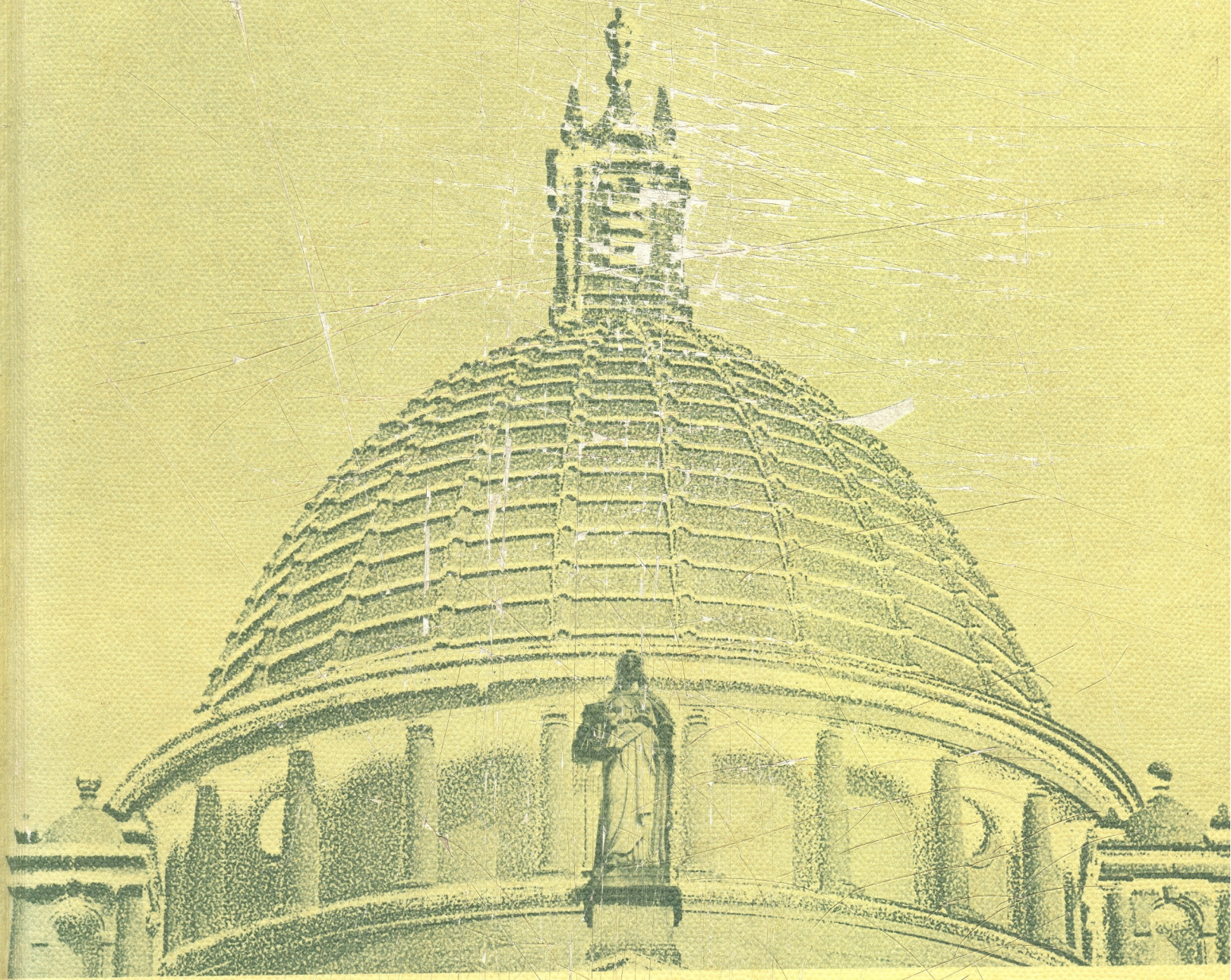
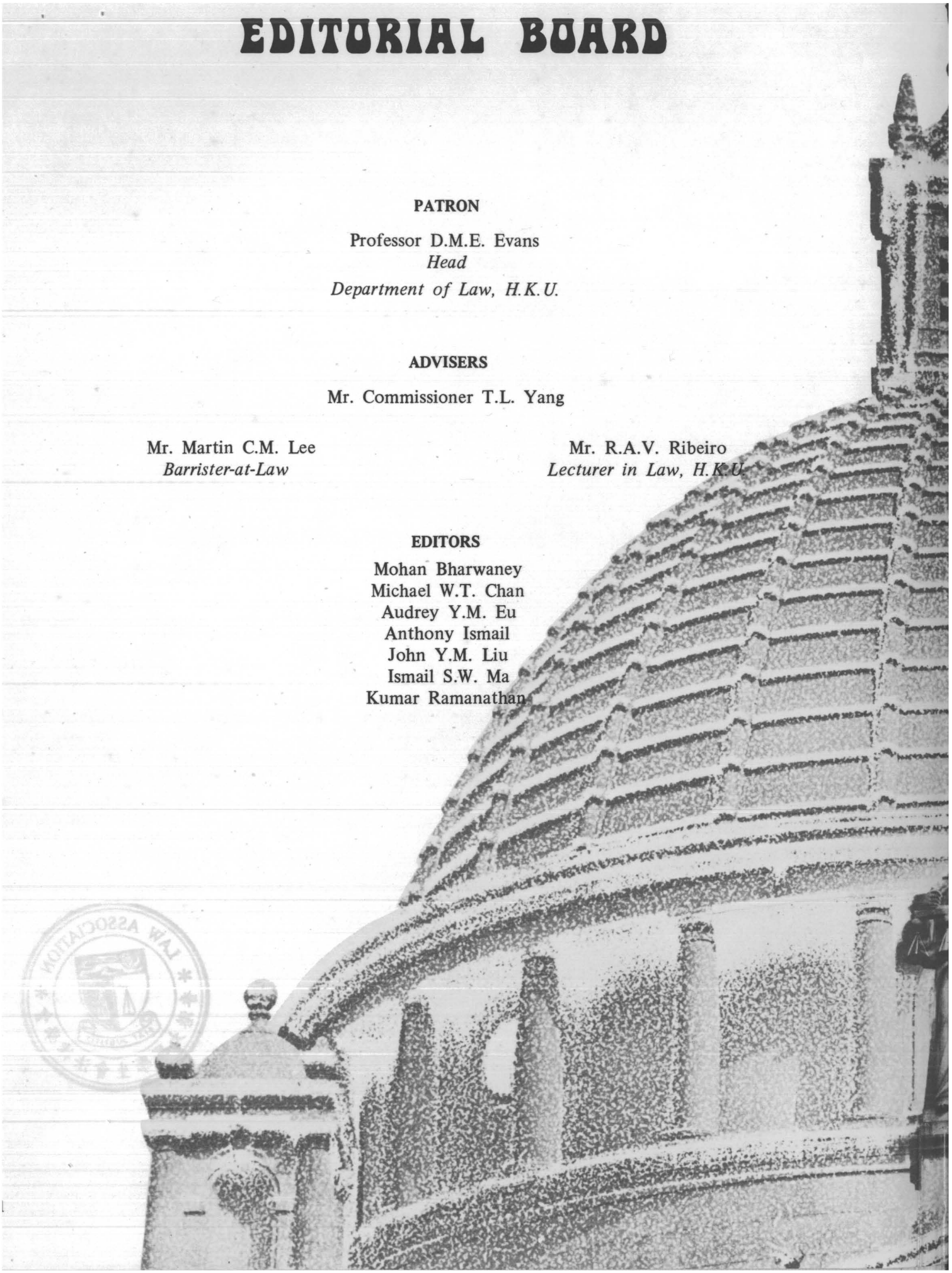
JUSTITIA



HONG KONG UNIVERSITY
LAW ASSOCIATION REVIEW
1973-1974

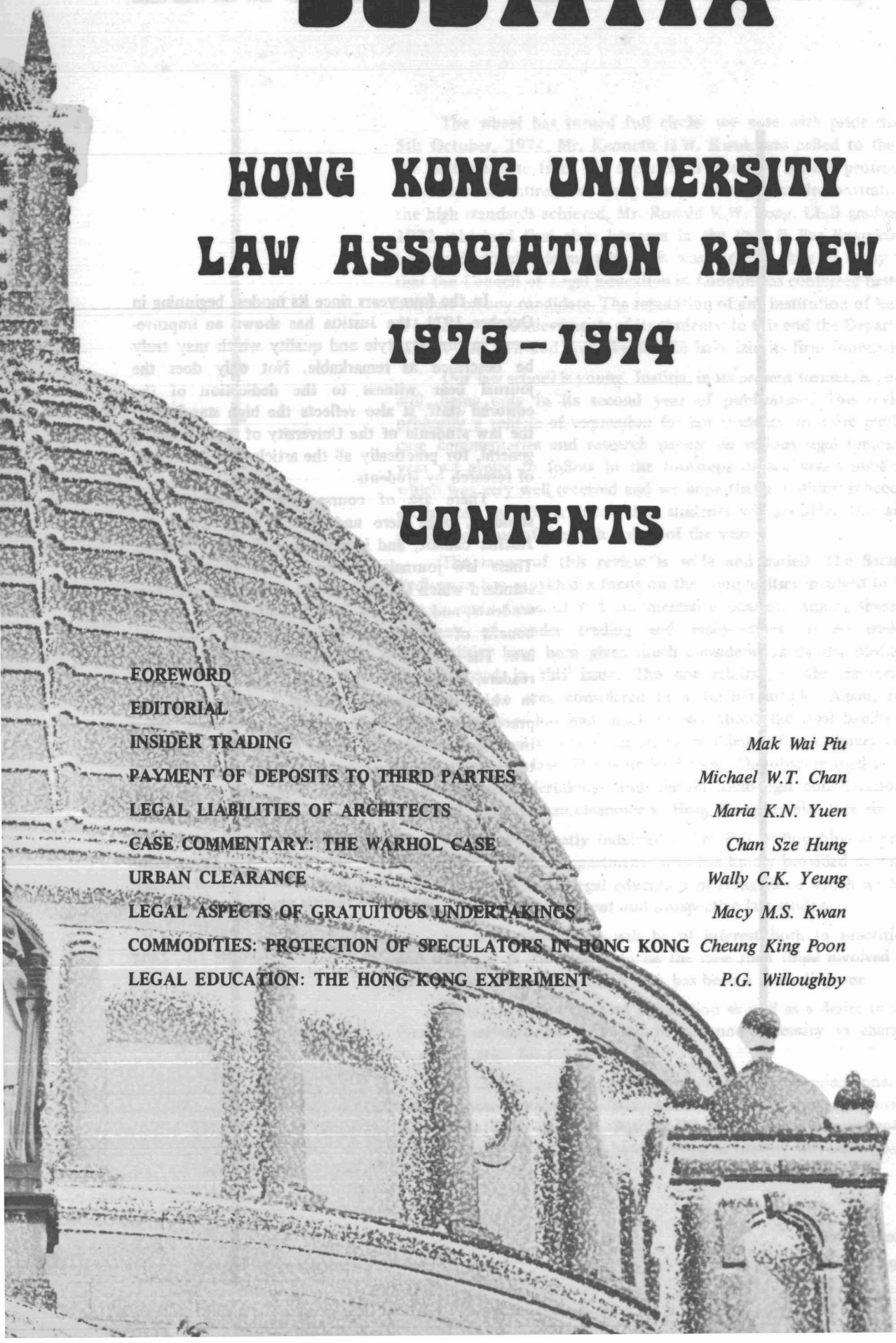
EDITORIAL BOARD



JUSTITIA

HONG KONG UNIVERSITY LAW ASSOCIATION REVIEW

1973-1974



CONTENTS

FOREWORD

In the four years since its modest beginning in October 1971, the Justitia has shown an improvement in format, style and quality which may truly be described as remarkable. Not only does the journal bear witness to the dedication of the editorial staff, it also reflects the high standard of the law students of the University of Hong Kong in general, for practically all the articles are the results of research by students.

