

Land Administration and Practice in Hong Kong

Fifth Edition

Roger Nissim

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PREFACE TO THE FIFTH EDITION

When the first edition of this book came out in 1998, I had no idea that in the ensuing 24 years there would be a need for such regular updating ultimately leading to this publication. There is, however, a clue if you look at the index of relevant court cases; in the 1998 edition there were 32 listed, compared with today, where there are close to 90.

The nature of the subject is such that it will always be a work-in-progress because of the continuing stream of new departmental practice notes, government policy reviews, relevant court cases, not to mention new legislation, all of which can have a significant impact on land administration and practice. Only Section I, which relates to the historical aspects, remains unchanged. The other three sections all have some important and significant updates and revisions.

The Hong Kong government is extremely well connected to the internet and all the departments concerned with this subject have comprehensive websites; that has removed the need, evident in earlier editions, to copy each individual practice note as they are all easily available on the internet. The following websites are particularly useful:

Lands Department: www.landso.gov.hk

Planning Department: www.pland.gov.hk

Development Bureau: www.devb.gov.hk

Building Department: www.bd.gov.hk

Rating and Valuation Department: www.rvd.gov.hk

Census and Statistics Department: www.censtatd.gov.hk

Legislation: www.legislation.gov.hk

As with all the previous editions, I am hugely indebted and grateful to my good friend John Davison for his continuing moral support and enthusiasm for

this ongoing project, as well as giving me access to his firm's legal library. Again, he has acted as my proofreader to ensure the highest degree of accuracy in my legal interpretations. Furthermore, with the help of John's librarian colleague, the opportunity has been taken to update the citations for a number of the court cases referred to in earlier editions, which should help readers source the originals, if required. However, as always, if there are any mistakes, they are entirely my responsibility.

Roger Nissim

May 2021

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INTRODUCTION

To assist readers the book has been organized in the following way:

- Section I This section contains five chapters which trace the historical development of land administration starting in 1841, through to the present day. This sets the scene to put in context the detail contained in the subsequent sections.
- Section II These chapters deal with the present-day land administration policies with particular reference to the functions of the Lands Department in respect of land disposal, modifications and exchanges with particular emphasis on the control of development through lease conditions. Land management and lease enforcement are also considered.
- Section III In these chapters, some of the more unusual problems associated with land work in the New Territories are investigated.
- Section IV The section contains two new chapters, which reflect the latest development in land administration in Hong Kong.
- Appendices There are some documents which are so lengthy that they would clutter up the main text but nevertheless where a full reference is considered appropriate, the documents will be found in the appendices.

HISTORICAL DEVELOPMENT OF LAND ADMINISTRATION

Section I contains five chapters which trace the historical development of land administration starting in 1841, through to the present day. This sets the scene and puts in context the detail contained in the subsequent sections.

- Chapter 1 The First Land Sales, 1841–1842
- Chapter 2 The Early Years, 1843–1898
- Chapter 3 1898 Onwards: The New Territories Lease
- Chapter 4 The Sino-British Joint Declaration 1984 and the Basic Law 1990
- Chapter 5 Hong Kong Special Administrative Region Government

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HONG KONG SPECIAL ADMINISTRATIVE REGION GOVERNMENT

Up until 30 June 1997 under Article XIII of the Hong Kong Letters Patent, the Governor had the power to make and execute grants and disposition of land in the territory. This power was, in turn, delegated down to the Director of Lands and his senior staff. During the very first hours of 1 July 1997, the Hong Kong Reunification Ordinance was enacted to ensure a seamless legal and administrative transfer from the old to the new administration. As regards land administration, Sections 27 and 32 of this ordinance are particularly relevant and are quoted below in full:

Delegations relating to land

All delegations to public officer of the power of the Governor to grant or dispose of land which were in force immediately before 1st July 1997 shall on and after that date continue in force and be deemed to be delegations to the corresponding public officer in the HKSAR of the power of the Chief Executive to lease or grant State land.

Lease or grant of land and natural resources

The Chief Executive may on behalf of the Government of the HKSAR lease or grant land and natural resources within the HKSAR which are State property.

There was welcome news for the property industry when just 15 days after the transfer to sovereignty, the Executive Council of the HKSARG approved the new policies that were to apply to the granting, modifying, renewing and extending of land leases. In essence, the policies that were applicable in the twelve and a half year transition period leading up to the transfer of sovereignty were very quickly reaffirmed which not only resulted in consistency but perhaps, more importantly, certainty for everyone involved in the development field. The basic principles that are applied by the Lands Department are as follows:

1. New leases

These are granted, except for new special purpose leases for recreational purposes, petrol filling stations, public utility companies or franchises and short-term tenancies, for a period of 50 years *from the date of grant*, at a premium and subject to payment from the date of the land grant of an annual rent equivalent to 3% of rateable value of the property at that date, adjusted in step with any changes in the rateable value. The exemptions from the liability to pay such rent in respect of certain rural holdings as permitted in accordance with Annex III of the Joint Declaration will continue.

New recreational leases and petrol filling stations are granted on 21-year leases. Public utility companies or other companies with a franchise or operating licence will normally receive a grant for the same length of time as their franchise or licence.

2. Modifications of lease conditions

Again there were no significant changes in policy. Modification cases which do not involve any realignment of the boundaries of the lot(s) in question are executed by modification letters with all the conditions previously applicable to the lease, including the lease term and rent remaining unchanged, with the exception of the conditions being modified. In all other modification cases executed by surrender and regrant, that is, land exchanges the new term is for 50 years *from the date of the conditions of exchange are executed* subject to an annual rent equivalent to 3% of the rateable value of the property, adjusted in step with changes in the rateable value thereafter, and payable from the date of regrant.

As before the premium to be charged for modifications and land exchanges will be equivalent to the difference between the value of the land under the previous conditions and its value under the modified conditions.

