comfort of the tenant or sub-tenant or members of his household; or
 - (ii) persistently withdraws or withholds services reasonably required for occupation of the premises as a dwelling; and
 - (b) knows, or has reasonable cause to believe, that that conduct is likely to cause the tenant or sub-tenant–
 - (i) to give up occupation of the premises; or
 - (ii) to refrain from exercising any right or pursuing any remedy in respect of the premises,
 commits an offence . . .
52. But see the case of *Wise Stand Ltd v United Pentecostal Church of Hong Kong Ltd*, unreported, DCCJ 19369/2001. See, e.g., *MERRY* at 55–57.
53. See *GOO & LEE* at 437–438; *MERRY* at 57–60. The *BLIS Glossary* translates the term *derogation* as “減免” or “減損”.
54. On the subject of habitability, 17(1) HALSBURY’S at para. 235.292 states:
 . . . on the letting of an unfurnished dwelling house or flat there is no implied warranty on the part of the landlord that it is in a reasonably fit state for habitation . . . The intending tenant is presumed to make his own inquiries as to its condition . . . he takes

the house as it stands . . . If the house is, in fact, uninhabitable, then, after accepting the lease, the tenant is without remedy except where he has obtained a warranty of fitness, or where he has been induced to take the lease by misrepresentation . . . [by] the landlord, in which case the tenant may be entitled to rescission or damages. The mere omission of the landlord to disclose defects is not such misrepresentation but the deliberate concealment of some defects may be conduct equivalent to a fraudulent misrepresentation. . . .

55. Regarding furnished premises:

On the letting of a furnished house, there is an implied condition that it is in a fit state for habitation . . . and, if this condition is not fulfilled, the tenant is entitled to repudiate the contract at once. . . . it is not enough that the landlord believes the house to be in a fit state for habitation; it must in fact be reasonably habitable. The implied condition may be treated also as a warranty, and the tenant may recover damages for the breach. The condition and warranty relate, however, only to the state of the premises at the commencement of the tenancy; and there is no implied condition or warranty that they are to continue fit for habitation throughout the term.

Id. at para. 235.294. See also *GOO & LEE* at 438–439; *MERRY* at 60–62.

56. See discussion below concerning repairs. For a discussion of a landlord's liability to make repairs, see 17(1) *HALSBURY'S* at paras. 235.289–235.290.

57. See *MERRY* at 63–65 and chapter 9 (Repairs).

58. *GOO & LEE* at 442–443. 17(1) *HALSBURY'S* at para. 235.298 states:

Waste consists of any act or omission which causes a lasting alteration to the nature of the land in question to the prejudice of the person who has the remainder or reversion of the land. The obligation not to commit waste is an obligation in tort, and is independent of contract or implied covenant.

59. *MACKENZIE & PHILIPS* at 222.

60. Voluntary waste:

occurs when the tenant does an, whether deliberate or negligent, act which tends to destroy or diminish the premises. A clear instance would be pulling down a building (even if it is replaced by a building of greater value). More common examples are the removal of fixtures and the alteration of the premises . . .

MERRY at 64.

61. On occasions, it is difficult to distinguish between voluntary waste and ameliorating waste where the alterations might be considered an improvement. The case of *Cheung Yeung Kan v Lui Kwan* [1973–1976] HKC 237 held the alteration of the character of the premises to be a decisive factor. See also 17(1) *HALSBURY'S* at para. 235.299.

62. See 17(1) *HALSBURY'S* at para. 235.298.

63. A tenant for a fixed-term of years is liable for permissive waste. Many fixed-term leases contain an obligation to repair that supersedes the duty not to commit waste. Yearly tenants must keep the premises wind-tight and water-tight but will not be liable for fair wear and tear (the gradual deterioration caused by normal use or the normal action of weather). Weekly or monthly tenants must keep the premises in “a tenant-like manner” by “doing the little jobs about the place that a reasonable tenant would do” like cleaning the windows, mending a fused light, clearing a blocked sink, etc. NIELD at 288.
64. MACKENZIE & PHILIPS at 222 provides:

Generally the rule is that a weekly tenant is liable for voluntary waste but not for permissive waste: in other words he may not knock a wall down but he can let it fall down . . . The duty is increased . . . that he must use the premises in a ‘tenant-like manner’ . . . This means that the tenant must clean the premises, mend the electric light if it is fused, unstop blocked sinks, and generally ‘do the little jobs about the place which a reasonable tenant would do’.
65. 17(1) HALSBURY’S at para. 235.301. *Id.* at para. 235.310 reviews “fair wear and tear.” *Id.* at para. 235.302 reviews the remedies available for the failure to repair.
66. See, e.g., GOO & LEE at 442; MERRY at 63.
67. BLACK’S LAW DICTIONARY at 1237 defines *privity of contract* as “[t]he relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so.” LEXISNEXIS, HONG KONG ENGLISH-CHINESE LEGAL DICTIONARY 1418 (2005) [hereinafter LEXISNEXIS] translates this term as “契約之相互關係”.
68. BLACK’S LAW DICTIONARY at 1238 defines *privity of estate* as “[a] mutual or successive relationship to the same right in property, as between grantor and grantee or landlord and tenant.” LEXISNEXIS at 1418 translates this term as “出租人與承租人的相互關係”.
69. See, e.g., MERRY at 65.
70. See, e.g., *id.* at 63; GOO & LEE at 442.
71. See, e.g., MERRY at 65.
72. 17(1) HALSBURY’S at para. 235.333 states:

[Absent an agreement], a tenant for years or a tenant from year to year or other term has the right to assign his term or tenancy, or to create underleases or subtenancies. A restraint on assignment or underletting is, however, valid, and may be created either by condition or by covenant. If it is created by a condition, the condition will express the lease to be void upon those events, but it will be construed as making the lease subject to re-entry at the election of the landlord. More usually the restraint will be imposed by the tenant’s covenanting not to assign or underlet. An assignment

in breach of such a covenant or condition is not void but is effective subject to the landlord's rights to forfeit the lease.

See *id.* at paras. 235.330–235.339.

73. See, e.g., *id.* at para. 235.055; GOO & LEE at 443–444.
74. Damages generally refer to monetary compensation. *Injunction* is a court order either ordering a person to or prohibiting a person from performing an act.

MERRY at 141 explains that:

A declaration of legal rights is really a polite alternative to an order for specific performance. Where the plaintiff is confident that the defendant will act on the decision of the court . . . he may ask that the court simply declare the legal position without the sanction of an order or an award of damages.

The *BLIS Glossary* translates *injunction* as “禁制令” or “強制令” and *declaration* as “宣告”.

Chapter Four

1. For additional information on the topic of subleases/underleases, see 17(1) HALSBURY'S at paras. 235.075–235.077. See also GOO & LEE at chapter 7 (Leases).
2. For instances where a lease may confer upon the tenant an option to purchase the landlord's interest in the demised premises, see 17(1) HALSBURY'S at para. 235.101; STUDENT'S GUIDE at 897–898.
3. For discussion of the option to purchase the premises by the tenant, see 17(1) HALSBURY'S at paras. 235.101–235.104; and for the option to renew a lease, see *id.* at paras. 235.106–235.107.
4. See, e.g., MERRY at 159; GOO & LEE at 422–424.
5. See 17(1) HALSBURY'S at para. 235.165.
6. Alternatively at the end of the quarter or as the case may be.
7. See also GOO & LEE at 424 and 17(1) HALSBURY'S at paras. 235.108–235.110 for a discussion of an option to determine a lease before the expiration of the lease term.
8. See *Conveyancing and Property Ordinance*, section 62(1).
9. Concerning this procedure, see GOO & LEE at 425–427; 17(1) HALSBURY'S at para. 235.448. The *BLIS Glossary* translates the term *surrender* as “退回”.
10. *Reversion* is defined by BLACK'S LAW DICTIONARY at 1345 as the:

interest that is left after subtracting what the transferor has parted with from what the transferor originally had; specif., a future interest in land arising by operation of law whenever an estate owner grants to another a particular estate, such as a life estate or a term of years, but does not dispose of the entire interest . . .