There are of course law journals of high standing, both here and abroad, with which the Justitia cannot, and is never intended to, compete. These law journals contain learned treatises of a standard which are perhaps not to be expected from students, and they are published exclusively for the benefit of those more closely connected with the law. The Justitia is aimed primarily at the general readers, in particular the youths. But it is a journal in which even qualified lawyers, be they scholars or practitioners, will find something of interest. More importantly, the essays cover such a wide variety of topics of general interest that the layman too will encounter something which is relevant to his work or daily life. It is therefore with this aim in mind that the value of this publication must be judged and assessed. I for one am convinced of the worthiness of that aim, and it is with the most sincere enthusiasm that I offer Justitia my best wishes!

Mr. Commissioner T.L. Yang

EDITORIAL

The wheel has turned full circle: we note with pride that on 5th October, 1974, Mr. Kenneth H.W. Kwok was called to the Bar, the first graduate from our department to obtain his full professional qualifications entirely in Hong Kong. In a cogent demonstration of the high standards achieved, Mr. Ronald K.W. Tong, LL.B graduate of 1972, obtained first class honours in the Part II Bar Examinations held in England this summer. This was the first time in many years that the Council of Legal Education in London has conferred first class honours on any candidate. The reputation of any institution of learning is built on the achievements of its students; to this end the Department of Law can well and truly be said to have laid its firm foundations.

Our law school is young, Justitia, in its present format, is younger still, being only in its second year of publication. This review is primarily a vehicle of expression for law students. In it are published case commentaries and research papers on various legal topics. This year we aspire to follow in the footsteps of last year's publication which was very well received and we hope that a tradition is becoming established by which future law students will consider this annual publication one of the high points of the year.

The range of this review is wide and varied. The Securities Ordinance has provided a focus on the complexities involved in Hong Kong's rapid financial and commercial expansion. Among these, the problems of insider trading and malpractices in the trade of commodities have been given much consideration by the media and are discussed in this issue. The law relating to the payment of deposits is an area considered in a further article. Again, recent English case law has had much to say about the legal liabilities of architects as well as the *locus standi* problems of an ordinary citizen in administrative law. This is under review. The obscure legal position of gratuitous undertakings and certain socio-legal considerations in connection with urban clearance in Hong Kong are also treated.

We are also greatly indebted to Mr. P.G. Willoughby, at present Acting Head of the Department, who has kindly provided us with an informative article on legal education in Hong Kong which we highly recommend to every present and prospective law student.

We hope this review will be of interest both to practitioners and students. If this proves to be the case than those involved in its preparation will feel that their task has been a rewarding one.

Owing to rising costs of publication as well as a desire to attain financial self-sufficiency, it has been found necessary to charge an economic price for the review.

We cannot conclude without thanking Mr. Commissioner T.L. Yang, whose interest in our work has been very encouraging; Mr. Martin C.M. Lee, Mr. R.A.V. Ribeiro and our patron Professor D.M.E. Evans, all of whom have assisted in making this issue possible.

Editorial Board

October, 1974

INSIDER TRADING

Mak Wai Piu

Insider trading is like revenge – wrong, but natural.

The Problem

The above observation on insider trading probably would not raise any controversy. The tragedy is that the simplicity about insider trading really ends here. Most of the complexities and conflicts in this area of law are still unsolved, and the rest are, at best, only unsatisfactorily dealt with. The difficulties range from definition, scope of prohibition, enforcement, to the extent of liability. Although many of these are, at present, to a large extent, only of significance in the United States, their full impact would inevitably be felt in any country that tries to bring insider trading under comprehensive control.

(I) *The Definition*

Insider trading has been defined as dealings in corporate securities where one party has, and the other does not have, access to confidential information which has a substantial bearing on the value of those securities.[1] It is a good definition, but, like most general definitions, it raises more questions than it solves. Who precisely is an insider? What type of information will be regarded as having a substantial bearing on the market value of the securities?

Directors, high officials and major shareholders of a corporation are clearly insiders as to the securities of that corporation for they are presupposed to have access to information intended to be available only for a corporate purpose. Once outside the ambit of presumption of accessment, it is not easy to define an insider. A representative of the American Securities Exchange Commission (SEC)[2] once admitted that they did not know how to define an insider but insisted that "we sure know one when we see him".[3] While this might be useless as a general guideline for those trading in securities to regulate their business accordingly, it is illustrative of the fact that, in practice, whether a

1 As defined in '*A Report by Justice: Insider Trading*.'

2 A body created by the Securities Exchange Act 1934 for overseeing the compliance of the Act.

3 As quoted by Mr. Haddon-cave, Financial Secretary of Hong Kong. (S.C.M.P. Dec. 19, 1973).

person is an insider is more or less decided *ad hoc*. A small investor, who happens upon some choice bit of inside information, is not held to a duty of disclosure in other than face-to-face transaction.[4] A tippee[5] is usually considered as an insider, insofar as liability is concerned, once proved that he knew or had reason to know that information not generally available to the investing public was being unlawfully conveyed to him.[6] A person who happens to overhear it in a public place and turns it into good use, on the other hand, is not regarded as an insider for, in a sense, the information is already in a public domain.[7]

As to the type of information which an insider has a duty to disclose, considerable difficulties also arise. An insider has no duty to disclose his special information in his security dealings unless it is "reasonably certain to have a substantial effect on the market price of the security if disclosed.[8] The test is whether "a reasonable man would attach importance"[9] to it. Are speculators and chartists also 'reasonable' investors entitled to the same legal protection afforded conservative traders? While a narrow construction to include only conservative prudent investors would render the law useless in most situations, to include speculators and chartists would make the construction unduly wide, for then the material facts would include not only the earnings and distributions of a company, but also all facts that may affect that future of the company and the desire of investors to buy, sell, or hold the company's securities. Similarly, it is not clear whether the disclosure requirement is extended to developments that are merely possible, or just to what are probable. There is simply no hard-and-fast rule in determining what should be disclosed and, once again, we have to be contented with *ad hoc* decisions.

With the general definition of insider trading so riddled with uncertainties, it is only natural that the mapping of the scope of prohibition is anything but simple and straight forward.

(II) *Cope of Prohibition*

Being an insider *per se*, does not prohibit such a person from dealing in securities, nor must his dealings necessarily be insider trading once he possesses material information not known to outsiders. The simplest way to avoid insider liability is for him to disclose the information to the other party. Ironically, in reality, this is the most risky solution for an insider. Material information is almost invariably corporate information, and premature disclosure not only could cause serious financial loss to the corporation, but could also incur liability on the insider.

Fortunately for insiders, even without disclosure, there is nothing inevitable about their security dealings falling within the scope of prohibition. The fact is that neither is that scope all-embracing nor are its boundaries sufficiently charted. So long as fraud is involved, no problems are created,[10] but in the peripheral areas, major uncertainties emerge. Does it also cover dealings not for making profits but for mitigating or forestalling loss? Should the reception of confidential information prejudice a prior scheme of investment? How should stockbrokers, investment advisers and trustees conduct themselves once they possess special information? Is there any limit on the imposition of liability on tippees?

The law in imposing liability does not seem to recognise any difference between insider trading for making profits and for forestalling loss.[11] The rationale probably is that the deal is, in a sense, still a kind of unfair trading when one party has, and the other party does not have, confidential corporate information, and with actual financial loss transferred to and suffered by the latter.

The worst dilemma an insider can get himself into probably is that prior to the reception of confidential information, he has already made up a scheme to invest. While it

4 *Strong* v. *Repide* 213 U.S. 419.

5 The person receiving information from an insider.

6 See Painter, Colum. L. Rev. 65: 1361, at 1389.

7 See Comment, 30 U. Chi. L. Rev. 65: 1361, at 1389.

8 *SEC* v. *Texas Gulf Sulphur Co.* 401 F. 2d. 833 (2d. Cir. 1968), at 848.

9 *Ibid.*

10 If fraud is involved, a plaintiff can claim under 'deception' or 'misrepresentation'.

11 In the United States, directors, if they sold shares before disclosing bad profit news for forestalling loss, would give the company a right to recover from them, see *Diamond* v. *Oreamuno* 24 N.Y. 494 (1969). In *Cady, Roberts* 40 SEC 912 (1961), a stock-broker was held liable despite argument that he traded with inside information only for forestalling loss.

In Hong Kong, Securities Ordinance s. 140 make it an offence to trade with inside information to avoid loss.

would be wholly unjust, at least in principle, to impose insider liability on someone merely because the inside information he subsequently acquired happens to support his independent judgment, to exempt him should require distinct proof on his part that the scheme is prior to and intended to be acted upon irrespective of the inside information received. In practice, without prior consistent investment patterns, it is nothing less than an acute question of credibility.[12]

Stock-brokers and investment advisers clearly owe fiduciary duties to their clients, but they also owe an obligation not to abuse inside information at the expense of the investing public. A broker obviously should not be permitted to purchase securities from his clients if he, with confidential information, knows that the selling price is unduly low[13], but neither should he solicit orders for his client as a 'special favour'. However, he should not be prohibited from executing unsolicited purchase orders on behalf of his clients [14] since his knowledge should not prejudice his clients' interest. Similarly an investment adviser should not be free to communicate inside information under the guise of disclosing fully the 'research' on which his recommendation is based. On the whole, the American courts seem to have little, if any, regard as to the existence of special fiduciary duties in upholding the general principle. In *Cady, Roberts,* [15] a broker was nonetheless penalised though he used inside information only for the benefit of clients for whom he carried discretionary accounts. Also, a lawyer is currently facing trial in the United States for trading with inside information as a trustee for the benefit of the *cestui que trust*. While one may sympathize with persons who are motivated not by self-profiteering, but by their keen sense of duty, the imposition of liability is actually nothing more than a natural extension of the generally accepted rule that no person, not even lawyers who owe perhaps the heaviest duty to their clients, can lawfully advise his clients to commit an offence,[16] nor should he, *a fortiori* commit an offence for them. As the Editorial Board of *the University of Chicago Law Review* expounds it, "(a) trust position is not a license to assault the universe. It does not convert the trustee into a twentieth century Robin Hood, empowered to exact plunder from others on behalf of worthy causes."[17]

While tippees are generally liable as insiders, it is submitted that the scope of prohibition should not be extended to those of 'lower levels', that is, persons who get their information from tippees. The lower the level, the less authoritative the information becomes, and it would be weighed no more than as an ordinary rumour by the recipient. It serves no good purpose to extend the law to cover someone who genuinely believed that he is taking, if not greater, at least as great a risk as ordinary investors in investing according to rumours. Moreover, to extend liability beyond the first few levels of tippees would create undue difficulties in enforcement.[18]

(III) *The Enforcement*

The problem confronting enforcement of liability is the simple truth that penalties can only be imposed if the offence is discoverable. Apart from those involving fraud, improper trading in an open market is extremely difficult to trace, especially if the market is an active one.