3. Non-renewable leases

Leases not containing a right of renewal, upon expiry, should, at the sole discretion of the HKSARG, be extended for a term of 50 years, without payment of an additional premium but an annual rent is charged from the date of extension equivalent to 3% of the rateable value of the property adjusted in step with any change in the rateable value thereafter.

The phrasing of this statement makes it clear that lessees do not have an automatic right of renewal and, as previously, if for example the lessee has ceased using the land for the original purpose it was granted, or was not making the most efficient use of the land in question by serious under-utilization, or if the land was required for a planned public purpose, then

it may be reasonable to expect that the HKSARG would not renew such leases.

One case that caused some concern related to the treatment of the expiring lease of Ocean Terminal, formerly Kowloon Permanent Pier No. 83. The original lease was for a term of 21 years from 17 June 1966 renewable, at premium, for a further term of 25 years that expired on 16 June 2012. The owners, a subsidiary of Wharf Holdings Limited, applied for a 50-year extension without payment of premium which the government rejected on the grounds that this was not a standard commercial lease, with the principal user being a commercial ocean terminal together with associated supporting government facilities such as custom and excise together with immigration offices plus car parking. It appears that the non-standard user conditions and non-standard lease terms justified a departure from the standard treatment of non-renewable leases.

In the end, the case was settled with the owners accepting a new 21-year lease that was in fact processed by way of an in-situ land exchange as an additional piece of land (which had been leased to the company under a short-term tenancy since 1995) was also included, allowing for additional commercial floor space. A full market value premium was charged to reflect all these benefits it being considered that a 21-year lease was appropriate for a cruise terminal facility which in fact makes up some 40% of the permitted total floor space.

Separately, the Hong Kong Institute of Certified Public Accountants have for the purposes of amortization (depreciation) promulgated their own determination on the same issue. With effect from 24 May 2005, they advise that 'lessees shall not assume that the lease term of a Hong Kong land lease will be extended for a further 50 years, or any other period, while the HKSAR Government retains the sole discretion as whether to renew'.

4. Extension of special purpose leases

The same principles set out in paragraph 3 above are to be applied to this category of leases where, again following the previous policy, it is now agreed that special purposes leases other than those specified below may, on expiry and at the HKSARG's sole discretion, be extended for a term of 50 years without payment of a premium, but an annual rent shall be charged from the date of extension equivalent to 3% of the rateable value of the property at that date adjusted in step with any changes in the rateable value thereafter. The exceptions to the arrangements, which again are unchanged from before, are as follows:

- (a) leases for recreational purposes may not be extended for a term exceeding 15 years;



PRESENT-DAY LAND ADMINISTRATION

These chapters deal with the present-day land administration policies with special reference to the functions of the Lands Department in respect of land disposal, modifications, and exchanges. Particular emphasis is placed on the control of development through lease conditions. Land management and lease enforcement are also considered.

- Chapter 6 Economic Background, Land Needs, and Reclamations
- Chapter 7 Lands Department Functions under Administrative Law
- Chapter 8 Land Exchange and Lease Modifications
- Chapter 9 Development Control in Older Lease Conditions
- Chapter 10 Access Arrangements and Rights-of-Way
- Chapter 11 Town Planning Controls and Development Restrictions in Lease Conditions
- Chapter 12 Land Management and Lease Enforcement

As land is a scarce commodity, it is essential to have an effective and professional land administration system in order to keep pace with the fast rate of growth.

Under Article 7 of the Basic Law, the Hong Kong Special Administrative Region government is responsible for the management, use, and development of land and for granting leases to individuals, legal persons or organizations for the use or development of land. In practice, this power is delegated from the Chief Executive to the Secretary for Development, who provides the key policy guidelines, and then down to the officers of the Lands Department which is the government's executive arm for land disposal, land acquisition, and land management.

The Lands Department, which is headed by the Director of Lands, is responsible for all aspects of land administration. The department plays a major role in the entire property development cycle: granting leases, arranging public auctions, tenders and private treaty grants of government land. It is also involved in the approval of building plans and monitoring development performance.

There are specialist sections that deal with the acquisition of private land for public projects including urban renewal and environmental improvement schemes, lease extensions, regrants, and renewals of private leases. Among its other responsibilities are valuations for government land transactions and projects involving a change in land use.

For land administration purpose, the HKSAR is at present divided into 12 districts, 4 in the urban area and 8 in the NT. Each district is looked after by a District Lands Officer (DLO), who provides a wide range of professional services related to land matters in the district. Large one-off public work projects, such as the construction of the new airport off Lantau, require specialist land teams to be formed and dedicated to supporting and implementing the project. A similar team was also formed for the Mass Transit Railway Corporation's (MTRC) West Rail project.

Legal advice on land transactions and conveyancing services for disposal and acquisition of land are provided by the department's own in-house solicitors, who are members of the Legal Advisory and Conveyancing Office (LACO). LACO provides legal support and services to the Director and other senior members of the department. It also maintains sub-offices in the territory to provide legal support to each of the District Lands Officers.

The Survey and Mapping Office (SMO) of the Lands Department is committed to the provision of accurate and up-to-date maps on a wide selection of topics and scales. Their map production is now computerized.

The chapters of this section cover an outline of the history and background information regarding land reclamations. There are also discussions on how the Lands Department functions under administrative law, and its policies on land disposal, land exchange and modification methods. There is also a review of how development is controlled under new and old lease conditions and their interrelationship with planning and building legislation.



LAND EXCHANGE AND LEASE MODIFICATIONS

Lease Modifications

In Annex III of the Joint Declaration, there was a distinction made between new land and existing land. Lease modifications applied to existing land but importantly, the land areas involved did not form part of the 50-hectare quota although the premium received by the government had to be shared in the same way that revenue from land auctions and grants of new land had to be shared.