The *BLIS Glossary* translates the term *reversion* as “復歸權益”.

11. For analysis, see, e.g., 17(1) HALSBURY'S at paras. 235.449–235.454; MERRY at 187–190.
12. CURZON at 221 defines *equitable lease* as a: “lease which does not satisfy the necessary requirements for a legal lease but is, nevertheless, valid in equity.” The definitions of *equitable interest* and *legal estate* are set out in the *Conveyancing and Property Ordinance*, section 2.
13. This matter is discussed in further detail in 17(1) HALSBURY'S at para. 235.451.
14. *Id.* at para. 235.450.
15. *Id.* at para. 235.453.
16. As explained in greater detail:
 The grant by the landlord of a new lease to a third person, with the tenant's consent, operates as a surrender of the old lease, provided the old tenant gives up possession to the new tenant at or about the time of the grant of the new lease. The same effect is produced where the landlord, with the tenant's consent, accepts another person as tenant, and that other person takes possession . . .
Id. at para. 235.454.
17. One should note:
 A merger occurs where the tenant acquires the landlord's reversion or a third person acquires both the lease and the reversion with the result that the two interests merge, being in the ownership of the same person. The principle underlying surrender and merger is the same, namely that the lease and the reversion become vested in the same person . . .
Id. at para. 235.448 fn.1. See, e.g., GOO & LEE at 428; MERRY at 190.
18. NIELD at 299–300.
19. See, e.g., GOO & LEE at 427, 466–469; MERRY at 171–181. The *BLIS Glossary* translates the term *forfeiture* as “沒收租賃權”.
 See, e.g., *Landlord and Tenant (Consolidation) Ordinance*, sections 117 and 126.
20. *Landlord and Tenant (Consolidation) Ordinance*, section 126 provides:
 In the absence of any express covenant for the payment of rent and condition for forfeiture, there shall be implied in every tenancy a covenant to pay the rent on the due date and a condition for forfeiture for non-payment within 15 days of the due date.
 See GOO & LEE at 469–471.
21. The *BLIS Glossary* translates the term *distress* as “扣押”.
22. See, e.g., *High Court Ordinance* (Cap 4), sections 21F–21H, which provide that relief will be granted to the defaulting tenant if the rental arrears and costs are paid in full before the time for acknowledging service of the writ or before a possession order is executed. Similar provisions can be found in the *District Court Ordinance* (Cap 336), section 69. The *BLIS Glossary* translates the term *waiver* as “放棄” and *estoppel* as “不容反悔法”.

- (c) The benefits and protection afforded by this Part shall not be available to a personal representative of a deceased tenant or, notwithstanding any will or the law of succession on intestacy, any other person who is not a person mentioned in paragraph (a) as entitled to those benefits and that protection.
52. See 17(1) HALSBURY'S at para. 235.493.
53. For a more detailed review of this procedure, see, e.g., 17 HALSBURY'S LAWS OF HONG KONG para. 235.469 (2000) [hereinafter 17 HALSBURY'S]; GOO & LEE at 429–432.
54. 17 HALSBURY'S at para. 235.469.
55. For more details concerning this procedure, see *id.* at para. 235.470.
56. *Id.*
57. *Id.*
58. *Lands Tribunal Ordinance* (Cap 17), section 10(2)(d). Subsection 2 states:
 (2) Without prejudice to the generality of the powers vested in it under subsection (1), the Tribunal may—
 . . .
 (d) for good cause, enlarge the time, whether or not that time has already expired, fixed by any Ordinance—
 (i) for the giving of any notice (and whether or not the notice relates to any proceedings);
 (ii) for the taking of any step in any proceedings;
 (iii) for the filing or lodging of any document in any proceedings.
59. See the case of *Speakman v Huang Investment Ltd* [1987] 1 HKC 258.
60. See *Landlord and Tenant (Consolidation) Ordinance*, former section 119M(2). 17 HALSBURY'S at para. 235.508 which notes:
 In practice, the power of the tenant to give notice of refusal of the new tenancy provides to the tenant the opportunity to consider the terms of the new tenancy ordered to be granted by the Lands Tribunal and to elect not to accept the grant if he considers the Tribunal's determination of the rent is higher than he is prepared to pay or other terms of the grant are unacceptable.
 See also 17 HALSBURY'S at paras. 235.471, 235.477.
61. 17 HALSBURY'S at para. 235.471 (citing *Landlord and Tenant (Consolidation) Ordinance*, former section 119A(4)).
62. I.e., the tenant has served Form CR103. See also 17 HALSBURY'S at para. 235.508. See MERRY 2003 at chapter 16 (Grounds of opposition).
63. Note that in accordance with *Landlord and Tenant (Consolidation) Ordinance* section 119L, a landlord is required to file a Form CR109 with the Commissioner of Rating and Valuation, failing which a landlord is not entitled

to maintain an action to recover rent under the lease or agreement, although the landlord may still forfeit the lease or tenancy for non-payment of rent, provided that there is a forfeiture clause in the agreement. 17 HALSBURY'S at para. 235.507 (citing *Fuk Lai Ling v Poon Shu-Wan* [1983] 1 HKC 126).

For a discussion of non-payment of rent and breach of covenant, see MERRY 2003 at 228–229.

64. 17 HALSBURY'S at para. 235.486.
65. See *id.* at para. 235.487. See, MERRY 2003 at 229–235 for a review of this ground.
66. 17 HALSBURY'S at para. 235.488.
67. For a review of these criteria, see 17(1) HALSBURY'S at para. 235.502; MERRY 2003 at 234–235.
68. For more information, see 17(1) HALSBURY'S at para. 235.503; MERRY 2003 at 231–232.
69. See the former section 119H(1)(a). One authority discusses this in greater detail:

Where the Tribunal does not make an order for the grant of a new tenancy on the ground that the landlord requires the premises for his own use, or use of stipulated close relatives, the Tribunal may specify the name of the person for whom it is satisfied the premises are required. Furthermore, in such cases the landlord must not, for a period of 24 months after the decision of the Tribunal declining to make an order for the grant of a new tenancy, let the premises or any part of the premises or assign, transfer or part with possession of the premises or any part of the premises. Nor must the landlord use, or allow the use of the premises or any part of the premises other than as a residence for the person for whose occupation the Tribunal was satisfied that the premises were required.

17 HALSBURY'S at para. 235.497.

70. See the former section 119H(2); 17 HALSBURY'S at para. 235.497.
71. See the former section 119H(9); 17 HALSBURY'S at para. 235.497.
72. For a further discussion of this topic, see 17 HALSBURY'S at para. 235.498; MERRY 2003 at 235–238.
73. For further details, see 17 HALSBURY'S at para. 235.491.
74. See also *id.* at para. 235.498 which presents the restrictions upon landlords claiming possession of the premises upon the basis of rebuilding of the premises.
75. The former section 119F(4).
76. See, e.g., MERRY 2003 at 238–239.
77. 17 HALSBURY'S at para. 235.492.
78. See, e.g., MERRY 2003 at 240–241.