Insider trading can be brought into light by disclosure requirements on insiders to report periodically changes in their securities holding.[19] A failure to report fully which carries the danger that sooner or later it would be known, subjects the insider to criminal liability, yet to report fully would expose him to insider liability. Unless an insider braves the probability of criminal charges, any insider trading made by him could easily be traced by simply comparing the changes in his holdings with the developments of the corporation concerned. Reporting requirements, however, cover only insiders who are presupposed to have access to corporate in-

12 In *Cady, Roberts, supra,* Commissioner Gary: "the record does not support the contention that .... the sales were merely a continuance of his prior schedule."

13 See cases cited in Daum & Phillips, *'The Implications of Cady, Roberts'*, 17 Bus. Law 939, at 940 – 942.

14 The difference is that the orders are initiated by the clients.

15 *Supra*, footnote (11).

16 *R.* v. *Cox and Railton* (1884) 14 Q.B.D., 153.

17 U. Chi L. Rev. 30: 121 (1962) *'Insider Liability Under SEC r. 10b-5: Cady, Roberts '.*

18 As it is very difficult to discover and to prove.

19 In the United States, s. 16(a) SEC, in the United Kingdom, ss. 27-29, s. 31 Companies Act 1967.

formation,[20] and even they can evade these requirements by using inside information to trade, not in the securities of their corporation, but in those of its subsidiaries or affiliates, or in the stock of other corporations related to the insiders' company by contract or otherwise. While it is possible to broaden the reporting requirements, (as indeed so broadened in England in 1967), to cover transactions in the shares of subsidiaries and affiliates, to include the latter is inadvisable. In an age when large corporations and their subsidiaries are linked with numerous companies by material contracts, reporting requirements, so broadened, would, instead of exposing, allow insider trading to be safely concealed in a deluge of paper.

To achieve overall scrutiny, a body serving as a public watchdog is indispensable. Admittedly, even a body with strong statutory powers and active in probing, such as the SEC, could not possibly be expected to do much more than spot-checking, yet, the deterrent effect would still be tremendous. Since investigations are naturally concentrated in dealings prior to the public announcement of significant developments, they hit where insider trading is most likely to occur and when worst abuse can result from such kind of improper dealings.

Civil action to enforce liability can also be brought by private individuals. Recovery depends on showing that actionable wrongs have been caused by the insider sued, and that the loss is within the extent for which he is legally liable.

(IV) *The Extent of Liability*

An insider does not become a market insurer for all investors just because he has engaged in insider trading. He is only liable to compensate those who can somehow link their loss to his misconduct. Reliance usually form that 'link'. As a basis for recovery, reliance has its inadequacy. A plaintiff must prove that he would not have traded in that security if he had not relied on the misrepresentation. In cases of mere non-disclosure, apart from 'face-to-face' transactions where silence on matters that should be disclosed can be positively relied on as evidence of their non-existence, reliance, in its real sense, does not exist. A person trading in Securities Exchange does not rely on the "omission of an individual whose indentity is unknown to him",[21] he relies on his general impression of the financial situation of the company, and on the general market tendency.

A possible alternative basis is 'causation'. This would allow recovery in situations where a person's intention to trade has nothing to do with the misrepresentation, in fact he may even be unaware of it, but nonetheless he still might have suffered loss as the misrepresentation affected the market value. However, causation is not a perfect answer. Apart from the frightening prospect of making every market participant after the misrepresentation a potential plaintiff, it does not form a sound basis for recovery in cases of mere non-disclosure. A director has the discretion to choose any moment he considers most favourable for the corporation, to disclose any developments.[22] Unless the failure to disclose before a given time infringes statutory requirements or was motivated by considerations other than for the benefit of the corporation, the mere fact that the director also engages in insider trading does not make his rightly exercised discretion improper. With no impropriety, it is hard to see how anyone can recover on 'causation'. With or without insider trading, market value would still be affected by the non-disclosure. No investor could possibly prove that 'but for' the insider trading, he would have suffered no loss. Indeed, it has even been argued that the participation of the insider in the market might have minimised the outsiders' loss.[23]

It is possible, however, to argue that while it is within a director's discretion to choose a suitable time for disclosing corporate information, he owes a duty to disclose it to the

20 See above: the section on 'the Definition', at 1-2.

21 Comment, 63 Colum, L. Rev. 913, at 941 (1963).

22 In *Casey* v. *Woodruff* 49 N.Y.S. 2d. 635, at 642 (1944), the 'judgment' rule was stated thus: "The Directors are entrusted with the management of the affairs of the (company). If in the course of management they arrive at a decision for which there is reasonable basis, and they acted in good faith, as the result of their independent judgment, and uninfluenced by any consideration other than what they honestly believe to be for the best interest of the (company), it is not the function of the court to say that it would have acted differently and to charge the directors for any loss or expenditures incurred."

23 Mann, '*Insider Trading on the Stock Exchange*'. When a director buys on knowledge of favourable news not yet due for disclosure, he might have slightly raised the market price to the benefit of those who would sell anyway. Similarly, selling before the announcement of bad news may push down the price for those who would buy anyway.

party who deals with him. Privity is thus advanced as the basis for recovery in cases of non-disclosure. While it is sound in principle, to use privity as a basis for recovery raises a difficult policy question. In a Securities Exchange, privity is established purely by random matching of share certificates. There is absolutely no justification for allowing someone to recover while others go without compensation merely because he is 'lucky' enough to have shares coming from or going to an insider under a chance matching system.

The Control in the United States

The United States was the first country to come to the conclusion that insider trading, though natural, is nonetheless wrong, and to have provided comprehensive control over it.

(I) *State Law*

It is beyond dispute that a company can claim from a director who trades on inside information. Even if the company has not suffered financially, courts are willing to uphold the claims on the basis that the abuse undermines the company's "reputation of integrity, (its) image of probity, (essential) for its management and in insuring the continued public acceptance and marketability of its stock".[24] In the recent case of *Schein* v. *Chasen,*[25] the Court of Appeals went as far as to hold tippees and those who conduited the information as intermediates were also liable to the corporation jointly and severally, even though the intermediates had not traded on the basis of that information. This decision was on the ground that it was a 'common enterprise' involving the director, intermediates and the tippees misusing confidential corporate information. Unfortunately, the courts' attitudes toward individuals' claims are diversified. There are three approaches.[26] The majority of the courts, on the one hand, are of the opinion that insiders owe no duty to shareholders in buying or selling the corporate's securities. The minority of the courts, on the other hand, have taken the view that an insider has a duty to disclose inside information when dealing in the corporate's securities. The harshness of the 'majority rule' is, however, mitigated by the development of the 'special facts' doctrine which requires disclosure by directors who have sought out shareholders for the purpose of buying their shares, though its main application is in face-to-face transactions[27] and has never been applied to dealings on a Stock Exchange[28].

(II) *Federal Law*

It is, however, through the developments in the Federal laws that the United States stays firmly ahead in regulating insider trading.

(a) *Rule 10b-5.*

Of all the Federal laws that cover insider trading, the most pervasive is rule 10b-5.[29] Ironically, this rule was originally formulated to deal with fraud and misrepresentation rather than insider trading as such. Its present significance is more or less a judicial product, the result of a gradual process culminating in the landmark case of *SEC* v. *Texas Gulf Sulphur.*[30] In this case, certain directors, officers, and an employee, with inside information relating to the discovery of high grade ore, bought the company's shares on the market, secured the granting of stock option by the company through a board that was not apprised of the discovery, recommended that stock to others, and released a misleading press statement, all before the public announcement. SEC brought proceedings against the company, directors, officers, and the employee for violating the rule 10b-5. The Second Circuit of Court of Appeals held that "anyone", not just insiders as defined in other sections of the Securities Exchange Act,[31] who had "access, directly or indirectly," to material corporate information must either disclose it to the investing public, or must abstain from trading in, or recommending, the

24 *Diamond* v. *Oreamuno*, *supra*, footnote (11).

25 479 F. 2d. 817 (Second Cir. 1973).

26 *Goodwin* v. *Agassiz*, 283 Mass. 358, 186 N.E. 659 (1933).

27 *Supra*, footnote (4).

28 Lattin, Jennings and Buxhaum, '*Corporations Cases and Materials*', (4th ed. 1968), 731.

29 Made by the Securities Exchange Commission under power delegated by s. 10 of the Securities Exchange Act, 1934.

30 401 F. 2d. 833 (1968).

31 See for example s. 16 SEA, 1934. Usually includes only directors, officers of the company and beneficial owners of more than ten percent of any class of equity securities in a company.

corporate's securities. Material information was defined as "essentially extraordinary in nature and which are reasonably certain to have a substantial effect on the market price of the security if disclosed." The liability of 'tippees' had not been expressly decided but the court noted that their conduct" certainly could be equally reprehensible." Civil remedies for those who had sold to the insiders were inpliedly accepted by the court. In addition, the Court of Appeals remitted the case to the trial court to determine whether the press release was misleading, on the footing that the issue of a misleading release would be a breach by the Texas Gulf Sulphur Company of the rule 10b-5. It is, however, not clear as to whether the Company would be held liable in civil actions to compensate former shareholders who had sold their shares to 'outsiders'.

(b) *Section 16 Securities Exchange Act, 1934.*

This section imposes disclosure requirement on insiders to report monthly changes in their security holdings[32] and prohibits them from making 'short-swing profits'.[33] Under this section, profits made by insiders in sale-and-purchase or purchase-and-sale in equity securities of the corporation within a period of six months can be claimed by the corporation.[34] However, this section does not cover insider trading for forestalling loss by selling long-held securities, nor when the duration between the availability of inside knowledge and the public announcement is of a period more than six months. It does, however, make risk-free quick profits almost impossible for those who come under this section. Many intervening factors might happen in a period of six months. The greatest advantage of this section is its simplicity and certainty of operation, but as it operates "without regard to good faith",[35] it may prevent or even penalise perfectly innocent transactions.