It is the government's policy in certain areas to modify old lease conditions which severely restrict the development permitted on a lot, so that redevelopment that complies with current town planning requirements can take place. A premium equivalent to the difference in land value between the development permitted under the existing lease and that permissible under the new lease is charged for any modification granted. A good example of this would be where an existing lease has the old 35-foot height restriction, but the current Outline Zoning Plan permits a plot ratio of 5 with medium/high-rise residential development. An application from, or on behalf of, the registered owners to the local District Lands Officer would be circulated through the government and basic terms and conditions, including premium would be offered. These terms and conditions which can be negotiated on before they are finally accepted, will look very similar to be conditions outlined on pages 60–61 for new sale sites. In other words, the government takes the opportunity to rewrite the development control sections of the old lease.¹

When applying for a lease modification or land exchange, it is important to remember that the government will only accept such applications from the registered owners of the land, or their formally appointed agents who have written instructions to act on their behalf. In order to assist in speeding up the time taken to process land transaction, architects, surveyors, and solicitors

were in 1991 advised to include in their applications a copy of the up-to-date lease conditions together with a location plan to the scale of 1:1000. Today, applicants must now follow the requirements of the application checklist which is appended to the Lands Department's Practice Note Issue No. 4/2007 which include the need to accompany their applications with two sets of the following documents:

1. a computer printout containing the historical and current ownership particulars of the subject property; **and**
2. a complete copy of the Government Land Grant (including all modifications and attachments thereto) affecting the subject property.

One set of these documents needs to be certified by either the Land Registry or by the solicitor acting for the applicant. The other set can be a photocopy of the certified documents.

Lease Modification Documentation

Modification Letter/Deed of Variation

Modifications affecting conditions in respect of lots held in single ownership and where there are no changes proposed to the lot boundaries are effected by a modification letter, and where a government lease has been issued, a deed of variation will be used. The treatment of lease modifications are covered by a Lands Department's performance pledge, which reads as follows:

1. A reply to an application for lease modification, advising the applicant whether the case can be entertained or not and identifying the case officer, will be given within 3 weeks from receipt of the application.
2. In straightforward cases, a letter offering the basic terms (without premium), or a letter rejecting the application, will be issued within 22 weeks from receipt of the application. More time is usually required for non-straightforward and complicated cases.
3. Once the final basic terms and premium offer has been accepted, the legal document will be issued for execution within 12 weeks from receipt of the acceptance.

'No Objection' Letter

This is used where a lot has been subdivided into undivided shares with exclusive rights to the use and occupation of various units in the building

thereon, and a modification in respect of one unit or part of the building only is to be effected. In such cases, it is not practical to modify the conditions by the usual modification letter, which requires to be executed by all the co-owners, and thus a 'no objection' letter requiring only the acceptance of the unit owners concerned is issued. Frequently, the 'no objection' letter will state that it only applies for the lifetime of the building currently standing on the lot.

Extension Letter/Conditions of Extension

There are occasions when an existing or parent lot is allowed to be expanded by adding additional adjoining government land. If the lot is subject to conditions, an extension letter will be used but if it is subject to a lease, then conditions of extension may be used. A full premium will be assessed to reflect the enhancement in value to the parent lot. Today, the most frequent application of this method is to allow lot owners to extend their boundaries for the purpose of slope stabilization works, thereby ensuring that the right party not only carries out the necessary works but, as important, is responsible for the future maintenance of these slopes. It is often very difficult to assess a premium in such cases unless a significant saving in cost can be identified as a result of the granting of the extension area.

Prior to 1985, parcels of land suitable for use as garden were granted by way of extension, but they became a casualty of the 50-hectare land disposal quota previously discussed in Chapter 4. Consequently, the policy was changed and garden land is now dealt with by direct grant of tenancies. As the 50-hectare quota is no longer an issue, the Lands Department could, on application, consider reverting to the old policy of granting permanent garden extensions where appropriate.

Contemporaneous Exchange

Cases in the following categories are dealt with by way of a contemporaneous exchange:

1. case involving a major readjustment of lot boundaries;
2. cases involving the amalgamation of lots;
3. cases involving major amendments to the existing lease including up-dating of the conditions.

In the past, land exchange ratios for the NT had generally been at the ratio of 5:2 for agricultural to building land. More recently however, in the light of circumstances prevailing in individual cases, lesser ratios have sometimes been permitted; in low-density development areas, a 1:1 ratio has been adopted.



LAND ADMINISTRATION PROBLEMS AND PRACTICE ASSOCIATED WITH THE NEW TERRITORIES

In Chapter 3, reference has been made to some of the special characteristics of land administration in the New Territories. In this section, the following topics are examined in more detail:

- Chapter 13 Land Exchange Entitlements (Also Known as Letters A/B)
- Chapter 14 Small House (丁屋) Policy and the 300-Foot Rule
- Chapter 15 Limitations Ordinance, Adverse Possession, and the Principle of Encroachment
- Chapter 16 *Tsos* (祖) and *Tongs* (堂) and Their Impact on Land Assembly
- Chapter 17 Succession
- Chapter 18 *Fung Shui* (風水) and Graves
- Chapter 19 Boundary Disputes, Missing Lots, Missing Documents, and Secondary Evidence

Not all these problem areas are unique to the New Territories but it is evident from the quoted case law that the vast majority do occur there. It is therefore important to be aware of the pitfalls particularly if one is involved in the development, valuation or assembly of sites. Some of the topics have only been covered in outline merely to make the reader aware of the potential problems that may occur. It is very likely that once a particular problem has emerged a more detailed investigation and in-depth analysis of the specific legal issues will be required with appropriate legal advice.