79. 17 HALSBURY'S at para. 235.493.
80. *Id.* at para. 235.494. See also MERRY 2003 at 241.
81. 17 HALSBURY'S at para. 235.473 (citing the *Landlord and Tenant (Consolidation) Ordinance* (Cap 7), former section 119D(3)(a)(ii)). See also 17 HALSBURY'S at para. 235.476.
82. See the former section 119D(3)(a)(iii) of the *Landlord and Tenant (Consolidation) Ordinance*.
83. *Lands Tribunal Ordinance*, former section 8(7) provides:
 The Tribunal shall have jurisdiction to make orders for possession or for ejection in relation to premises to which Part I, or tenancies or sub-tenancies to which Part II, Part IV or Part V of the Landlord and Tenant (Consolidation) Ordinance (Cap 7) applies where the contractual period of a tenancy or sub-tenancy has been terminated by forfeiture, by surrender (including surrender under the former section 52A, or under section 117, of that Ordinance), by notice of termination within the meaning of Part IV or Part V of that Ordinance or by notice to quit given by the landlord to the tenant, the tenant to the landlord, the principal tenant to the sub-tenant or the sub-tenant to the principal tenant.
84. See 17 HALSBURY'S at para. 235.477.
85. *Landlord and Tenant (Consolidation) Ordinance*, former section 119J states:
 The terms of a tenancy granted by order of the Tribunal under this Part (other than terms as to the duration thereof and as to the rent payable thereunder) shall be such as may be agreed between the landlord and the tenant or as, in default of such agreement, may be determined by the Tribunal; and in determining those terms the Tribunal shall have regard to the terms of the current tenancy and to all relevant circumstances.
86. *Id.* at former section 119I.
87. *Id.* at former section 119.
88. See 17 HALSBURY'S at para. 235.503.
89. *Landlord and Tenant (Consolidation) Ordinance*, former section 119K.
90. *Id.* at former section 119M.
91. See, e.g., *Landlord and Tenant (Consolidation) Ordinance*, section 2 which also states: “business premises” (商用處所) means premises which are not domestic premises.” Part V states:
 (1) . . . this Part shall apply to every tenancy . . . whether the same be effected orally or in writing and notwithstanding any provision in such tenancy, including any provision purporting specifically to exclude the provisions of this Part.

...

Landlord and Tenant (Consolidation) Ordinance, section 121.

100. *Id.*
101. In *Fujitsu Hong Kong Ltd v Kwan Sit-cham* [1991] HKDCLR 23 the judge implied a term that the landlord must give interest for the deposit.

Chapter Five

1. See STUDENT'S GUIDE at 78–80. The *BLIS Glossary* translates the term *fixture* as “固定附著物” and *fitting* as “裝置”. See also GOO & LEE at 11–32.
2. See also the case of *Elitestone Ltd v Morris* [1997] 2 All ER 513; 17(1) HALSBURY'S at paras. 235.126–235.127; MERRY at 204–208.
3. See also 17(1) HALSBURY'S at para. 235.128.
4. *Goldful Way Development Ltd v Wellstable Development Ltd* [1998] 4 HKC 679.
5. *Deen v Andrews* [1986] 1 EGLR 262.
6. *Irene Loong v Pun Tsun Hang* [1959] HKDCLR 192. Yet, in *Yu Yiu Kong Samuel v Kobylanski Stephen Andre*, [2001] HKEC 821, the court stated:

If the item is intended to be permanent and to afford a lasting improvement to the land or building, it will be a fixture. If the attachment is intended to be temporary and no more than necessary for the use and enjoyment of the item, it remains a chattel . . . Applying these tests . . . the air-conditioning unit . . . a window-type air-conditioner, was not a fixture. Its attachment to the wall was only temporary. It could have been removed without much damage to the wall. Such an air-conditioner was no different in nature from a ceiling fan or wall-lamp. All of these items are . . . chattels rather than fixtures.
7. *Penta Continental Land Investment Co Ltd v Chung Kwok Restaurant Ltd* [1967] HKDCLR 22, 26.
8. *Orient Leasing (Hong Kong) Ltd v NP Etches* [1985] HKLR 292, 298.
9. For comments concerning lease provisions to leave fixtures, see 17(1) HALSBURY'S at para. 235.137. Concerning a landlord's remedies for the wrongful removal of fixtures, see *id.* at para. 235.138. Commenting further on trade fixtures, *id.* at para. 235.131 states:

A tenant may remove fixtures if they have been affixed for the purposes of trade or manufacture, so long as the lease does not provide to the contrary, and so long as they are capable of being severed from the land without irreparable injury to it . . .

See also MERRY at 206–207.
10. 17(1) HALSBURY'S at para. 235.132. See also MERRY at 207–208.
11. 17(1) HALSBURY'S at para. 235.133.

Chapter Six

1. For a review of adverse possession in Hong Kong, see the Consultation Paper prepared by the Law Reform Commission, dated December 2012,

7. *Bailey v Stephens* (1862) 12 CB (NS) 91, 115. See GOO & LEE at 666–668.
8. NIELD at 320.
9. BLACK'S LAW DICTIONARY at 941 defines *lie in grant* as “to be passable by deed or charter without the ceremony of livery of seisin.” The term *livery of seisin* refers to the transfer of possession of the land. For an explanation of the ceremony, see <http://legal-dictionary.thefreedictionary.com/livery+of+seisin>
10. See GOO & LEE at 669–671.
11. [1892] 1 Ch at 484.
12. The *BLIS Glossary* translates the term *appurtenant* as “從屬” and “附屬於”.
13. See, e.g., NIELD at 319–322 and 16 HALSBURY'S at paras. 230.616–230.635.
14. I.e., without any limitations.
15. MEGARRY'S MANUAL at 422–423; THE LAW OF REAL PROPERTY at para. 27–058.
16. As this is rare in Hong Kong, no further comments are made. For additional information, see, e.g., THE LAW OF REAL PROPERTY at para. 30–028; MEGARRY'S MANUAL at 422.
17. See the case of *Bettison v Langton* [2001] UKHL 24.
18. *Cross-Harbour Tunnel Co Ltd v Commissioner of Rating and Valuation* [1977–1979] HKC 81 uses the term “wayleave” while the *Electricity Networks (Statutory Easements) Ordinance* (Cap 357) refers to “statutory easements.”
19. NIELD at 327. See also GOO & LEE at 677–679.
20. NIELD at 331. See also GOO & LEE at 692–699.
21. NIELD at 331.
22. (1879) 12 Ch D 31. As noted by NIELD at 333–334, the similarity between the *Conveyancing and Property Ordinance*, section 16 and the rule in *Wheeldon v Burrows* is striking, but there are a number of distinctions:
 - s 16 operates where there is diversity of occupation before the sale. It therefore does not apply to quasi-easements. *Wheeldon v Burrows*, by contrast, operates in just this situation.
 - s 16 operates only where there is a formal assignment or lease of the property but *Wheeldon v Burrows* will apply where there is an agreement to assign or lease. [citation omitted]
 - s 16 will pass rights that are not continuous or apparent or reasonably necessary for the enjoyment of the property. [citation omitted] In both cases, however, the right must be enjoyed at the time of the lease or assignment.
 - s 16 and the rule in *Wheeldon v Burrows* both give way to a contrary intention expressed by the parties. However, whereas *Wheeldon v Burrows* is based upon the presumed intention of the parties so that a right cannot arise unless it is within the implied contractual rights of the grantee, s 16 may operate to create an easement to which the

grantee has no right under the contract by which he acquired his interest in the land.