(c) *Take-over Bids.*

In 1968, the 'William Act'[36] was passed to impose duty on the bidder to disclose identity, background, future plans and other material information to the shareholders of the 'target' company before they sell securities to that bidder. This is another step ensuring that the bidder and the shareholders are on an equal footing insofar as availability of material information is concerned.

The Control in England

Legislation controlling insider trading, or rather the lack of it, is attracting considerable attention recently in England. This partially reflects the present inadequacy of control over this particular form of improper trading.

(I) *Common Law*

Individuals seeking for compensation are, at best, under-privileged claimants at common law. The stumbling block is *Percival* v. *Wright.*[37] In this case, shareholders offered to sell their shares to the directors who bought them without disclosing a tentative bid which eventually proved abortive. The court rejected the contention that a director held a fiduciary position as trustee for shareholders. Swinfer Eady J. went on to hold that directors were under no obligation to disclose to their vendor-shareholders inside information in buying their shares. Although this case was a decision at first instance only and has been much criticised outside the courts, its authority has never been doubted in any reported English judgment. The only case that distinguished *Percival* v. *Wright* on fact is the Privy Council decision in *Allen* v. *Hyatt.*[38] In this case, the directors approached the shareholders for buying their shares while having in their possession inside information. The Privy Council upheld the vendor-shareholders' claims on the ground that since those directors made the ap-

32 s. 16 (*a*) SEA, 1934.

33 s. 16 (*b*) SEA, 1934.

34 Time limit for action is two years, and actin can be brought by any shareholder on behalf of the company.

35 *Petteys* v. *Butler* 347 F. 2d. 528 (1966), at 532.

36 *Public Law* 90-439; 82 Stat. 454.

37 (1902) 2 Ch. 421.

38 (1914) 30 T.L.R. 444.

proaches, they were accountable to the vendor-shareholders for secret profits they made with inside knowledge either as trustees or as agents.

Even if the English courts are to follow the Privy Council decision, the common law is still in a parlous state as regard to individual claims. Individuals can never claim from insider-directors of another company since they are not in any fiduciary relationship. Similarly, insider-directors owe no fiduciars duties to purchaser-shareholders since the directors are not, constructive or otherwise, their agents or trustees before or at the time of their purchase. Moreover, the essence of the 'rule' of *Allen* v. *Hyatt* is that the director approaches the shareholders, and in a Stock Exchange, it is virtually impossible to say when it is the Director that makes the approaches.

As to claims from the company concerned, it is still an open question whether a director can be made accountable for the profits he makes in dealing in that company's securities in reliance on confidential information. No such claim has ever been brought by a company in England. The situation is further complicated by the fact that since a company in England cannot legally deal in its own securities, the company itself cannot prove any direct injury caused by such dealings. In legal theory, there seems to be no obstacle to such a claim. It was held in *Phipps* v. *Boardman* [39] that a person who has acquired confidential information in the course of his fiduciary duties must account for any benefit he has made as a result of its use even if the person to whom the duty was owed would not himself have made it. However, since for various reasons, such as the avoidance of publicity, and the reluctance of the co-directors to commence proceedings, this remedy probably would not be pursued, and the question whether in practice a director is accountable is likely to remain, for a long while, an academic one.

(II) *The City Code on Take-over and Merger*

The City Code provides some control over insider trading. Under the Code, details of dealings within twelve months prior to the announcement of the take-over or merger must be revealed in the take-over or merger document along with information about share-holdings of the offeror and offeree companies on each side.[40] It strictly prohibits dealings between the period when an approach is contemplated up to the time of public announcement, by privies to the preliminary discussion or to the intention to make an offer [41] The Code's effectiveness is limited. The Panel that aiministers the Code does not have power to interrogate or to demand access to relevant documents. The Code is not a rule of law and subsequently lacks fully efficacious sanctions. Although the threat of suspension from membership is effective against a stock-broker, it is totally powerless as against a director. Suspension of quotation of the company's shares will penalise also innocent shareholders. Moreover, the Code governs misuse of information at take-overs and mergers only.

(III) *Statutory Control*

Apart from imposing disclosure requirements [42] on changes in security holdings by directors and ten percent shareholders, and in prohibiting the buying of 'put', 'call', or 'put-and-call' option by a director in any quoted shares or debentures of that 'company group' [43], there is no statutory provision that deals with insider trading as such.

A White Paper was published in 1973 and was followed by a Bill in 1974. The Bill, insofar as insider trading is concerned, was badly drafted and had come under heavy criticism. In widely defining an insider as a person having price-sensitive information, it created ridicule. Directors and high officers always have information that can be called 'price-sensitive', and by not confining it to corporate information, there is no limit to its operation and everyone can be an insider. The Bill has lapsed due to the dissolution of Parliament pending election. It remains to be seen whether it would emerge again in the next session, and if so, in what form.

39 (1967) 2 A.C. 46.

40 r. 17 City Code on Take-over and Merger.

41 r. 30 City Code on Take-over and Merger.

42 ss. 27–29, 31 Companies Act, 1967.

43 s. 25 Companies Act, 1967.

The Law in Hong Kong

Hong Kong is a late-comer in the control of insider trading and consequently has benefited immensely from experience gained by others. The recently enacted legislation in effect brings the control in Hong Kong from near non-existence to, at least in theory, an advanced state.

(I) *Common Law*

Basically, Hong Kong follows the common law of England, hence the investors are equally unprotected. A vendor-shareholder does, however, have a slight advantage over his English counterpart as the Privy Council decision in *Allen* v. *Hyatt* is of direct and binding authority in Hong Kong. However, that alone, as has been seen above,[44] is not sufficient and definitely is no substitute for comprehensive legislative protection.

(II) *Statutory Control*

The need for statutory control is aggravated by the fact that the mass of Hong Kong investors are relatively unsophisticated, thus making them easy prey for insiders. However, the idea of having statutory prohibition is not without its opponents. It has been argued that to legislate against insider trading is undesirable in Hong Kong since it might drive away overseas capital. Admittedly, Hong Kong needs investments from abroad and consequently cannot adopt too harsh a set of commercial laws; yet, this does not mean that we must allow the continued existence of insider trading as a necessary evil. *A priori*, this evil might not even be necessary. It is inconceiveable that we should permit an improper practice to persist merely because it might attract some overseas capital. This argument, if adopted, would open the flood-gates allowing in all kinds of abuses. Moreover, the prohibition of insider trading actually would not deter investments as overseas investors are unlikely to be so intimately associated with Hong Kong Companies that they would be able to trade with inside information; and even if some were, it is not a valid ground for tolerating insider trading. Those who come only to make quick profits with inside information will not benefit Hong Kong; what we need are long-term investors, not short-term speculators. The last thing Hong Kong wants is to have the market once again over-heated and collapse. Indeed, the successful operation of the quotation system demands a high degree of public confidence in fair dealing on the Stock Exchange, and allowing insider trading to flourish certainly will not help. Only through general prohibition of all improper trading practices can such confidence be instilled.

In any event, statutory control has already become a part of the Hong Kong law. While justification of its existence is important, attention undoubtedly should centre on the law itself.

(a) *Section 19, Securities Ordinance.*

It is made an offence carrying a fine of $10,000 and imprisonment for six months for a member of the Securities Commission[45] or a person employed in the administration of the Securities Ordinance to deal in securities on information obtained through his work.[46]

(b) *Section 140, Securities Ordinance.*

Insider trading is principally dealt with in this section. It defines an insider as a person associated with a corporation in the ways prescribed in sub-section 9. These include directors, secretaries, ex-secretaries, ex-secretaries, officers and employees of that 'company group',[47] ten percent shareholders, and persons acting in any capacity for the corporation.[48] The section prohibits insiders from trading and tipping once they have knowledge of confidential information, which, if it had generally been known, might reasonably be expected to have materially affected the market price of the securities. The prohibition extends to cover securities of another corporation which is related to the

---

44 *Supra*.

45 Created by s. 9, Securities Ordinance.

46 Exceptions are provided in s. 19(5).

47 s. 140(9): 'corporation deemed by section 4 to be related to it.' These include its subsidiaries, its holding company and the subsidiaries of that holding company.

48 If a corporation is a ten percent shareholder of another company, its directors, managers, or secretaries are regarded as insiders of that company.
If it is a corporation that acts in any capacity for another company, its directors, managers, secretaries and employees are regarded as insiders of that company.

insider's corporation in any transaction involving both corporations or involving one of them and the securities of the other. It is also made an offence for a person receiving inside information to deal in that security provided he knew or had reasons to know that the price-sensitive information was both confidential and had come from or through an insider. Unless the dealing came within one of the exceptions provided in sub-section 11, an insider or a tippee trading with inside information could be fined up to $50,000 and liable to imprisonment for two years.

Apart from a fine and imprisonment, an insider is also liable to compensate the corporation that issued the sucurities and any person who had incurred loss by reason of the insider trading. The quantum of loss or profit recoverable is the difference between the price at which the dealing was effected and the price which, in the opinion of the court, the dealing would have been effected at the time it was effected if the inside information had been generally known. It is still unclear whether the court would assess the 'would be' price according to the market value immediately after the public announcement, or that at the peak of the fluctuation caused by the release of the information. The former presumes the outsider would still trade in that security if he had known the information, while the latter presumes the outsider would retrain from trading till then. Both presumptions are undoubtedly fictitious, but it is submitted that it is more reasonable to use the price immediately after the announcement as the basis of assessment, since the outsider should have a duty to mitigate his loss by either buying back or selling the shares once he possessed that information.

The right conferred on the corporation to claim the profit from an insider raises a policy question. The claiming of the profit by the corporation would not be of any comfort to the vendor-shareholder at whose expense that profit was made, especially if he had already sold all his shares. In contrast, the insider, as a shareholder, would be entitled to enjoy indirectly part of the profit. In theory, this does not matter as the ex-shareholder can still bring a separate action against the insider since this section seems to allow multiple liability. However, in practice, it might not be that ideal. As this section deals with insider trading that does not involve fraud or misrepresentation, there is simply no sound basis for recovery.[49] Indeed, as the main purpose of this section is to deter insider trading, it might be more expedient to do away with civil remedies altogether and to concentrate only on criminal penalties.

This does not, however, suggest that the present penalties are sufficient to deter insider trading. A fine of $50,000 may be considered as a heavy penalty in other circumstances, but in view of the pecuniary advantage an insider can potentially gain from abusing confidential information, its disincentive effect is only minimal. To be effective, especially if it were to replace civil remedies completely, the court should be given a discretion to increase the fine by including the amount of advantage which in its opinion an insider had gained from insider trading. In contrast, imprisonment up to two years is a powerful deterrent. Persons who are in a position to effect insider trading are likely to be businessmen with precious reputation. Unlike a city thug, imprisonment means a great deal to them. Disgrace and loss of social status which inevitably accompany imprisonment would certainly make them think twice before engaging in insider trading.