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SMALL HOUSE (丁屋) POLICY AND THE 300-FOOT RULE

The Small House Policy (SHP), which has been operated administratively by the government since late 1972, was started at about the same time that the government was beginning to significantly influence affairs in the NT, particularly with the expansion of the public housing programme. It became one way of compensating the indigenous population by ensuring that their needs and traditions were respected and that they could also benefit from the major changes that were being forced upon them, particularly the development of the new towns and their associated infrastructure. The principal features of the policy are outlined as follows (note that in the NT, despite the government's best effort, there is still a strong preference for using imperial measurements rather than metric):

1. Any male over the age of 18 who can trace his ancestry through the male line back to 1898 as being an indigenous villager of an established village¹ in the NT at the time are entitled to a once-in-a-lifetime grant of a house site for occupancy by himself and his family. Such grants are made at nominal premium subject to strict restrictions on alienation other than a building mortgage for purposes of constructing the house itself. Only if the grantee subsequently pays to the government the full assessed market value of the lot is he then entitled to sell the lot and house for profit. Currently, the grant permits the grantee to erect a house not exceeding 700 square feet (65.03 square metres) in area and 27 feet (8.23 metres) and three storeys in height, which does not require the employment of an authorized person (AP) or approval of building plans under the Buildings Ordinance (Cap. 123) (BO). This exemption applies to all landowners in the NT and is not presently limited to indigenous villagers.

Previously, the height limit was 25 feet (7.62 metres) and over the years the storey restriction has gradually been increased from two, to two-

and-a-half, to three stories. Some of the older grants and buildings will reflect these conditions.

These dimensions are important because the moment they are exceeded, the exemption from BO falls away. In the case of *Chong Ping (莊秉) v Hung Ling Yuen (孔令源)* [2000] HKLRD (Yrbk) 500 and [2000] 1 HKLRD A17, the building in issue was 7.92 metres high, and the vendor had, on payment of a fine, received a letter from the District Lands Officer (DLO) tolerating the breach of height under the lease. The High Court ruled that this could not be extended to being tolerated under the BO as the latter was a separate entity and there was no way the DLO could usurp the authority of the Building Authority (BA). As a consequence and because it could not be demonstrated 'beyond reasonable doubt' that the purchaser would not be at risk of enforcement by the BA, the absence of an occupation permit (as required under the BO) meant that the vendor had failed to prove good title to the property. Somewhat fortuitously for this case, the height of an exempt building has since been raised to 8.23 metres; so presumably this particular problem will fall away.

2. If there is insufficient government land in a particular village for the DLO to execute a private treaty grant (PTG), then an alternative is for an indigenous villager who owns agricultural land within the village environs to apply to the DLO for a free building licence (FBL) or land exchange (LE) in order to build his house. The PTG, FBL and LE will all contain similar conditions as described in Paragraph 1 above. One important difference, however, is that for a PTG the restriction on assignment, which can only be applied for three years after completion, is perpetual whereas for LEs and FBLs it is only for five years, which is significant when it comes to assessing the premium for relaxing this restriction.
3. The Buildings Ordinance (Application to the New Territories) Ordinance (Cap. 121), enacted in 1987, codifies the present position and provides for Certificates of Exemption (C of E) from certain provisions of the BO for building works, site formation works and drainage works or certain buildings in the New Territories. These C of Es are issued by the DLO, but where the proposed buildings are to be built on sloping ground or are for more than a few houses, a C of E for the site formation and drainage may not be given and a formal engineering submission under the BO will be required. In these cases, the DLO will only issue a C of E for the houses themselves once the site formation and drainage plans have been approved. In effect, this means that these houses can be built without the need to employ AP and without the need to submit formal building plans for approval. This important privilege enables these houses to be built very

quickly with a significant saving in professional fees. It also explains the other name by which they are sometimes referred to, that is New Territories Exempted Houses or NTEHs. As mentioned earlier, this privilege applies not just to indigenous villagers. All ‘small houses’ are NTEHs but not all NTEHs are ‘small houses’, for example NTEHs can be built on lots held under GN364 condition referred to in Chapter 3.

4. The Town Planning Board (TPB) in May and June 2014 when considering the extent of the ‘V’ zones of certain villages that fall within country park enclaves such as Hoi Ha, Pak Lap, and So Lo Pun were mindful of the potential threat to the environment that such traditional small house development could be, particularly given the inadequate drainage arrangements. Accordingly, TPB has recommended that for any small house developments that are approved in these enclave locations, there should be a requirement that the applicant submit to the Environmental Protection Department (EPD) a septic tank and soakaway (STS) system with a percolation test, the results of which have to be certified as having met the requirements of EPD in accordance with their ProPECC PN 5/93. These STS systems need to be designed and submitted by an authorized person. This is a significant step in the right direction of requiring these types of development to respect the environment in which they are being placed.
5. The same three villages mentioned in paragraph 4 above were subject to another judicial review reported at [2017] HKEC 2527, in which the judgment made a clear distinction between the ‘desire’ for housing and the genuine ‘need’ and found that in all three cases the TPB had not properly inquired into the issues and representations related to establishing the genuine needs for development by the indigenous villagers. The OZP plans were therefore quashed and had to be resubmitted after proper inquiries had been made. The new plans were resubmitted for consideration by TPB on 3 March 2020. In all three cases, the areas now shown zoned ‘V’ were reduced from the original: Hoi Ha from 1.95 hectares down to 1.65 hectares, Pak Lap from 0.98 hectares down to 0.95 hectares and then further reduced to 0.5 hectares in 2021, and So Lo Pun from 2.48 hectares down to 1.11 hectares. The initial reductions in the first two can be seen to be more token than substantial while the third one, although with the largest reduction in area, completely ignored the facts made clearly by green group representations that for the past 10 years there had been *zero* small house applications and during the same period the village had remained unoccupied with many of the existing houses in a dilapidated state that together completely invalidate any ‘need’ justification. Instead TPB, guided by the planners, chose to go along with the indigenous inhabitant representative’s unsubstantiated ‘desire’

IV

FUTURE DEVELOPMENTS IN LAND ADMINISTRATION

This section contains two chapters, which reflect the latest development in land administration in Hong Kong.