23. (1879) 12 Ch D at 49 (emphasis added). See GOO & LEE at 697–700.
24. NIELD at 334. See GOO & LEE at 692–693.
25. [1965] 1 QB at 181.
26. MACKENZIE & PHILLIPS at 519.
27. *Id.* (emphasis in original). See GOO & LEE at 693–697.
28. *Pwllbach Colliery Co Ltd v Woodman* [1915] AC 634, 646–647.
29. NIELD at 334.
30. MACKENZIE & PHILLIPS at 519–520.
31. *Id.* at 519.
32. NIELD at 335. See GOO & LEE at 700.
33. NIELD at 335.
34. *Id.* at 337.
35. *The Statute of Westminster I* 1275 later fixed the time as 1189. See GOO & LEE at 703.
36. NIELD at 337.
37. *Id.* See the cases of *Bridle v Ruby* [1988] 3 WLR 191; *Tang Tim-fat v Chan Fok-kei* [1993] 2 HKLR 373 and see MACKENZIE & PHILLIPS at 535; GOO & LEE at 703–704.
38. See the case of *Neaverson v Peterborough RDC* [1902] 1 Ch 557 where a claim was defeated by proof that during the period of time when it was possible to have made the grant there was no person who could lawfully have made the grant.
39. NIELD at 341. An informal release will be effective provided it would be inequitable for the dominant tenant to claim that the right still exists. See GOO & LEE at 710.
40. NIELD at 341. See GOO & LEE at 710–711.
41. MACKENZIE & PHILLIPS at 547.
42. NIELD at 340 (citing *Crown Leases Ordinance* (Cap 40), section 15 and *New Territories Leases (Extension) Ordinance* (Cap 150), section 7).
43. This is a complicated area and is regulated in part by statute. A comprehensive discussion of covenants is outside the scope of this introductory work. The reader is referred to NIELD at chapters 14 (Leasehold Covenants) and 15 (Land Covenants). See also CLEMENT SHUM, *GENERAL PRINCIPLES OF HONG KONG LAW* 254 (3rd ed. 1998) [hereinafter SHUM].
44. LIM & GREEN at 192–193.
45. MACKENZIE & PHILLIPS at 512.

19. An order *nisi* is a temporary order which will become final unless opposed by the other party. See *infra* Chapter Eleven note 122.
20. See 16 HALSBURY'S at paras. 230.790–230.792; STUDENT'S GUIDE at 1307–1310; HK CONVEYANCING, vol. 1(B), chapter XIII, at paras. 1451B and vol. 2(E), chapter XIII, at paras. 81–115.
21. SHUM at 259. Section 51 of the *Conveyancing and Property Ordinance* provides, among other things, that:
 - (1) Unless the contrary intention is expressed, there shall be implied in any legal charge or equitable mortgage by deed, the powers, exercisable by the mortgagee, a receiver (acting personally or through their agents) and any person entitled to give a receipt for the mortgage money on its repayment, mentioned in the Fourth Schedule.
 - (2) Any power exercisable under a mortgage shall be subject to any prior estates, interests and rights to which the mortgaged land is subject.
 - (3) No power of sale shall empower a mortgagee or a receiver under an equitable mortgage, by virtue of that mortgage only, to assign the legal estate in the mortgaged land.
 - (4) The powers implied by subsection (1), and the provisions of the Fourth Schedule relating to the exercise of those powers may be varied or extended by the mortgage deed and, as so varied or extended, shall have effect as if contained in this Ordinance.
 - (5) This section shall not apply to any mortgage executed before the commencement of this section.
22. 16 HALSBURY'S at para. 230.777. See *id.* at paras. 230.776–230.787. See also STUDENT'S GUIDE at 1312–1313; HK CONVEYANCING, vol. 1(B), chapter XIII, at paras. 1554–1705; GOO & LEE at 781–795.
23. *Conveyancing and Property Ordinance*, Schedule 4, para. 11 provides:

The powers mentioned in paragraphs 2 to 9 shall not be exercisable unless–

 - (a) notice requiring payment of the mortgagee money has been served on the mortgagor, or on one of the several mortgagors, and default has been made in payment of the mortgage money or part thereof for one month after such service; or
 - (b) interest under the mortgage is in arrear and unpaid for one month after becoming due; or
 - (c) there has been a breach of a provision, express or under this Ordinance, of the mortgage other than a covenant for payment of the mortgage money and interest.
24. In the case of *Tse Kwong Lam v Wong Chit Sen* [1983] 3 All ER 54 the court held that the mortgagee had failed to take reasonable care to obtain market price where notice of the foreclosure auction was advertised only shortly

before the auction; the reserve price was determined arbitrarily without any advice from a qualified valuer; and only one bid was received, which came from a related company.

A receiver in these circumstances has the same duty to act in good faith.

25. *Conveyancing and Property Ordinance*, section 50 provides:
- (1) There shall be implied in any legal charge or equitable mortgage by deed, where the mortgage money has become due, a power exercisable in writing by the mortgagee . . . to appoint a receiver or receivers of the mortgaged land and the income thereof, to remove any receiver appointed and appoint another in his place.
 - (2) Any receiver so appointed will be deemed the agent of the mortgagor and the mortgagor will be solely responsible for the receiver's acts and defaults.
- . . .
- (8) The provisions of this section are subject to contrary intention expressed in the mortgage deed and may be varied or extended by the mortgage deed, and, as so varied or extended, shall have effect as if contained in this Ordinance.
26. See *GOO & LEE* at 775–781; *SHUM* at 260.
27. *NIELD* at 477.
28. *Id.* at 464.
29. *Id.*
30. *Id.* at 463.

Part 3

1. As noted in 16 *HALSBURY'S* at para. 230.133:

The types of contract for the sale of land in Hong Kong include:

- (1) sales under Conditions of Sale; most alienation of land by the Government is effected by a public auction, and the contract is called Conditions of Sale under which the purchaser receives a leasehold estate; Other [*sic*] forms of alienation include Conditions of Exchange, and Conditions of Regrant.
- (2) secondary sales where the Government lessee sells his land, or more correctly assigns his leasehold, to a purchaser where no estate agent is involved, in most of these cases the parties will instruct a solicitor to act prior to being bound;
- (3) secondary sales where the Government lessee sells his land, or more correctly assigns his leasehold, to a purchaser where neither party instructs a solicitor initially, but both sign a contract, referred to as a Preliminary or Provisional Agreement, drafted by an estate agent who is agent for both vendor and purchaser, and who also signs the contract; . . .

(4) sales of uncompleted units in multi-storey developments, which are regulated by the Lands Department under the Consent Scheme; and

(5) sales by mortgagees on the mortgagor's default.

See also *id.* at para. 230.004, where the main Hong Kong ordinances relating to land are presented.

Chapter Nine

1. The only freehold land in Hong Kong is St John's Cathedral which was granted in perpetuity but subject to the condition that the land continues to be used as a church. For a detailed history, see HK CONVEYANCING, vol. 1, chapters I (Land Tenure in Hong Kong) and II (System of Land Holding in Hong Kong).

2. This work will follow Hong Kong local practice where:

the Government lessee is referred to . . . as the 'owner' of the land, despite the fact that he merely holds a leasehold estate. Then when that 'owner' grants a sub-lease, the sub-lessee's interest is referred to as that of a 'lessee'.

16 HALSBURY'S at para. 230.002. See also HK CONVEYANCING, vol. 2, chapter II, at para. 52; STUDENT'S GUIDE at chapter 8 (Formation of Contract for Sale of Land); chapter 9 (Contract-Vitiating Factors); chapter 10 (Contract-Capacity, Status and Disabilities).

3. NIELD at 303–304:

Occasionally Government leases are granted otherwise than by auction. Privately negotiated Conditions of Grant may be made for public purposes, for instance, for a school. Where land is exchanged for other land, which is quite common where an old site is being redeveloped, it may be convenient for the lessee to surrender his old Government lease and obtain a new grant where, for instance, he wishes to change slightly the boundaries of the site or where evidence of his title is rather fragmented. In this case, Conditions of Exchange are issued. . . . The Conditions of Extension may be issued where an additional area of land is granted as an extension to, and on the same terms as, an existing site. These other types of agreement for a Crown lease are also governed by s 14 of the *Conveyancing and Property Ordinance*.