On the whole, this section is excellently drafted, but it is not without defects. In providing exceptions, it overlooks the probability of having a prior scheme of investment.[50] Even more incredibly, in defining an insider, it has failed to expressly include take-over bidders. Although it might be argued that he could come under the catergory of ten percent shareholder, it is doubtful whether he could actually be included as such. For this section to operate, apart from being a ten percent shareholder, he must have obtained the material information as a result of this association with the company. A bidder's price-sensitive information is his intention to bid, and not information he had obtained from the corporation as a ten percent

49 *Supra.*

50 *Supra.*

shareholder. In any event, the privies to the preliminary discussion or to the intention to make an offer are completely free to trade with confidential information of the bid. However, this defect is actually more apparent than real. As take-over bids are usually made by companies rather than individuals, insiders of the offeror company are covered by this section by virtue of sub-section 2 which prohibits trading with price sensitive confidential information in securities of another company which is related to their own company by any transaction, even if such transaction is only an executory or anticipated one.

The administration of this section is entrusted to the Securities Commission. The Commissioner has wide discretion to initiate investigations and to seize documents or articles relating to any suspected insider trading.[51] However, the Commission is a new creation and of unknown quality. Only time can show whether it will be an active probing public watchdog or just another plug in the bureaucratic machine. The only thing certain about it is that its work would not be easy, and is definitely not helped by the lack of disclosure requirements on the part of directors and major shareholders to report periodically about changes in their security holdings. It is regrettable that the proposal for imposing these requirements, though strongly supported by the minority, was rejected by the majority members of the Companies Law Revision Committee.[52]

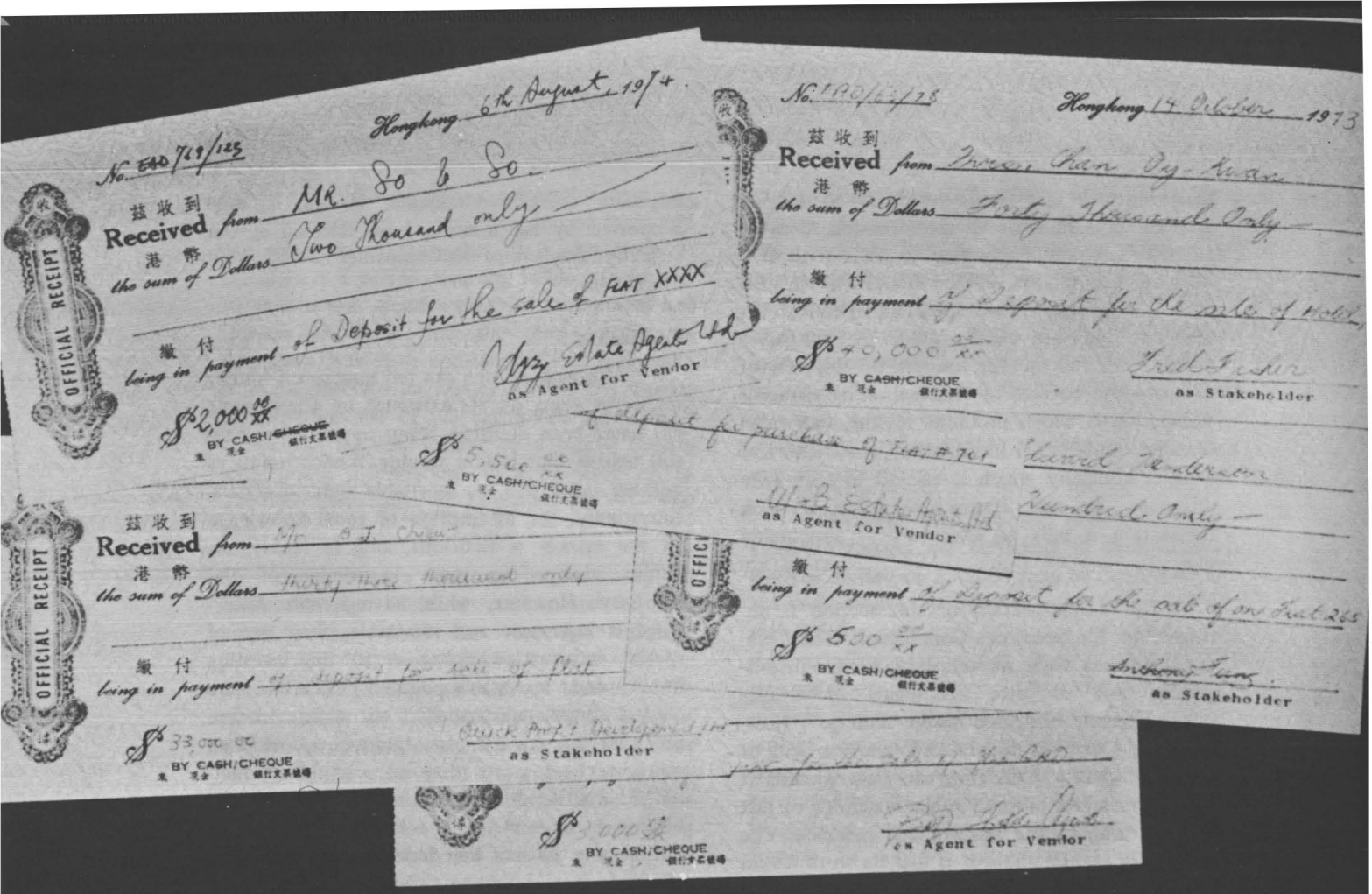
Conclusion

Although no one can tell how much insider trading is going on, its existence on a large scale has never been doubted. Many people apparently still believe that insider trading, though unfair, is nothing more than an inevitable state of affairs. Admittedly, the assumption of equal knowledge on the market is fictitious, and, in reality, an insider always has more knowledge of the company. However, while having more knowledge is legitimate and inevitable, their use of special information unknown to the investing public and reasonably certain to affect the market price substantially, to make risk-free profit at the expense of ordinary investors is an outright cheat rathor than an unavoidable fact-of-life. Although legislation to curb insider trading is undoubtedly necessary, there should not be any illusion that legislation by itself can eliminate insider trading altogether. It is rather a means to the end by creating the right climate of opinion. Insider trading would disappear only when insiders, though feeling that insider trading is emotionally natural, nonetheless restrain from such trading as they will instinctively realise that it is morally wrong.

---

51 s. 124, s. 125 Securities Ordinance.

52 *The Second Report of the Companies Law Revision Committee* , at 250-266.



PAYMENT OF DEPOSITS TO THIRD PARTIES

Michael W.T. Chan

A purchaser under a contract for the sale of land will rarely pay his deposit directly to the vendor, but instead to some third party, such as an estate agent, a solicitor or an auctioneer. Nevertheless, this makes no substantial alteration at all to the nature of the deposit, or the implied terms upon which the money is paid by the purchaser[1]. The question is one of ascertainment of the capacity in which the third party receives for this affects both the use which can be made of it before completion and the liability to bear the loss of it if the third party defaults with it. In short, is the deposit held by the third party as a stakeholder, a vendor's agent or a purchaser's agent?

1. Vendor's Solicitor

If the sale is by private treaty, the deposit is usually paid to the vendor's solicitor. In England, the conditions of sale are incorporated into the contract by reference to the *Law Society's General Conditions of Sale 1970*. By condition 5(1):

> "The purchaser shall immediately upon entering into the contract pay to the vendor's solicitors as stake-

1 *Hall* v. *Burnell* [1911] 2 Ch. 551, at p. 554, *per* Eve J.

holders a deposit of 10 per centum of the purchase money excluding any separate price to be paid for chattels, fixtures or fittings."[2]

In Hong Kong, individual firms of solicitors may have different practices,[3] but usually in the absence of express provision to the contrary,[4] a solicitor holds it as agent for the vendor.[5] In such a case, he cannot retain any interest on the deposit and has to hand over it together with the interest to the vendor at the latter's request.[6] He cannot be sued for its return by the purchaser since his duty is to pay it to no one else but the vendor [7] and this is so even if the vendor is quite unable to make title.[8]

Sometimes it is the intention of both parties that the vendor's solicitor is to hold the deposit as a stakeholder for both parties[9] so that he cannot part with it without the consent of both[10] and in the event of premature payment to a party not entitled, he is liable to the party ultimately entitled to receive it.[11] Any interest earned on the deposit whilst in the hands of the stakeholder solicitor belongs to him.[12] In practice, on completion of the contract[13] the purchaser will provide a letter authorising release of the deposit to the vendor.[14] On the default of the stakeholder solicitor, the purchaser cannot sue the vendor because he has never received it, or become entitled to receive it.[15]

When a vendor sells in a fiduciary capacity, for example, as personal representative or trustee, it is usual for the contract to provide for the deposit to be paid to the vendor's solicitor as agent for the vendor or trustee. Thus, any money payable under the contract is trust money and should be under the control of the trustee.[16]

Where the agreement is made "subject to a proper contract to be prepared by the vendor's solicitors" and a deposit is paid, such deposit is held to be recoverable although the purchaser declined to sign a formal contract which his solicitor has approved.[17]

2. Auctioneer

On a sale at auction, it is customary to pay a deposit to the auctioneer who, in the absence of special agreement, normally receives it as a stakeholder for the vendor and the purchaser.[18] His duty is to hold it until either under the express conditions of the contract or under the general law the deposit either becomes payable to the vendor or returnable to the purchaser.[19] Until such time, he must not pay it over to the vendor without the purchaser's consent. If he does so and that party defaults, he must account to the party eventually entitled to it.[20]

However, he is an agent for the vendor in so far as it concerns the loss of deposit sustained by the auctioneer's insolvency or misconduct.[21]

3. Estate Agent

In the case of a sale of land, an estate agent is authorised to find a purchaser and it is customary for him to demand and accept a deposit from a prospective purchaser in anticipation of a contract coming into existence.

---

2 *The National General Conditions of Sale of Land 1969* have no similar clause. They merely have a space on the backsheet (memorandum of agreement) for the capacity in which the deposit is held to be inserted. Thus, it is a matter of agreement.

3 The usual common practice in Hong Kong is that the solicitors hold the deposits expressly as agents for the vendors.

4 *Wiggins* v. *Lord* (1841) 4 Beav. 30.

5 *Edgell* v. *Day* (1865) L.R. 1 C.P. 80, at p. 85; *Ellis* v. *Goulton* [1893] 1 Q.B. 350.

6 *Mayson v. Clouet* [1924] A.C. 980.