Chapter 20 How Planning and Land Policy Could Be Used to Enhance Conservation in Hong Kong

Chapter 21 The Land Titles Ordinance 2004

Since the start of the new millennium, a number of topics have moved higher up the public agenda, in particular the preservation of our natural environment and the conservation of our built heritage. Because of Hong Kong's unique leasehold land system, the potential solutions to these problem areas lie in making revisions to the current land administration policies which are discussed in more detail in Chapter 20.

The passing of the Land Titles Ordinance in 2004 heralds a completely new system of guaranteed title to replace the current deed registration system for conveyancing. The implications of these changes, which will occur over the ensuing 12 years, are considered in Chapter 21.

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THE LAND TITLES ORDINANCE 2004¹

Introduction

On 7 July 2004, the Land Titles Ordinance (LTO) was enacted. The ordinance (Cap. 585) will change the deeds system of conveyancing currently in force in Hong Kong to a system of registration of title. When fully implemented, the important consequence of this change will be that an executed assignment, which at present passes title to land, will have no effect in relation to the land, merely creating contractual rights. Instead, title to the land will require the registration of a statutory form of transfer in the Land Registry. Consequential amendments will result in a statutory form of instrument for all registrable dealings. This will have the effect that instead of having to search a chain of title deeds to establish title, only the register needs to be searched. Any state of title certificate issued by the Registry will reflect only the state of the title at the time of issue. The register of title itself will be the authoritative statement of title, containing all current notifications and registrations.

What Type of System Is Being Introduced

The main features of the new system are:

- a. a paramount register requiring registration of dealings in statutory form to effect title to or an interest in land;
- b. an indefeasible title, subject to a proviso in the case of fraud by the registered owner, which is good from attack by all;
- c. statutory protection by way of entry of a caveat for an unregistered dealing. As equitable interests are to be barred from the system, some device was needed to give protection to an interest prior to registration, and the caveat fulfilled this function;

- d. the possibility of rectification of the register where necessary, either at the initiative of the registrar or under court order;
- e. an assurance system providing compensation to a party suffering loss in certain cases; and
- f. dealings with the land, such as mortgages and leases, requiring registration.

When Will the Legislation Take Effect?

Enactment of the LTO in 2004 was made subject to condition that the government review a number of matters and report back to the Legislative Council before proposing a commencement date. On 27 June 2018 the Secretary for Development reported to the Legislative Council that following 14 years of extensive consultation with relevant stakeholders trying to balance the divergent views on this complex subject, the government was proposing a Two-Stage Conversion Mechanism for land currently registered under the LRO.

To enable early implementation of the new title registration system the government is now actively pursuing a 'new land first' proposal, but no timetable for the LTO amendments to achieve this has been announced.

New 'land' is likely to be defined as land granted under a government lease on or after the 'appointed day' on which the LTO amendments come into operation with a lease term expressed to run from or after the appointed day. It will include land granted by the government by way of land sale (auction or tender), private treaty grant and land exchange.

The conversion of existing land currently registered under the LRO will be pursued after a few years of implementing the registration of new land.

So there is still a long way to go before the new system will be fully implemented.

The Incubation Period

During the incubation period, the LTO will apply to new grants land to dealings in any properties built on land granted after the commencement date. The amended LRO will apply to dealings in all previously registered land and property.

There will be one major change in respect of certain transactions which are not protected at present under the LRO but by reference to common law principles. This relates to the manner in which unwritten equities are to be dealt with.

Unwritten Equities

At present, a person claiming an interest in land under a transaction which has not been reduced to writing cannot register the claim in the Lands Registry because only written claims to land may be registered. Once the LTO operates to affect LRO land, the claim behind the unwritten equity will be lost if previously it had not been registered under the LRO. To enable this, the LRO has been amended by the LTO to introduce a caveat procedure which on registration gives notice of the claim. During the incubation period a claimant under an unwritten equity may register a caveat but this is not essential to retaining a claim during that period.

One example of an unwritten equity is that referred to as 'the bus driver's interest' which was considered in *Wong Chim-ying v Cheng Kam-win* [1991] 2 HKLR 253. That interest was said to be a beneficial interest under a resulting trust. As only interests which were registered under the LRO were recognized in a contest with a bona fide purchaser of the subject land, the unwritten equity was able to be ignored by such a purchaser, even one who took with notice of it, that is, who knows the existence of the equity. However, in a radical decision, the Court of Appeal held that the claim to the interest was to be protected under non-statutory notice provisions, largely perhaps because it was said that the purchaser in that case had had notice of the possibility of a claim. Despite the failure to register the interest, it was binding on the purchaser because common law principles would bind the purchaser in equity.

Once the incubation period ends and the LTO binds LRO land, an unwritten equity will not be permitted to affect land unless it had been 'caveated' during the incubation period. On conversion to the LTO, the caveat will become a 'non-consent caution'. Without registration, the claim will be lost as proprietary interest in the land, and the position will be the same as that prevailed prior to 1991; at most the interest will be contractual.

APPENDICES

APPENDIX I

Public Notice and Declaration of 1 May 1841

“The following Notice is published for general information. But the necessary particulars not having yet been obtained regarding the portions of land already surveyed, the blanks relating to number and extent of allotments and period of sale, cannot yet be filled up.

“Arrangements having been made for the permanent occupation of the Island of Hong kong it has become necessary to declare the principles and conditions upon which allotments of land will be made, pending Her Majesty’s further pleasure.

“With a view to the reservation to the Crown of as extensive a control over the lands as may be compatible with the immediate progress of the establishment, it is now declared that the number of allotments to be disposed of from time to time will be regulated with due regard to the actual public wants.

“It will be a condition of each title that a building of a certain value, hereafter to be fixed, must be erected within a reasonable period of time on the allotments; and there will be a general reservation of all Her Majesty’s rights. Pending Her Majesty’s further pleasure the lands will be allotted according to the principles and practice of British laws upon the tenure of quit rent to the Crown.