16 HALSBURY'S at para. 230.131:

Letters A and Letters B are also called Land Exchange Entitlements. They were issued on the resumption of New Territories land, between 1960 and 1983, to entitle the holder to a grant of land in an urban New Territories development area at some future time. Both forms of Letters could be used to offset the price of land purchased from the Government by auction or tender. The New Territories Land Exchange Entitlements (Redemption) Ordinance, with effect from 27 June 1997, provides for the conversion of the Letters A

and B into money payments at a prescribed value and for the extinguishment of their use for payment of land.

4. A tenant's rights and obligations are usually set out in the Government lease or by implication of law, e.g.:
- quiet enjoyment;
 - exclusive possession;
 - assignment or sub-lease; and,
 - offensive trade

See, e.g., *supra* Chapter Three section F

5. There are five kinds of conditions:
- Conditions of Sale – under which land is sold;
 - Conditions of Exchange – under which the granted land is exchanged for other land;
 - Conditions of Grant – under which land is granted for a particular purpose;
 - Conditions of Regrant – under which a grantee applies for a new grant upon the expiration of the lease; and,
 - Conditions of Extension – under which additional land is granted by the Government.

For a detailed discussion of these conditions, see 16 HALSBURY'S at paras. 230.108–230.114. See also STUDENT'S GUIDE at 86–103; HK CONVEYANCING, vol. 2(A), chapter II, at paras. 151–196 and paras. 251–311.

6. Various authorities may issue the certificate, including: the Director of Public Works, the Registrar of Titles or the Director of Lands. A certificate of exemption is issued in the New Territories for buildings which do not need to comply with the *Buildings Ordinance* (Cap 123). A certificate of exemption has the same effect as a certificate of compliance. See 16 HALSBURY'S at para. 230.108 fn.3 (citing *Chung Mui Teck v Hang Tak Buddhist Hall Association Ltd* [2001] 2 HKLRD 471, CA).

7. 16 HALSBURY'S at para. 230.420 fn.7 comments:

No Government lease has issued, since prior to 1970, on the completion of the building covenant in the conditions of sale . . . only the conditions of sale now represent the Government lease. The equitable interest of the purchaser becomes legal on the issue of a certificate of compliance from the Government indicating that the purchaser has observed the covenants in the conditions; there are usually two such covenants, namely the payment of the premium . . . and the building covenant . . . see the *Conveyancing and Property Ordinance* (Cap 219) s 14 as to the conversion from equitable interest to legal estate.

8. *Conveyancing and Property Ordinance*, section 14(1)(a) states:

(1) Where a person has a right to a Government lease of any land upon compliance with any conditions precedent, then, upon compliance with those conditions –

the development. This would be particularly relevant in a liquidation of the developer.

6. See *infra* Chapter Eleven section C where this is discussed. The link to this rule is set out *infra* Chapter Eleven note 33.
7. 16 HALSBURY'S at para. 230.453. See generally STUDENT'S GUIDE at 371–388.
8. 16 HALSBURY'S at para. 230.456. See also GOO & LEE at 826–839.
9. *Id.* at para. 230.430.
10. *Id.* at para. 230.456.
11. See *Building Management Ordinance* (Cap 344), section 8 discussing the duties of the Land Registrar and certificates of registration.
12. 16 HALSBURY'S at para. 230.430.
13. See *id.* at para. 230.462. The *Building Management Ordinance* states at section 33(1):

A corporation may be wound up under the provisions of Part X of the Companies Ordinance (Cap 32) as if it were an unregistered company within the meaning of that Ordinance and the provisions of that Ordinance relating to the winding up of an unregistered company shall, in so far as they are applicable, apply to the winding up of a corporation.

14. The *BLIS Glossary* translates *deed of mutual covenant* as “公契”.
15. HARTLEY BRAMWELL, *CONVEYANCING IN HONG KONG* 270–271 (1981). For an extensive review of DMCs, see *HK CONVEYANCING*, vol. 1, chapter IV, at paras. 76–260.
16. An undivided share is:

an undivided share in the legal estate of the whole property. Without a Deed of Mutual Covenant (DMC), each co-owner of the property would be entitled to the full use and enjoyment of the whole property. The DMC governs the right of the co-owners amongst themselves and regulates, amongst other things, the portions of the property in respect of which each owner would have the exclusive right of enjoyment. That exclusive right of enjoyment cannot be assigned on its own, but has to be assigned by a vendor who was assigning that right of exclusive enjoyment together with an assignment of his right of exclusive enjoyment to some other part of the building with undivided shares . . .

16 HALSBURY'S at para. 230.438 fn.2. See also *id.* at para. 230.432, where it is stated:

In general, the deed of mutual covenant will provide that the owner will not be able to deal separately with the elements which make up his rights as tenant in common; thus his right of exclusive use to his particular unit cannot be dealt with separately from any rights he may have over other parts of the building such as a parking space.

- (8) reserve the operation of covenants in a DMC entered into at a time when conditions of sale affected the land, but which were later replaced by the Government lease on the issuance of the certificate of compliance; similar provision is made in respect of a DMC registered prior to the conversion of the conditions of sale into the Government lease [CPO sections 42(1) and 42(2)];
- (9) provide that where the Government lease, having expired, has been renewed the pre-existing covenants are to continue in force under the new lease [CPO section 42(3)].

16 HALSBURY'S at para. 230.447. See also *id.* at para. 230.436, and fn.2 thereto which states:

To overcome problems with the enforcement of the covenants in the DMC against owners who were not parties to the DMC, the Law of Property (Enforcement of Covenants) Ordinance 1956 was enacted, the relevant provisions of which have now been subsumed into the Conveyancing and Property Ordinance (Cap 219) ss 39, 41 . . .

E.g., *Conveyancing and Property Ordinance*, section 41 provides in part:

- (2) This section applies to any covenant, whether positive or restrictive in effect –
 - (a) which relates to the land of the covenantor;
 - (b) the burden of which is expressed or intended to run with the land of the covenantor; and
 - (c) which is expressed and intended to benefit the land of the covenantee and his successors in title or persons deriving title to that land under or through him or them.
- (3) . . . a covenant shall run with the land and, in addition to being enforceable between the parties, shall be enforceable against the occupiers of the land and the covenantor and his successors in title and persons deriving title under or through him or them by the covenantee and his successors in title and persons deriving title under or through him or them.

...
 (9) A covenant in an instrument registered in the Land Registry under the Land Registration Ordinance (Cap 128) against the land affected by the covenant shall bind the successors in title of the covenantor and the persons deriving title under or through him or them whether or not they had notice of the covenant.

- 20. 16 HALSBURY'S at para. 230.448. See also STUDENT'S GUIDE at 349–350.
- 21. 16 HALSBURY'S at para. 230.437.
- 22. See also the list of nine provisions typically addressed in a deed of mutual covenant presented in *id.* at para. 230.438.
- 23. As explained in *id.* at para. 230.431:

12. See STUDENT'S GUIDE at 831–832.
13. *Richard Ellis Ltd v Van Hong Tuon* [1988] 1 HKLR 169, CA; *Chesterton Petty Ltd v Groeneveld*, unreported, CACV No. 69 of 2000 (Court of Appeal).
14. See, e.g., *Cheng Kwok Fai v Mok Yiu Wah Peter* [1990] 2 HKLR 440.
15. *Chan Yiu-ming v L & D Associates* [1992] HKDCLR 1.
16. *But Chung Yin v Billion Extension Development Ltd* [1997] 1 HKC 531.
17. The BLIS Glossary translates *liquidated sum* as “經算定款項”.
18. *Daiman Development Sdn Bhd v Mathew Lui Chin Teck* [1981] 1 MLJ 56, 58; cited with approval in *Lam Tam Yi v Chak Wai Man* [1993] 1 HKC 537, 541. See also the case of *Kwan Lai Kit Eddie v Leung Muk Lan*, unreported, (2000) HCA 2179/1998.
19. [1962] HKLR at 492.
20. [1980] HKLR at 743.
21. *Id.* at 746.
22. In the case of *Regal Success Venture Ltd v Jonlin Ltd* [2000] 2 HKC 199, CA; on appeal [2000] 4 HKC 143, CFA, a clause in the sale and purchase agreement provided that the sellers must show good title to the satisfaction of specified solicitors, failing which the buyers could end the agreement. The court held that the agreement was a conditional contract.
23. For example, in the case of *Lee-Parker v Izzet* (No 2) [1972] 1 WLR 775 the agreement was made “subject to the purchaser obtaining a satisfactory mortgage”. The court determined the phrase to be a condition. However, the condition was void because it was too vague to be enforceable. As the phrase was considered to be a condition precedent, the uncertainty destroyed not only this clause but the whole contract which was premised upon this clause. *Id.* at 779–780.
24. [1992] 1 HKLR at 3.
25. *Au Wing Cheung v Roseric Ltd* [1992] 1 HKC 149, CA involved a concluded preliminary agreement. Subsequent correspondence concerning the proposed formal sale and purchase agreement were headed “subject to contract”. The Court of Appeal held that the letter had no legal effect upon the already binding preliminary agreement.
26. *Michael Richards Properties Ltd v Corporation of Wardens of St Saviour's Parish, Southwark* [1975] 3 All ER 416. In the case of *Hong Kong Housing Authority v Hung Pui* [1987] 3 HKC 495, the rent was already agreed and the lease was already binding before the “subject to contract” letter was sent.
27. The courts have approved this principle. See the cases of *Link Brain Ltd v Fujian Finance Co Ltd* [1990] 2 HKLR 353; *Yiu Yau-ping v Fong Yee-lan* [1992] 2 HKLR 167; *Wisecal Ltd v Conwell International Ltd* [2011] HKEC 967; and *Liverpool City Council v Irwin* [1977] AC 239. See also 16 HALSBURY'S at para. 230.195.

28. LEXISNEXIS at 1632 translates *requisitions on title* as “業權要求”.
29. For a discussion of the covenants for title, see 16 HALSBURY’S at paras. 230.361–230.369. For example, *id.* at para. 230.367 notes that:

The implied covenant for quiet enjoyment is that the land may be quietly entered into and . . . be held and enjoyed by the purchaser . . . without any lawful interruption or disturbance. Such a covenant for quiet enjoyment limited to lawful disturbance by the covenantor or any other person for whose acts or omissions he is responsible is not broken by claims under title paramount to that of the covenantor, or by tortious acts other than those of the covenantor himself. Since the covenant is a future covenant, the damages seem to be measured by the loss to the covenantee when the disturbance takes place.

See also STUDENT’S GUIDE at 525–526 (duty to show title), 901–902 (breach) and 1130–1143 (assignment); HK CONVEYANCING, vol. 1(A), chapter V, at paras. 4–16. As the court stated in *Timmins v Moreland Street Property Co Ltd* [1958] 1 Ch 110, 132: “If no interest is mentioned [in the memorandum of agreement], then prima facie an unencumbered freehold interest will be implied.”

30. *Chu Wing Ning v Ngan Hing Cheung*, unreported, (1992) HCA 9409/1991 para. 37.

See also the case of *Walford v Miles* [1992] 2 AC 128. The Miles owned a photograph processing business which they wished to sell along with the business premises. The Miles and Walford entered into a sale and purchase agreement. There was an alleged collateral “lock-out” agreement concluded 18 March between the parties that the Miles would end negotiations with any other potential buyers. Should the Miles receive a satisfactory proposal from any third party before the deadline, the Miles would not deal with that party or give further thought to any alternative.

The trial court found in favour of Walford’s claims of repudiation of the contract and misrepresentation, concluding that the March 18th agreement was an enforceable collateral agreement to the main contract for the sale of the business and business property. On appeal, the court held that the March 18th agreement was an agreement to negotiate and thus unenforceable. A further appeal to the House of Lords confirmed that a contract to negotiate is unenforceable because it lacks certainty. Additionally, the March 18th lacked certainty because it did not specify the time the seller was prohibited from negotiating with other parties.

31. *Keung Shiu Tang v DH Shuttlecocks Ltd* [1994] 1 HKC 286, CA.
32. *Mak Lai Man v Lam Siu Yui Peter* [1993] 1 HKC 452.
33. Text of Rule 5C may be found at The Law of Society of Hong Kong, *The Hong Kong Solicitors’ Guide to Professional Conduct*, vol. 2 Cap. 18 *Solicitors’ Practice Rules* Rule 5C:

http://www.hklawsoc.org.hk/pub_e/professionalguide/volume2/default.asp?cap=18#5C

34. *Conveyancing and Property Ordinance*, section 36 provides: “The covenants and conditions mentioned in the Second Schedule, or any of them, may be incorporated into any instrument by reference.”
35. For a discussion of equitable estates, see, e.g., *STUDENT’S GUIDE* at 133–136.
36. *Rocheagle Ltd v Alsop Wilkinson* [1991] 3 WLR 573, 577–578.

Clause 13 of Part A of Schedule 2 provides, in regards to paying the remainder of the purchase price:

(1) The vendor’s solicitors are the vendor’s agents for the purposes of the receipt of any money due under this agreement and any payment made under the agreement to the seller’s solicitors shall be a full . . . discharge of the purchaser’s obligation in respect of that payment.

Per this clause, the seller’s solicitor receives the remainder of the purchase price as the seller’s agent, rather than as a stakeholder. Again, this is intended to protect the buyer. If the purchase money is paid to a solicitor who steals the funds, the buyer must pay again if the solicitor were acting either as the buyer’s agent or as a stakeholder. If the solicitor acts as the seller’s agent, the funds are considered as being received by the seller, and the buyer will not have to pay again. *Edward Wong Finance Co Ltd v Johnson, Stokes and Master* [1984] AC 296.

37. The topic of formal completion will be discussed in detail in section F below.
38. In *Prime Win Enterprises Ltd v Nova Management Consultants* [2004] 2 HKC 587 the parties agreed to a break lease. The landlord had inspected the empty premises; however, the tenant did not return the premises’ keys to the landlord after the inspection. The tenant, instead, gave the keys to the management office which returned the keys to the landlord six months later. The court found the tenant liable for the rent for this six-month period as the landlord did not have control or vacant possession of the premises without the keys. In *Wealthy China Trading Ltd v Huie Man Kit* [1999] 3 HKC 832 the court found that a shop attached to an outside wall would affect the buyer’s use of the exterior wall; therefore, the seller had failed to deliver vacant possession. However, a small amount of chattels left behind would come within the *de minimis* rule according to the court in *Grandwide Ltd v Bonaventure Textiles Ltd* [1990] 2 HKC 154.

See also 16 HALSBURY’S at para. 230.225, which states that:

the property is sold with vacant possession. If no tenancies are disclosed and no statement is made as to possession, the implication is that the purchaser is to have vacant possession except in the case of the completion of a sub-sale in a confirmation transaction.

A confirmation transaction:

occurs where the vendor sells to a purchaser under a Sale and Purchase Agreement (SPA), and prior to completion the purchaser

essential, run the risk of losing the purchase. More usually the right of rescission is made to arise only when a requisition is persisted in, and the purchaser runs no such risk in making the requisition in the first instance. Requisitions should, however, never be frivolous or unnecessary. They should either call attention to a real or apprehended defect in the title, or ask for relevant information. The vendor cannot rely on the clause if he has no title, or if he acts in bad faith or recklessly.

47. 16 HALSBURY'S at para. 230.227 states:

The vendor has no obligation to disclose any defect in the habitability or physical condition of the property, whether these defects are patent or, in some cases, latent, and he is not liable for physical defects nor is he obliged to abate the purchase price for any such defects.