7 *Edgell* v. *Day, supra*, – if the solicitor professes to receive it as an agent for the vendor, he is bound to pay it over to the vendor on demand.

8 *Ellis* v. *Goulton, supra*, at pp. 353–4, *per* Bowen L.J., "I am of opinion that payment of the money to the solicitor was equivalent to payment to his principal, and that the money cannot be recovered from the solicitor, whether he has paid it over to his principal or not".

9 *cf.* condition 5(1) of *Law Society's Conditions of Sale 1970*.

10 *Yates* v. *Farebrother* (1819) 4 Madd. 239; *Smith* v. *Jackson* (1816) 1 Madd. 618; *cf. Collins* v. *Stimson* (1883) 11 Q.B.D. 142, at p. 144.

11 *Burrough* v. *Skinner* (1770) 5 Burr. 2639; *Furtado* v. *Lumley* (1890) 54 J.P. 407; *Edwards* v. *Hodding* (1814) 5 Taunt. 815.

12 *Smith* v. *Hamilton* [1951] Ch. 174, at p. 184, *per* Harman J.

13 There is already a binding agreement.

14 The Council of the Law Society has expressed the view that an authority for the release of a deposit in the hands of a stakeholder on completion should be made out on the headed notepaper of the purchaser's solicitors – *Law Society's Gazette*, Sept., 1947, p. 177.

15 Stonham, "*The Law of Vendor and Purchaser*", at p. 343, para. 587; *Grant* v. *O'leary* (1955) 93 C.LR. 587, at p. 593; *cf.* Farrand, "*Contract and Conveyance*", at p. 245.

16 Farrand, "*Contract and Conveyance*", at p. 246 cited Gibson's *Conveyancing*; see the *"Law Times"*, vol. 224, at p. 36 where the respective views were discussed and the conclusion reached is that the trustee's liability, if he allowed payment to a stakeholder, would depend on the facts of the case.

17 *Chillin worth* v. *Esche* [1924] 1 Ch. 97.

18 *Harrington* v. *Hoggart* (1830) 1 B. & Ad. 577.

19 *Gray* v. *Gutteridge* (1828) 1 Man & Ry. K.B. 614.

20 *Burrough* v. *Skinner, supra, Furtado* v. *Lumley, supra.*

21 *Annesley* v. *Muggridge* (1816) 1 Madd. 593; *Smith* v. *Jackson and Lloyd, supre; Rowe* v. *May, supra.*

A. *Why is such a Payment made?*

Since such a deposit is paid "subject to contract", either party may refuse to enter into one without any fear of subsequent legal proceedings with the notable consequence that purchaser may withdraw together with a demand as to the return of the deposit.[22] So it does not serve the same function as that paid under an uncompleted contract. Lord Denning M.R., in *Burt* v. *Claude Cousins and Co. Ltd.*[23] remarked:

> "We all know that, once a deposit is received by an estate agent, he regards the property as virtually 'sold'. He takes it off the market and does not try to get another purchaser".[24]

However, neither the vendor nor the estate agent is under any obligation to take property off the market; indeed, if someone makes a better offer, the estate agent should notify the vendor.[25]

B. *Practice of an Estate Agent in relation to his receiving a Deposit*[26]

The purpose of such a payment is to confirm the buying intention of the prospective purchaser. From the latter's point of view, he hopes either the vendor or the estate agent will take the property off the market. Generally the estate agent will close the offer at this stage though he is not legally bound to do so. Even if another person proposes a better price, the agreement with the first prospective purchaser will still be carried through if a deposit is paid.[27]

The vendor will be informed that a deposit has been received and credited into the estate agent's account. Sometimes the vendor may ask him to make over the deposit, but the estate agent will not, in any way, comply with his request. It will remain with him[28] until the vendor's solicitor writes to tell him that its transfer to the vendor's solicitor should be effected.[29]

On the question of capacity in holding a deposit, an estate agent usually communicates to the prospective purchaser by a statement on the receipt issued by the agent for the deposit that he is holding it as agent for the vendor. In so far as the loss of deposit occasioned by his default is concerned, the vendor is liable.

C. *Who bears the risk of the Estate Agent defaulting?*

In *Burt* v. *Claude Cousins and Co. Ltd.*, the owner of an hotel employed estate agents, Cousins & Co. Ltd., to sell it for him. The agents found Burt, who gave them a deposit on the purchase, but no binding contract for the sale was made and the agents went into liquidation. Burt successfully claimed the return of his deposit from the vendor, who had not received it from the agents. No capacity had been stated in which the agent received the money. The majority of the Court of Appeal, in coming to this decision, held that *Ryan* v. *Pilkington*[30] is "fairly and squarely an authority that the estate agent is at all material times during the pre-contract period an agent for the vendor". Nevertheless, in *Ryan's case*, the salient and distinguishing feature is that it was stated on the receipt that the estate agent held it as agent for the vendor.

Lord Denning M.R. took the opposite view in *Burt's case:*

---

22 See *Goding* v. *Frazer* [1966] 3 All E.R. 234, at p. 239, *per* Sachs J.

23 [1971] 2 All E.R. 611.

24 *Ibid.*, at p. 618.

25 *Keppel* v. *Wheeler and Atkins* [1927] 1 K.B. 577.

26 Information obtained from *Hutchison Estate Agents Ltd.*; information from *HONGKONG LAND Co., Ltd.* reveals that their estate agents do not ask for a deposit, but only find a prospective purchaser, for the vendor.

27 Before accepting a deposit, an estate agent usually asks the vendor if the offer is still open. This is to take into consideration the possibility that the vendor may have employed a few other agents.

28 If the purchaser asks for its return, the estate agent must return it to him.

29 This is only in accordance with normal practice. It is not dealt with as a term in the formal written contract. Usually, the agent will seek ratification from the vendor before he complies with the solicitor's request.

30 [1959] 1 All E.R. 689.

> "When nothing is expressly agreed as to the capacity in which the estate agent takes the deposit, he takes it as stakeholder. He does not take it as vendor's agent".[31]

This is practically based on the inference drawn from the evidence respecting the practice of the estate agent profession – if he receives it as agent for the vendor, he will be bound to pay it over to the vendor who will alone be answerable for its return, but the practice precludes it from being handed over to the vendor; therefore, he is nothing but a 'stakeholder' because this conclusion is consistent with the common practice of the profession.

On the other hand, the majority (Sachs and Megaw L.J.J.) found it difficult to appreciate the force of Lord Denning M.R.'s alleged consistency. If payment by the depositor to the estate agent is payment to the vendor, why should it not be payment subject to the obligation that in the pre-contract period he is liable to repay it to the depositor on demand, and therefore not entitled to have it paid over to the vendor unless and until the depositor consents or the contractual position changes in vendor's favour.[32] Moreover, Megaw L.J. agreed with Russell L.J.'s dictum in *Maloney* v. *Hardy and Moorshead:*[33]

> "The phrase 'as stakeholder' when all is still in the field of negotiation is not very apt."

It merely, as contended by Megaw L.J., describes the special position of the estate agent – he may not hand over the deposit even to his principal, the prospective vendor, unless and until the prospective purchaser consents, by the terms of the contract of sale or otherwise.

D. *Rationale behind the Majority Judgment in Burt* v. *Claude Cousins and Co. Ltd.*

There are two justifications for the majority judgment in *Burt's case*:

(1) The vendor holds the estate agent out to be a person connected with the sale; consequently, everything he does is something he could not have done but for his selection and appointment.[34]

Megaw L.J., in delivering his judgment, thought that his ruling is in conformity with justice because:

> "It is the prospective vendor who has chosen the estate agent, who has clothed him with the capacity of agent, and who has enabled him to ask for and receives a deposit in connection with the business to which the agency relates.[35]

If the estate agent is honest and keeps the deposit money in some separate account, all is well. But if he is dishonest, he may demand a deposit from more than one purchaser, use it as a deposit to pay expenses of his failing business, or misappropriate it.

But this argument was dismissed as "too simplistic" by Edmund Davies L.J. in *Barrington* v. *Lee.*[36]

(2) The taking of a deposit is reasonably and ordinarily incidental to the vendor's express instructions of promoting a contract with a prospective purchaser.[37]

Mr. J. Murdoch[38] contended

---

31 *Supra*, at p. 616.

32 *Ibid.*, at p. 627 Megaw L.J. cited a passage from Bowstead on *Agency*, 13th ed., at p. 375; *Barrington* v. *Lee* [1971] 3 All E.R. 1231, at p. 1246.

33 at p. 631.

34 at p. 623, *per* Sachs L.J.

35 at p. 624.

36 [1971] 3 All E.R. 1231.

> that there is no justification to hold that the instruction of an estate agent to introduce prospective purchasers carries with it, by necessary implication, the authority to accept deposit on behalf of the vendor since "he receives no legal benefit from this money and his practical benefits are of no greater value than those obtained by the purchaser".[39] Therefore, such implication seems unjustified when the vendor himself does not even see fit to ask his agent to collect a deposit.

Despite this, the majority in the Court of Appeal in *Burt's case* placed emphasis on some legal justification instead. There were dicta to the effect that the fact that the taking of a pre-contract deposit on behalf of the vendor accords with the established practice of the profession means that vis-a-vis the vendor there is an implied authority[40] to take deposit. Alternatively, the same fact also gives rise to ostensible authority vis-a-vis the prospective purchaser, for by employing an agent of that type the vendor holds him out as having such authority as is within the normal scope of that employment. The authority relied on is *Ryan* v. *Pilkington* where the judges described the estate agent's authority as both "implied" and "ostensible".

This approach was vigorously criticised by Lord Denning M.R. in his dissenting judgment who alleged that the estate agent in *Ryan's case* should have no authority given. In the absence of the latter, he can only sign it "as stakeholder" because the practice of the profession shows that an estate agent is a stakeholder in connection with receiving deposit. He does not have implied authority to bind the vendor to repay by signing on the receipt "as agent for the vendor" because he can only do what the practice allows him – to sign "as stakeholder" or if nothing is said, that is the case as that is in harmony with the practice.

Unfortunately, Lord Denning M.R.'s argument has been attacked as fallacious.[41] The fallacy is what one may call 'label fallacy': the estate agent is described as a stakeholder for a particular purpose, namely, for not paying over the deposit to the vendor unless with the purchaser's consent; therefore all the consequences of his being a stakeholder apply. This way of pinpointing the capaicty of the agent is very unjustified.

The disparity in reasoning in the Court of Appeal stems from the fact that Lord Denning M.R. started from a premise different from that of Sachs and Megaw L.JJ. –

> "One side concluded that evidence regarding the practice of an estate agent accorded with that of a stakeholder while the other accepted that the same evidence was in line with that of an agent for vendor".

It is thus not surprising to find that the consistency alleged by Lord Denning M.R. does not virtually exist if one is convinced that the practice discloses that an estate agent should be an agent for the vendor with the said obligation.