“Each allotment to be put up at public auction at a certain upset rate of quit rent and to be disposed of to the highest bidder: but it is engaged upon the part of Her Majesty’s Government, that persons taking land upon these terms shall have the privilege of purchasing in freehold (if that tenure shall hereafter be offered by Her Majesty’s Government), or of continuing to hold upon the original quit rent, if that condition be better liked.

“All arrangements with natives for the cession of lands, in cultivation, or substantially built upon, to be made only through an officer deputed by the Government of the Island; and no title will be valid, and no occupancy respected, unless the person claiming shall hold under an instrument granted by the Government of the Island, of which due registry must be made in the Government Office.

“It is distinctly to be understood, that all natives, in the actual occupancy of lands, in cultivation, or substantially built upon, will be constrained to establish their rights,

to the satisfaction of the land officer, and to take out titles, and have the same duly registered.

“In order to accelerate the establishment, notice is hereby given, that a sale of town allotments, having a water frontage of yards, and running back yards, will take place at Macao on the instant, by which time, it is hoped, plans, exhibiting the water front of the town, will be prepared.

“Persons purchasing town lots will be entitled to purchase suburban or country lots of square acres each, and will be permitted, for the present, to choose their own sites, subject to the approval of the Government of the Island.

“No run of water to be diverted from its course without permission of the Government.

(Signed). “CHARLES ELLIOT.”

“Macao, 1st May, 1841.”

[Hongkong Gazette, 1st and 15th May, 1841.]

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APPENDIX II

Public Notice of 7 June 1841 and Terms of Sale on 14 June 1841

On the 7th June, 1841, a Notice under the hand of Sir CHARLES ELLIOT was advertised of the proposed sale of the annual quit rents of 100 lots of land with water frontage and of 100 town or suburban lots, as follows:-

PUBLIC NOTICE OF 7TH JUNE, 1841.

“Notice is hereby given, that a sale of the annual quit rent of 100 lots of land having water frontage will take place at Hongkong, on Saturday, the 12th instant, as also of 100 town or suburban lots. The dimensions of the respective lots will be specified and defined on the spot by the Commanding Officer of Engineers, to whom parties are referred for further particulars.

“The titles will be delivered on payment of the rent, and the minimum value of the buildings to be erected on the lots, and the period allowed for erection, will also be then declared.

(Signed), CHARLES ELLIOT,
Chief Superintendent,

charged with the Government of Hongkong.

“Macao, 7th June, 1841.”

The sale advertised for the 12th was postponed to the 14th June, 1841, when it had been found impossible to put up the number of lots (200) as advertised in the Government Advertisement of the 7th of that month, and only 50 lots having a sea frontage of 100 feet each, or nearly so, were offered for sale, and it will be observed, from the following copy of the terms of that sale, that not only was the frontage not defined, but the depth from the sea to the road (the present Queen’s Road), was stated to necessarily vary considerably, and that the parties, (intending purchasers), would have the opportunity of observing the extent for themselves.

TERMS OF SALE ON 14TH JUNE, 1841

“1. Upon a careful examination of the ground, it has been found impossible to put up the number of lots named in the Government Advertisement of the 7th instant, and only 50 lots, having a sea frontage of 100 feet each, can at present be offered for sale. These lots will all be on the seaward side of the road. Lots on the land side of it, and hill and suburban lots in general, it will yet require some time to mark out.

“2. Each lot will have a sea frontage of 100 feet, nearly. The depth from the sea to the road will necessarily vary considerably. The actual extent of each lot as nearly as it has been possible to ascertain it will be declared on the ground. And parties will also have the opportunity of observing the extent for themselves.

“3. The biddings are to be for annual rate of quit rent, and shall be made in pounds sterling, the dollar in all payments to be computed at the rate of 4s. 4d. The upset price will be £10 for each lot, the biddings to advance by 10s.

“4. Each lot having been knocked down to the highest bidder, he will receive an acknowledgment that he is the purchaser of the lot; and this acknowledgment will be exchanged for a more formal title, as soon as the precise measurement and registration of the lots shall be completed.

“5. Upon delivery of the titles, the purchasers will be called on to pay the rent for the first year reckoning from the date of sale.

“6. They will also be required to erect upon each lot a building of the appraised value of \$1,000 or to incur upon the land an outlay to that amount, within a period of six months from the date of sale. As security for the performance of this engagement a deposit of \$500 shall be paid into the hands of the Treasurer to the Superintendents within one week from the day of sale, the deposit repayable as soon as an equal amount shall have been expended. Non-compliance with these terms will incur forfeiture of the deposit and allotment.

(Signed),

J ROBERT MORRISON,
*“Acting Secretary and Treasurer to the
Superintendents of Trade.”*

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APPENDIX VII

Secan Ltd. v Attorney General [1995] 2 HKLR 523

Secan Limited	Plaintiff (Respondent)
AND	
Attorney General of Hong Kong	Defendant (Appellant)
—————	
(Court of Appeal)	
(Civil Appeal No. 120 of 1995)	
—————	

Litton, V-P., Bokhary and Liu, JJ.A.

13th–15th June 1995.

Administrative law—environment—noise—agreement made between the Developer and Crown agents to implement “such ameliorative measures as deemed necessary by the Director of Environmental Protection”—whether the Director of Environmental Protection could insist on developer to build a noise barrier—approach in construing Special Condition in the agreement—whether the Director’s powers to require taking of ameliorative measures were “spent”.

In 1988, the plaintiff, a developer, entered into an agreement with Government to carry out substantial redevelopment at Ap Lei Chau which included a residential areas called “South Horizons”. The parties agreed certain Special Conditions including Clause 12(a) which provided that the developer “. . . shall implement such ameliorative measures as deemed necessary by the Director of Environmental Protection”. The development was shown as having residential blocks alongside a road leading towards proposed industrial areas.