Contrast this with the seller's obligation to disclose all latent defects in his title. If a seller: "wishes to prevent a purchaser from objecting to a defect he must do so in plain terms, stating clearly the exact nature of the defect to which the purchaser is not to make objection." *Id.* at para. 230.185.

48. *Conveyancing and Property Ordinance*, section 34A states in part:

(1) This section applies to an agreement for the sale and purchase of undivided shares in land, together with a right to exclusive occupation of a unit or other interest—

(a) in an uncompleted development of the land; or

(b) in a completed development of the land where —

(i) the vendor is the developer of the whole development; and

(ii) no assignment of the unit or interest has been executed since the date on which the relevant occupation permit or certificate of compliance was issued in respect of the development.

(2) This section also applies to an agreement for the sub-sale and sub-purchase of undivided shares in land, together with a right to exclusive occupation of a unit or other interest in an uncompleted or completed development referred to in subsection (1), but only where a solicitor or solicitor corporation, or 2 or more solicitors practising in partnership or association, is or are authorized, by or under the Legal Practitioners Ordinance (Cap 159), to act for both the sub-vendor and the sub-purchaser of those undivided shares.

(3) Any provision of an agreement to which this section applies is void in so far as it would, but for this section, have the effect of requiring the purchaser or sub-purchaser of the undivided shares in the relevant land to pay the costs of the vendor or sub-vendor in or in relation to—

- (a) preparing, completing, stamping and registering the agreement; or
 - (b) preparing, obtaining approval for and executing any instrument that gives effect to the agreement; or
 - (c) preparing and executing any relevant preliminary agreement.
- (4) Subsection (3) has effect only where the vendor and purchaser, or the sub-vendor and sub-purchaser, under the agreement have separate legal representation.
- ...
49. Some cases have held that the presence of illegal structures made the seller unable to give good title. See the cases of *Giant River Ltd v Asie Marketing Ltd* [1990] 1 HKLR 297; *Homyip Investment Ltd v Chu Kang Ming Trade Development Co Ltd* [1995] 2 HKC 458. In *Chi Kit Co Ltd v Lucky Health International Enterprise Ltd* [2000] 3 HKC 143, CFA, the property was encumbered by the obligation of the Owners' Incorporation to pay a portion of the damages in a negligence action.
50. The *BLIS Glossary* translates *licensee* as “認可証持有人”.
51. *Crocodile Garments Ltd v Prudential Enterprise Ltd* [1989] 1 HKC 474 (assignee from covenantor not liable to repay deposit); *Hua Chiao Commercial Bank Ltd v Chiaphua Industries Ltd* [1987] 1 All ER 1110, PC (mortgagee not liable to repay deposit).
52. *Stamp Duty Ordinance*, section 29B(5) states in part:
- (5) The following matters are specified for the purposes of subsection (1) –
 - (a) the name and address of the vendor and of the purchaser of the immovable property;
 - (b) if the vendor or purchaser is an individual, his identification number;
 - (c) if the vendor or purchaser is not an individual but is registered under the Business Registration Ordinance (Cap 310), the business registration number of the vendor or purchaser;
 - (d) the description and location of the immovable property;
 - (e) a statement as to whether the immovable property is residential property or non-residential property, within the meanings of section 29A(1);
 - (f) the date on which the agreement for sale was made;
 - (g) if the agreement for sale was preceded by an unwritten sale agreement, or an agreement for sale, made between the same parties and on the same terms, the date on which the first such agreement was made;
 - (h) a statement as to whether or not a date has been agreed for a conveyance on sale pursuant to the agreement for sale and, if so, that date;

- (i) a statement as to whether or not there is an agreed consideration for the conveyance on sale that is to, or may, take place pursuant to the agreement for sale and, if so, the amount or value of the consideration;
- (j) the amount or value of any other consideration which each person executing the document knows has been paid or given, or has been agreed to be paid or given, to any person for or in connection with the agreement for sale or any conveyance on sale pursuant to that agreement (excluding legal expenses), together with the name, address, and the identification number or business registration number of each person receiving or to receive such consideration, and a description of the benefit to which the consideration relates;

...

- 53. *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd* [1993] 2 WLR 702, PC. Hong Kong courts agreed with this decision in *Wan Moon Ling Wandy v Sino Gain Investment Ltd* [1997] 2 HKC 592; *China Pride Investments Ltd v Silverpole Ltd* [1994] 2 HKC 341; *Luen Wai Crane Engineering Co v Ajax Pong Construction Equipment Ltd*, unreported, (1994) HCA 5972/1992; *Dawson Enterprises Ltd v Talisteam Ltd* [1994] 2 HKC 327.
- 54. *Wan Moon Ling Wandy v Sino Gain Investment Ltd* [1997] 2 HKC 592, 599.
- 55. *Id.* at 600.
- 56. Only remedies available under contract law are discussed here. Other remedies available for a breach of the sale and purchase agreement may also be found in tort law, e.g., where misrepresentation or fraud is involved.
- 57. In *Wellfit Investments Ltd v Poly Commence Ltd* [1995] 3 HKC 56, the court decided that specific performance was appropriate as, inter alia, the property market had risen substantially.
- 58. An exception to this rule is found in Clause 11 in Part A of Schedule 2 to the *Conveyancing and Property Ordinance* which provides: “In the event of the vendor failing to complete the sale in accordance with the terms of the agreement it shall not be necessary for the purchaser to tender an assignment to the vendor for execution before taking proceedings to enforce specific performance of the agreement . . . ”
- 59. See, e.g., *Charles Hunt, Ltd v Palmer* [1931] All ER Rep 815, where the court refused to grant specific performance to the seller who had represented the property as “valuable business premises” when, in fact, there were restrictive covenants that severely restricted the land’s use and value. In *Re Puckett and Smith’s Contract* [1902] 2 Ch 258, the court refused specific performance because the seller had described the land as suitable for building when there was an underground culvert preventing building on part of the land.
- 60. In *Chu Kit Yuk v Country Wide Industrial Ltd* [1995] 1 HKC 363, the original potential buyer sought specific performance but the court determined that the

88. In *Wu Koon Tai v Wu Yau Loi* [1995] 2 HKC 732, CA (overruled by the Privy Council because of another point; see [1996] 3 WLR 778), the judge found to be void a conveyance written in Chinese and which failed to comply with section 4(1).
89. *Conveyancing and Property Ordinance*, section 4 states in full:
- (1) A legal estate in land may be created, extinguished or disposed of only by deed.
 - (2) This section does not apply to –
 - (a) an assent in writing by a personal representative;
 - (b) a disclaimer made in accordance with section 59 of the Bankruptcy Ordinance (Cap 6) or section 268 of the Companies Ordinance (Cap 32);
 - (c) a surrender by operation of law, including a surrender which may, by law, be effected without writing;
 - (d) the grant, disposal or surrender of a lease taking effect in possession for a term not exceeding 3 years (whether or not the lessee is given power to extend the term) at the best rent which can be reasonably obtained without a premium;
 - (e) other assurances not required by law to be made in writing;
 - (f) a receipt not required by law to be under seal;
 - (g) a vesting order or vesting declaration by a court or other competent authority;
 - (h) a creation, extinguishment or disposal of a legal estate in land by operation of law.
90. The *BLIS Glossary* translates *equitable jurisdiction* as “衡平法司法管轄權”.
91. E.g., if the assignee commits a breach or is not willing to perform its obligations. See the case of *Parker v Taswell* (1858) 2 De G & J 559. In the case of *Wu Koon Tai v Wu Yau Loi*, *supra* note 88, the parties did not sign the document.
92. *Walsh v Lonsdale* (1882) 21 Ch D 9. This is an application of the maxim that “equity regards as done that which ought to be done.” Thus it is regarded in equity as if a decree of specific performance has already been granted.
93. See the case of *Town Bright Industries Ltd v Bermuda Trust (Hong Kong) Ltd*, unreported, (1999) CACV 137/1998, where the court found that:
 for the purposes of 53(1)(c) of the Law of Property Act, 1925 (on which section 5 of the local Ordinance is based) a [written] direction given to a trustee by a person entitled in equity directing it to hold the trust property in trust for another is a disposition of his equitable interest . . .
 Thus, property held by trustees may be assigned through a written document to the trustees.
94. BLACK’S LAW DICTIONARY at 588 defines *possessory estate* as “[a]n estate giving the holder the right to possess the property, with or without an ownership interest in the property.”