Having persistently rejected the previous proposition as reasoned by Sachs and Megaw L.JJ., Lord Denning M.R. proceeded to consider ostensible authority since it generally co-exists and coincides with implied authority and sought to distinguish *Ryan's case* from *Burt's case:*

> That the decision in *Ryan's case* "only applies when the estate agent signs 'as agent for the vendor'. It has no application when the estate agent gives a receipt for the deposit on his own account and does not support or profess in any way to give it 'on behalf of the vendor".[42]

A similar case, *Barrington* v. *Lee*, later came before the Court of Appeal where Lord Denning M.R. was again outvoted, but this time he seemed to have given way to *Ryan* v. *Pilkington*:

> "The correct view of *Ryan* v. *Pilkington* is that Pilkington had implied authority to receive the deposit as agent for the vendor. And in *Burt's case*, Megaw

---

37 *Burt* v. *Claude Cousins and Co. Ltd., supra*, at p. 631.

38 *"The Lost Deosit"* (1972) 35 Conv. (N.S.) 1.

39 *Ibid.*

40 *Freeman and Lockeyer* v. *Blackhurst Park Properties (Mangal) Ltd.* [1964] 1 All E.R. 630, at p. 644.

41 (1971) *Law Society's Gazette* 302.

42 *Burt* v. *Claude Cousins and Co. Ltd., Supra*, at p. 617.

> L.J. said that the authority of Pilkington would today be described as implied authority. That means that Pilkington had actual authority to receive the deposit as agent for the vendors, such authority not being expressed, but being inferred from the conduct of the parties in the special circumstances of that case".[43]

Is this tantamount to a tacit acknowledgement of the common practice as Sachs and Megaw L.JJ. saw it in *Burt's case*? Has he rejected his own contention in *Burt's case* – that an estate agent holds the deposit "as stakeholder"? The learned Master of the Rolls never expressly denied his former interpretation, but just remarked that the decision in *Ryan's case* is due to its own special circumstances as set out by Willmer L.J. in *Ryan's case.*

E. *Present State of the Law Concerning the Estate Agent's Capacity*

The decision in *Barrington* v. *Lee* does not remedy the unsatisfactory state of the law in this field. The majority favoured *Burt's* line of reasoning, but all three judges distinguished it on the ground that the purchaser had obtained a judgment, though an unsatisfied one, against the estate agent and therefore the vendor was absolved. This is not the first time that this way out of an unsatisfactory result has been resorted to. If the principal is really the person liable, why should he escape because proceedings that subsequently turn out to have been ill-advised were brought against his agent?

It remains to mention that a recent case, *Potters* v. *Loppert* [44] may be of some avail in supplementing what has been left out in *Barrington's case*. The capacity of the estate agent is not directly at issue in this case, but whether the estate agent should account for the interest earned on the deposit to the prospective purchaser when returning the deposit to him. In answer to this, Pennycuick V.C. held that as he expressly held the deposit as stakeholder, he could retain the interest. Deposit held by a stakeholder estate agent is money held contractually or quasi-contractually and not by him as a trustee for either the vendor or the purchaser. The importance of this decision lies in the court's consent, whether implied or express, that an estate agent can hold deposit expressly as a stakeholder.

We may thus note in passing that if nothing is said as to the agent's capacity until contract, he will hold the deposit as agent for the vendor, who will be liable to repay it if the agent does not return it should the proposed sale fall through.[45] Where the agent holds it expressly as agent for the vendor, the purchaser will depend on the vendor for its repayment if the agent absconds.[46] On the other hand, if there is an express provision to the effect that the agent holds it as stakeholder, the vendor will then not be liable for the default of the agent.[47] But if this is accepted, it seems that we shall relapse into the fallacy of Lord Denning M.R.'s view in *Burt* v. *Claude Cousins and Co. Ltd.* and *Barrington* v. *Lee* – 'the label fallacy'.

Conclusion

In Hong Kong, the vendor's solicitors usually inform the purchasers that they are holding the deposits as agents for the vendor, but, in England, there is a growing practice that the capacity of a solicitor in such a situation is a stakeholder which is largely due to an attempt by the Law Society in England in standardising the terms of the contract or the conditions of sale by putting forward a well-known set of conditions, *The Law Society's Conditions of Sale 1970.*[48] Though individual solicitors' firms may have their own conditions and so may individual vendors and purchasers, the ultimate set of conditions of sale on the contract is just a modification of *the Law Society's* or *the National Conditions of Sale.*

From the purchaser's point of view, he may prefer the capacity of a solicitor to be an "agent for the vendor" because there is a higher probability that the third party may default. Yet the risk of supervening bankruptcy of the vendor is by no means remoter than that of the solicitor or, indeed, any other professional third party.[49]

---

43 *Barrington* v. *Lee, Supra,* at p. 1237.

44 [1973] 1 All E.R. 658.

45 *Burt* v. *Claude Cousins and Co. Ltd., supra.*

46 *Ryan* v. *Pilkington, supra.*

47 *Potters* v. *Loppert, supra*, does not deal with the question of who is to bear the loss in such a situation. It only recognises one situation – that an estate agent can hold a deposit expressly as a stakeholder and does not have to account for any interest so accruing.

48 Condition (5); *National Conditons of Sale 1969* provide a few alternatives on this matter which is up to the discretion of the parties involved.

49 J.E. Adams, "*Purchaser's Deposit for Use by Vendor.*" (1970) 120 N.L.J. 1128.

The fact that the defaults of the solicitors are now covered by a Compensation Fund administered by the Law Society ascribes to the view that they are acting as stakeholders in this respect. Since there is no such similar compensation fund initiated by the Law Society in Hong Kong, the practice which is flourishing in England does not seem to recruit much support here.

There is a ton of authorities to the effect that a solicitor's capacity depends on what has been communicated to the purchaser. On the other hand, there have been vigorous attempts to standardise the conditions of sale in conveyancing as, for example, *the Law Society's Conditions of Sale 1970* and *the National Conditions of Sale 1969*. So it seems that the present situation entails some uniform view from the solicitors on this issue of deposit-holding capacity before any assessment by the public of the respective values of the various possible capacities can prove fruitful.

The practices of estate agents in receiving deposits are similar both in Hong Kong and England. At all times before the formal contract, he keeps the deposit in his possession notwithstanding vendor's assiduous attempts in securing its being paid over to him. He will only pay it over until the vendor's solicitor writes to ask for its transfer, but only after he has confirmed the situation by asking the vendor to ratify this. The present state of the law allows the existence of a doubtful status depending again on what has been communicated to the prospective purchaser. It is submitted that this is intolerable and gives rise to some fallacious conclusions. As proposed earlier, an estate agent should not, by simply labelling himself as a stakeholder, be able to exonerate the vendor from being liable to the prospective purchaser in the event of the agent defaulting. After all, he is chosen by the vendor to find a prospective purchaser who will not sustain any loss but for the act of the vendor.

As usual, Lord Denning M.R., has rightly envisaged some effective remedial measures:

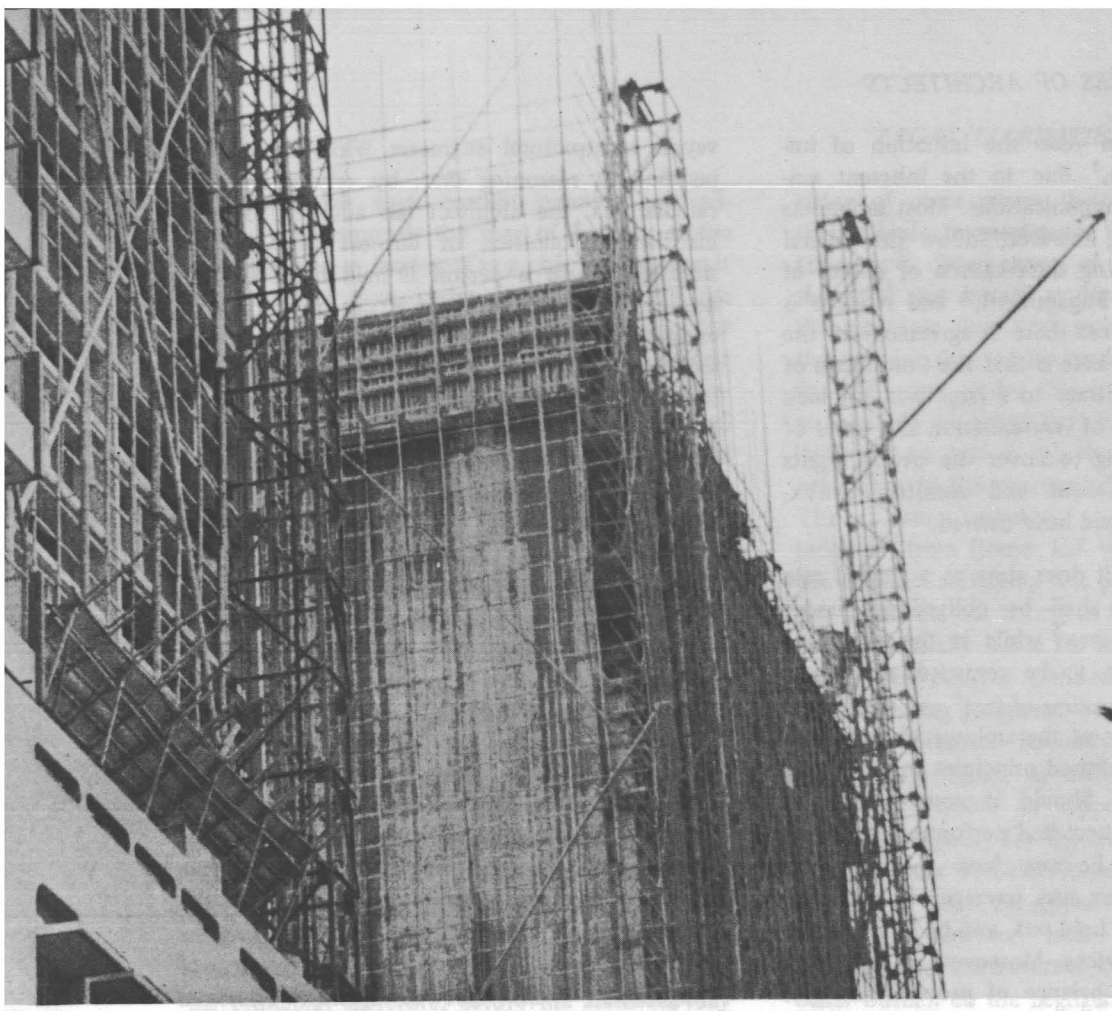
> "Whichever of us should turn out to be right, this case should serve as a warning to people who employ or pay deposits to estate agents. To them I would say: 'Never employ or pay an estate agent unless he is of good standing and repute.' I believe that all respectable estate agents do belong to one or other of the recognised societies; and that these societies have arranged for an indemnity bond which guarantees the public against the loss".[50]

One last thing that is worth mentioning is that an estate agents' association should be formed and should embark upon a project of formulating a standard form of memorandum of deposit making it clear what the agent is purporting to do. Once the position as intended by the agents is made more vivid, the question of the value of the practice can then be open to public scrutiny. [51] To consider the present state of law at length in the absence of such a basis is simply meaningless and superfluous.