In March 1988, the plaintiff was informed by the Environmental Protection Department about the environmental problems affecting the site. In July 1988, the plaintiff submitted an “environmental issues report” with certain proposals to deal with the problem but the proposal including weather-stripping the windows and double-glazing were not acceptable to Environmental Protection Department. In March 1989, the plaintiff was told to build a louvre tunnel to shield four residential blocks from the traffic noise. After meetings between various Government Departments and plaintiff, the proposal to build a louvre tunnel was abandoned but in November 1992, the plaintiff was required to build a large noise barrier. The blocks of flats were constructed and eventually, the plaintiff decided to insulate these flats instead of building louvre tunnel or noise barrier. The Government insisted the plaintiff build a noise barrier and said that otherwise permission to assign the flats would be refused. The plaintiff sought a declaration that it was not bound to construct the barrier. On 20th March 1995,

Sears, J. granted a declaration saying that it was not bound to construct the barrier to the plaintiff.

The defendant appealed.

Held:

1. (per Litton, V.-P.) The agreement was a commercial agreement which intended to give the Government a very large measure of control over the development proposal. In construing the agreement, a court should not be too astute or subtle in finding defects and must give effect to what the parties by their agreement have clearly intended. In the present case, since the proposal submitted by the respondent was not accepted by the Director of Buildings and Lands, the respondent was bound to implement such ameliorative measures as were deemed necessary by the Director of Environmental Protection.
2. In construing Clause 12(a), it was not legitimate to “pile implication upon implication”, (*Hang Wah Cheong Investment Co. Ltd. v. Attorney General of Hong Kong* [1981] 1 WLR 1141 applied).
3. Clause 12(a) empowered the Director of Environmental Protection to require ameliorative measures to be implemented but he was bound to act in good faith, exercise judgment and not act capriciously.
4. The power of Director was not “spent” at the time he required the noise barrier in about November 1992 since, when the proposal was eventually rejected, it was up to the respondent to come up with another proposal acceptable to the Director.
5. (per Liu, J. A.) There was no ambiguity in Clause 12(a). Accordingly, in construing Clause 12(a), it was not open to the parties to invite the judge to put himself in thought in the same factual matrix as that in which the parties found themselves at the time of the grant (*Reardon Smith Line v. Hansen-Tangen* [1976] 1 WLR 989 applied).

Appeal allowed.

P. Graham, instructed by Crown Solicitor, for the appellant.

N. Kat, instructed by Baker & McKenzie, for the respondent.

Cases cited in the judgment:

- Fawcett Properties Ltd. v. Buckingham County Council [1961] AC 636
Hall & Co. Ltd. v. Shoreham-by-Sea Urban District Council [1964] 1 WLR 240,
[1964] 1 All ER 1, 62 LGR 206
Hang Wah Cheong Investment Co. Ltd. v. Attorney General of Hong Kong [1981]
1 WLR 1141
Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government [1958] 1 QB
544, [1958] 2 WLR 371, [1958] 1 All ER 625, [1960] AC 260, [1959] 3 WLR
346, [1959] 3 All ER 1
Reardon Smith Line Ltd. v. Hansen-Tangen (t/a H.E. Hansen-Tangen) [1976]
1 WLR 989, [1976] 3 All ER 570, [1976] 2 Lloyd’s Rep 621
Viscount Tredegar v. Harwood [1929] AC 72, [1928] Ch 59

APPENDIX VIII

Humphrey's Estate (Queens Gardens) Ltd. v Attorney General and Another [1986] HKLR 669

Humphrey's Estate (Queen's Gardens) Ltd. Plaintiff
(Respondent)

AND

Attorney General and Another Defendants
(Appellants)

—————
(Court of Appeal)

(Civil Appeal No. 92 of 1985)
—————

Li, V.-P., Yang and Fuad, JJ.A.

7th–10th, 13th–15th and 31st January 1986.

Contract — negotiations for grant of lease “subject to contract” and with no intention to create legal relations — equity to preclude a party from relying on such protective terms.

Land law — licence to occupy premises — whether party estopped from giving notice of termination.

The dispute out of which this appeal arose concerned certain Conditions for Exchange, negotiated over a long period of time but never formally executed, regarding the redevelopment of a site at Queen's Gardens (Q.G.). The parties to the negotiations, which commenced in 1979, were the parent company of the plaintiff (H.K.L.) and the Crown (H.K.G.). In April 1980 the Principal Government Land Agent wrote to H.K.L. outlining provisional basic terms for an agreement, stressing that at that stage there was no intention to create any legal obligation. In January 1981 by a letter headed “without prejudice” H.K.G. wrote to H.K.L. stating that “subject to contract” H.K.G. agreed in principle to grant the Q.G. site on specified terms and conditions. H.K.L. replied immediately, also “without prejudice”, confirming that the basic terms were acceptable subject to the resolution of certain matters. On 1st June 1981 H.K.G. sent H.K.L. a copy of the draft Conditions of Exchange in respect of the transaction, again on the basis that there was no intention to create any legal obligation on the part of H.K.G. Essentially, it was agreed that the Q.G. site would be permitted to be redeveloped, together with any adjoining private land in H.K.L.'s ownership, on payment of a premium by H.K.L. This was to be satisfied partly in cash and partly by the assignment to H.K.G. of a number of flats in another of H.K.L.'s developments (Tregunter). On 29th June 1981 the first Tregunter flat was handed over to H.K.G. and the other flats were assigned between that date and 11th August 1981.

H.K.G.'s occupation of the Tregunter flats was on the terms of a draft licence which entitled H.K.L. to terminate the licence and resume possession should the proposed grant of a lease of Q.G. not be made. In November 1981 H.K.L. made the first payment on account of the premium for Q.G. and H.K.G. issued a licence for H.K.L. to enter the site and demolish the existing buildings. The licence expressly stated that it was not to be construed as having committed H.K.G. to the permanent grant of the licensed area.