95. LEXISNEXIS at 1512 translates *proprietary estoppel* as “所有人不容反悔”.

96. As noted in 16 HALSBURY’S at para. 230.317:

In general in the absence of agreement to the contrary, the purchaser prepares the draft assignment and submits it to the vendor for approval; however, where the property is contained in a large development it is usual for the vendor-developer’s solicitor to prepare a standard form assignment.

97. [1995] 1 HKC at 206. The principles of the case are limited as its facts concerning the identification of the purchaser was the issue: the case was discussed and distinguished in *Liu Moon Ping v Wong Kwok Tung* [2006] 1 HKLRD 358.

98. For a definition of marketable title, see 16 HALSBURY’S at para. 230.233 fn.3. *Id.* at para. 230.262 explains:

Upon the making of an enforceable contract for sale the purchaser becomes the owner of the land in equity, and can dispose of his beneficial (from the bare trust which comes into existence on the entry into the valid contract for the sale of land) or equitable interest (the interest arising traditionally under a valid contract for the sale of land) to a third person.

It has been common for the purchaser to sub-sell the property prior to completion, and to provide that the sub-sale is to be completed immediately prior to the head sale. In most cases the assignment will be from the vendor to the final purchaser (the sub-purchaser) with the head purchaser (the sub-vendor) executing it as confirmor.

On the matter of confirmations see also STUDENT’S GUIDE at 1024–1029, 1138–1139; HK CONVEYANCING, vol. 1(B), chapter X, at paras. 64, 67–77.

99. Statement by Financial Secretary at press conference on “Economic Situation in Second Quarter of 2010 and Latest GDP and Price Forecasts for 2010” <http://www.info.gov.hk/gia/general/201008/13/P201008130227.htm>

100. HK CONVEYANCING, vol. 2(E), chapter X, at para. 504 explains that in the case of a nomination:

Sometimes a purchaser does not intend to become the owner of the land, and, although not purchasing as agent for the intended owner, he will enter into the sale and purchase agreement with the intention that a third party will take the benefit of the assignment. This process is usually referred to as nomination and involves the purchaser nominating a third party as the ultimate party who is to be the assignee . . . In general the identity of the purchaser will not be a matter of concern to the vendor, and he will not be able to avoid the contract on the ground that the nominee was not a party to the contract . . . The right to nominate does not need to be included as a term of the contract . . . Nomination is sometimes used where the purchaser wishes to retain the beneficial interest in

108. As noted at 16 HALSBURY'S at para. 230.349:

A document requiring a stamp cannot be admitted in evidence in legal proceedings unless it is duly stamped or payment of the duty and certain further sums is made or an undertaking to pay is given. The proper stamping of title deeds is an important matter of title because, if the owner of the property is called upon to defend his right or to attack a wrongdoer with regard to the property, he must produce his title deeds in evidence and thus he cannot do so as long as the requirements for the admission of any deed have not been complied with.

See also STUDENT'S GUIDE at 1216–1218 and 1319–1323; HK CONVEYANCING, vol. 1(A), chapter VI, at para. 152.5 and vol. 2(F), chapter XIV, at paras. 2–4.4.

109. *Stamp Duty Ordinance*, section 2 defines *conveyance on sale* to mean: “every conveyance whereby any immovable property, upon the sale thereof, is transferred to or vested in a purchaser or any other person on his behalf or by his direction, and includes a foreclosure order”.

110. See, e.g., Schedule 1 to the *Stamp Duty Ordinance* which sets out the fee schedule.

111. This does not apply to commercial and industrial property. The intention is to reduce speculation and slow rising property prices by having the parties pay the stamp duty on each sale and purchase agreement rather than on the assignment. Prior to the changes in the Ordinance, it was possible for a series of sale and purchase agreements to be entered into prior to completion, with each sale and purchase agreement being a transaction for a higher sales price of the property. There would thus be no stamp duty costs imposed upon these buyers turned sellers in the rising property market. See HK CONVEYANCING, vol. 1(B), chapter XIV, at para. 4; STUDENT'S GUIDE at 1216–1218, 1319–1323.

The current Hong Kong government, for the purpose of cooling down the real estate market in order to avoid a property “bubble”, amended the stamp duty rates. Stamp duties on purchases of properties valued at HK\$2 million or more were doubled to 8.5 percent. The government also raised the minimum down payment on properties worth more than HK\$7 million; imposed a 20 percent stamp duty for re-sales of properties purchased within six months; and a ten percent duty for properties re-sold within one to three years of purchase. Another measure the government introduced was a 15 per cent buyer's stamp duty. See http://www.gov.hk/en/residents/taxes/stamp/stamp_duty_rates.htm

112. The *BLIS Glossary* translates the term “ad valorem” as “從價費”.

113. Registration is:

to protect priority of registration and to give notice of the registered interest to subsequent purchasers and mortgagees. A complementary result is that the register acts as a record of transactions so that these can be relied upon in establishing the details of the title to the land.

- 16 HALSBURY'S at para. 230.386.
114. *Id.* at paras. 230.382–230.383. See also STUDENT'S GUIDE at 1374–1375; HK CONVEYANCING, vol. 1(B), chapter XIV at para. 121 and vol. 2(F), chapter XIV, at para. 72.
115. 16 HALSBURY'S at para. 230.383. See also STUDENT'S GUIDE at 1374–1375, 1378–1383; HK CONVEYANCING, vol. 1(B), chapter XIV, at para. 123.
116. As defined in the *Land Registration Ordinance*, section 1A:
 “lis pendens” (待決案件) means –
 (a) any action or proceeding pending in a court or tribunal that relates to land or any interest in or charge on land; and
 (b) a bankruptcy petition . . .
Lis pendens is “[a] pending lawsuit.” BLACK'S LAW DICTIONARY at 950.
117. A court has stated that an option to purchase should be registered as it affects land or premises, even if the option to purchase is contained in a short term lease which itself need not be registered. *Markfaith Investment Ltd v Chiap Hua Flashlights Ltd* [1990] 2 WLR 1451.
118. *Land Registration Ordinance*, section 3(2) provides:
 All such deeds, conveyances, and other instruments in writing, and judgments . . . which are not registered shall, as against any subsequent bona fide purchaser or mortgagee for valuable consideration of the same parcels of ground, tenements, or premises, be absolutely null and void to all intents and purposes:
 Provided that nothing herein contained shall extend to bona fide leases at rack rent for any term not exceeding 3 years.
119. The *BLIS* Glossary. The *Land Registration Ordinance* at section 2A stipulates in part:
 (1) A document effecting a floating charge, whether or not it specifically identifies any land charged, is not, for the purposes of section 2, a deed, conveyance or other instrument in writing by which any parcel of ground, tenement or premises in Hong Kong may be affected.
 (2) A document effecting a floating charge created before, on or after 1 November 1984 –
 (a) becomes a fixed charge on the land intended to be affected; and
 (b) for the purposes of section 2, is a deed, conveyance or other instrument in writing by which any parcel of ground, tenement or premises in Hong Kong may be affected, upon crystallization of that charge . . . as evidenced by a certificate signed by or on behalf of the chargee.
120. *Land Registration Regulations* (Cap 128A), regulation 5 provides in part:
 (1) Registration of an instrument under the Ordinance shall be effected by delivering into the Land Registry such instrument

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