In February 1982 H.K.G. sent H.K.L. a draft of the proposed Conditions of Exchange but no consensus was reached and correspondence and discussions continued. In August 1982 the final payment of the premium was made. By early 1983 H.K.L. was in serious financial difficulties but continued to seek agreement with H.K.G. over the Conditions of Exchange. In 1984, however, H.K.L. decided not to proceed with the acquisition of Q.G. on the basis that there was no legally binding contract between the parties. H.K.L. requested repayment of all sums paid on account of the premium and gave notice to terminate H.K.G.'s licence to occupy the Tregunter flats within 28 days.

In an action by H.K.L. to recover the sum of the premium together with possession of the Tregunter flats H.K.G. argued that an equity had arisen out of the words and conduct of H.K.L. in such a way that the "subject to contract" formula and the disavowal of an intention to enter into legal relationships became irrelevant. H.K.G. relied in particular on the handing over of the flats in Tregunter as an indication that thereafter neither party could withdraw. It was further argued that H.K.L. was estopped from determining the licence in respect of Tregunter because, by its conduct in not demanding possession of the Tregunter flats until 1984, H.K.L. had encouraged H.K.G. to act to its detriment with an expectation that H.K.L. would carry out its part of the bargain.

At first instance the judge held for the plaintiff, directing H.K.G. to repay the premium to H.K.L. and granting H.K.L. declarations that H.K.G.'s occupation of the Tregunter flats was as licensee only, that the licence had been determined and H.K.L. was entitled to possession of the flats. H.K.G. appealed.

Held:

1. The equity relied upon for the main part of H.K.G.'s case and promissory estoppel have their differences. The distinction to be addressed is not so much any difference there might be between the two doctrines but rather the nature of the "representation" relied upon. Where a representation is made by words (which may or may not be contained in a letter or other document) the principal issue before the court will be the true construction of the representation in the light of the surrounding circumstances, which is strictly a matter of law. But where words, conduct (and acquiescence) are in issue it is doubtful if the same degree of unambiguity can be insisted upon and it will be a question of mixed law and fact.
2. Great importance must be attached to the "subject to contract" principle. By the use of this reservation the parties have expressly stipulated that the execution of a further contract is a condition of the bargain they have reached, and there will be no enforceable contract while that condition remains unfulfilled. The court will not recognise a contract to make a contract. (Per Fuad, J.A.) Provided parties to an agreement in principle are aware of the significance of the "subject to contract" doctrine in property deals each must realise that either party might withdraw, even without good cause, and certainly if the "buyer" gets into financial difficulties before the transaction can be finalised. To "expect" otherwise will, normally, be fanciful. (Per Li, V.-P.) When the formula "subject to contract" is employed by the parties, such formula must be expunged

- clearly and unambiguously by the words or conduct of the same parties before equitable relief can be claimed. Where only one party seeks to expunge it, such expunction must be known to, and acquiesced in by, the other party so as to make it unconscionable for the other party to insist on its strict legal right.
3. The court is only entitled in the exercise of its equitable jurisdiction to disregard the clear understanding between the parties that neither shall be bound until the condition they have stipulated has been fulfilled, in very unusual circumstances (*Salvation Army Trustee Co. Ltd. v. West Yorkshire Metropolitan County Council* (1981) 41 P & CR 179 considered).
 4. On the facts the “subject to contract” reservation was not a mere incantation in the documents and in the letters exchanged, as is often the case. It could not possibly be contended that H.K.G. did not understand or mean what was being said. If H.K.G. entertained the expectation or held the belief that by taking possession of the Q.G. site or the handing over of the Tregunter flats or both, H.K.L. would in no circumstances insist upon their legal right to withdraw from the transaction before formal completion, that expectation was unreasonable and unjustified.
 5. When possession or occupation of property is a fact in issue in this kind of case, if any conditions or limitations are placed upon that possession or occupation, then unless something happens afterwards to indicate that the conditions have been waived or removed, or that the owner’s words or conduct have led the occupant reasonably to believe so, they must prevail.
 6. (Per Fuad, J.A. *obiter*.) If H.K.L. had accepted the Q.G. site without restrictions, or handed over the Tregunter flats without conditions, the facts might have entitled the court to enforce the equity in relation to the entire transaction.
 7. With regard to the licence to occupy the Tregunter flats, for an argument based on promissory estoppel to succeed, the conduct, promise or encouragement (indicating that the licence could not be revoked) must be clear and unambiguous. (*Woodhouse Ltd. v. Nigeria Produce Ltd.* [1972] AC 742; *E. & L. Berg Homes v. Grey* (1979) 253 EG 473 and *Spence v. Shell* (1980) 256 EG 55 applied.) Silence or inaction cannot be regarded as a “representation” unless a legal duty (a moral duty is not sufficient) was owed by the representor to the representee to take the steps, the failure to take which is relied upon as the creation of the estoppel. The court in examining the conduct relied upon as creating the estoppel has to bear in mind the practicalities of the situation. At the material time H.K.L. was seeking to re-negotiate the terms of the Conditions of Exchange and it could not be held against the plaintiff that H.K.L. did not demand possession of the Tregunter flats (and in this way assert legal rights) until it became plain that H.K.L. had to take the Conditions of Exchange as they stood or not at all. (*Shaw v. Applegate* [1977] 1 WLR 970; and *E. & L. Berg Homes v. Grey* (*supra*) considered.)

Appeal dismissed.

G. Godfrey, Q.C. & D. Fleming, instructed by the Crown Solicitor, for the Crown.
R. Alexander, Q.C. & R. Ribeiro, instructed by Deacons, for the respondent.

Separate judgments were delivered by members of the Court of Appeal

Cases cited in the judgments:

1. Ramsden v. Dyson (1866) LR 1 HL 129
2. Taylors Fashions Ltd. v. Liverpool Trustees Co. [1982] 1 QB 133
3. Greasley & Others v. Cooke [1980] 1 WLR 1306
4. Gregory v. Mighell (1811) 18 Ves Jun 328
5. Plimmer v. Wellington Corporation (1884) LR 1 HL 129

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