---

50 *Burt* v. *Claude and Cousins Co., Ltd., supra*, at p. 618.

51 F.M.B. Reynolds, "*Estate Agents and Deposits again*" (1972) L.Q.R. 184, at p. 189.



LEGAL LIABILITIES OF ARCHITECTS

Maria K.N. Yuen

As with most professional people who possess specific qualifications, and who receive considerable remuneration for their work, an architect inevitably faces, during his practice, various responsibilities special to his calling. The circumstances, acts or omissions to act for which he may be taken to task are numerous and of ranging significance, so much so that "an attempt to divide the trivial from the important" as admitted by Megarry J.[1] "would be of insuperable difficulty". Besides this basic uncertainty, it is a great source of insecurity to the architect (though perhaps regarded as important for the protection of the housed public) that any occasional failure to discharge some of his duties or to discharge them in the required manner, might make him liable in law. His liability may be contractual, tortious or even criminal, arising both under the Common Law and by statute. Apart from these, he may be subjected also to quasi-legal sanctions in the form of disciplinary proceedings instituted under the Buildings Ordinance and by the Disciplinary Committee of the Hong Kong Institute of Architects. It is not the purpose of this dissertation to discuss at length whether all of these liabilities are justified, but to present succintly according to distinct branches of the law, the more serious liabilities with which an architect may find himself confronted throughout his career.

Contractual Liabilities

Up to the present time, Hong Kong architects have not followed in the footsteps of their British counterparts in consolidating in a written contract, their relationships *vis-a-vis* their clients. The tradition of the unwritten contract of personal service[2] is still sacrosanct, even

---

1 In *London Borough of Hounslow* v. *Twickenham Garden Developments Ltd.* [1970] 3 All E.R. 326 at p. 348b.

2 Although there are no cases in this area, it is submitted that the architect's contract for personal service cannot be vicariously performed, even though some parts of it may be delegated to draughtsmen or associates, but for which the architect will be solely responsible.

though this system risks the initiation of unnecessary litigation,[3] due to the inherent ambiguity of oral communications. Most architects in Hong Kong do, however, follow the general practice of presenting their clients of copies of the Conditions of Engagement,[4] and reliance is placed upon it unless there is agreement to the contrary. The flaw here is that the Conditions of Engagement concentrate to a large part on such matters as the scale of remuneration and times of payments, neglecting to cover the overall rights and liabilities of client and architect as extensively as one would have desired.

Nevertheless, it does state as a general rule that the architect shall be obliged to render ordinary skill and care [5] while in the service of his client. What is to be regarded as such is understandably a question of fact[6] and courts will adjudge the liability of the architect in each case in the light of established principles and practices within the trade.[7] Should it consequently be found that the architect had performed his duties without due care, he may have to forfeit his remuneration, as this was payment in exchange for services of skill held out, and he had actually rendered inept services. Moreover, if the client can prove, on the balance of probabilities that his architect's want of skill had occasioned loss on his part, e.g. cost of repair work or loss of profit, the client may also claim from the architect appropriate damages for such loss.[8]

While the average architect in Hong Kong should be aware of his obligation to render care and skill, he may not realise that under the local Conditions of Engagement, it may be possible for the client to sue him not only for poor work done by himself, but also for defective work of independent contractors, such as quantity surveyors or structural engineers. While this may be justified in reasoning that, by relying on their calculations, the architect has adopted them as his own, a question of fairness arises in this situation where a person is held liable for the negligence of another who is not answerable or employed by him[9] and whose technical knowledge and skills are beyond his vocational training. In the British Conditions of Engagement, it is expressly stated[10] that the architect shall not be responsible for such work; there is, however, no such clause in the Hong Kong version.[11] In contrast, to impose vicarious liability on the architect for the negligence of the Clerk of Works is more understandable for, though the Clerk is appointed and paid by the owner, he is responsible to the architect who may dismiss him for incompetence in assisting in supervision, a phase of building operations which the architect ought to know and know well.

Apart from these general liabilities of skill and care, the architect also usually becomes his client's agent [12] once the building plans have been approved and work is due to begin on the construction of the building.[13] In so doing, he risks incurring liability under another set of obligations – the laws of agency. Thus, an architect has been held to be personally liable to a supplier of building materials as, at the time he placed the order, he did not name his client as principal.[14] Another more important and certainly more abused aspect of agency is the rule that no agent may retain secret profits made as the result of his employment.[15] The architect will be liable, therefore, if he succumbs to secret commissions or kickbacks from contractors tendering for a job [16] or from suppliers of building materials.

3 Especially with regard to copyright infringement. *Blair* v. *Alan S. Tomkins & Frank Osborne* (1971) 1 All E.R. 468 and *Stovin-Bradford* v. *Volpoint Properties Ltd.* (1971) 3 A.E.R. 570.

4 The Hong Kong version resembles, *mutatis mutandis*, the Royal Institute of British Architects' (R.I.B.A.) version except for one important difference which is discussed *infra*.

5 *Rich* v. *Pierpont* (1862) 3 F. & F. 35.

6 *Chapman* v. *Walton* 2 L.J.C.P. 910.

7 *Slater* v. *Baker* (1767) 2 Wils. 359. In the United States of America, there have been disputes as to whether the local standard or federal standard should be referred to. For reasons of public policy, most courts are in favour of the national standard, which is higher than state standards.

8 *Leicester Board of Guardians* v. *Trollope* 75 J.P. 197.

9 These independent contractors are employed by the client.

10 R.I.B.A. Conditions of Engagement Part I 1-12.

11 This has caused concern in both Mr. Jon Prescott and Prof. W.G. Gregory of the Faculty of Engineering and Architecture, University of Hong Kong.

12 Halsbury Vol. 3 p. 526 *Gibson* v. *Pease* [1905] 1 K.B. 810.

13 This is the recognized practice in Hong Kong. In *Kimberly* v. *Dick* (1871) 13 L.R. Eq.1, however, the architect was regarded as the client's agent even before the sketches were made.

14 *Beiqtheil and Young* v. *Stewart* (1900) 16 T.L.R. 177.

15 *Rogers* v. *James* (1891) 56 J.P. 277.
Harrington v. *Victoria Graving Dock Co.* (1878) 3 Q.B.D. 549. This is also a criminal offence under s. 9 of the Prevention of Bribery Ordinance Cap. 201

16 Failure to disclose a material piece of information concerning a tenderer, e.g. an expected insolvency, would make the architect liable to the client.

Although such corrupt practices are admittedly widespread, the fear of liability at the receiving end at least acts as a check. However, if the proposal now under consideration by the H.K.I.A.[17] is accepted, it would legalise what amounts to a frontal attack on a basic principle of agency, i.e. that an agent must not place himself in such a position where his self-interest and fiduciary duty may conflict. Architects in favour of the proposal [18] that they be allowed to become directors of firms selling building materials, should appreciate that the essence of the rule is to prevent agents from coming by such a difficult situation. These architects' argument that they will be able to render independent judgment in such circumstances is therefore irrelevant. The law, by not taking into account the ability of the agent in separating his interest, intends to strike at the possibility of bias at its very root. Fortunately for the owners, even if the proposal is adopted, architects will still not be completely free from the rule. The proposal does not appear to have done away with the requirement that the agent must first make full disclosure to and obtain assent from his principal; therefore, before the architect may begin on a job, while retaining such an intimate interest in a business so closely related to his profession, he must obtain his client's assent – one that may not be forthcoming, especially in the light of high materials costs. This proposal has also been criticised as contravening the ethics of personal service – loyalty and independence.

Agency yet creates another problem of liability. Unlike the amendment proposal, however, this is "as old as the profession itself", and stems from the common practice of owners and contractors in naming the architect as their arbitrator.[19] Although architects are trained to act in two distinct capacities, as their clients' agents and as independent arbitrators, there have been a string of cases where they have been sued by their clients for negligence in the issuing of certificates.[20] The cases of *Chambers* v. *Goldthorpe*[21] and *Restell* v. *Nye*[22] have established the principle that "the architect in ascertaining the amount due to the contractor and certifying for the same under the contract, occupied the position of an arbitrator, and therefore was not liable to an action by the building owner for negligence in the exercise of these functions."[23] There was, however, a powerful dissenting judgment from Romer L.J. who argued that since the work of certifying was paid for by the client, the architect was acting as his agent and should be contractually liable for any negligence. In the subsequent case of *Wiesbech R.D.C.* v. *Ward*[24] this dissenting judgment was followed by a court of first instance. Recently, the problem was brought up again, in *Sutcliffe* v. *Thackrah*[25] where the Court of Appeal, despite showing obvious sympathy for the client, felt itself bound by *Chambers* v. *Goldthorpe*, which incidentally was also a Court of Appeal decision. The House of Lords, however, later allowed the client's appeal. This controversial decision puts yet another burden on the negligent architect, who previously would not be liable for over-certifying sums due to the contractor as long as he had not been dishonest in so doing.

It had been submitted above that the client is entitled to dismiss the architect when the latter had been found to have acted without due care and skill. It is of interest to note that both the client and the architect are free to terminate their contract unilaterally at any time without incurring liability. When questioned on this aspect of contractual liability, the Vice-President of the H.K.I.A. Mr. Andrew Lee remarked: "It's just like a marriage. If you can't stand it, why shouldn't you get a divorce?" While it may indeed be a vehicle of mutual convenience, many

17 A select group under the chairmanship of Mr. Christopher Haffna is now studying the proposal.

18 In a recently conducted referendum, 300 questionaires were sent to members of the H.K.I.A. 50 were returned 40 for the proposal and 10 against.

19 In this quasi-judicial capacity, it was formerly held that he would be liable to an action or would be replaced by the Court only if he had acted dishonestly. He would not be liable even if he had acted negligently.

20 It has been held that, for this purpose, there is no distinction between interim and final certificates.

21 (1901) 1 Q.B. 625.

22 *Ibid.*

23 *Supra, per* A.L. Smith M.R. at 636.

24 (1927) 2 K.B. 557.

25 (1973) 1 W.L.R. 888.

architects have complained of owners (especially property developers who are also contractors) exploiting this procedure by employing architects for the draughting of plans only, and then taking over the building operations, using the architects' plans under an implied license. [26]

Despite this notable exception, the liabilities of an architect to his client are numerous, and consequently, only the more important of these have been discussed. It remains to be examined whether the architect owes any duties, otherwise than in tort, to the contractor, with whom the architect must maintain a close and smooth relationship for the job to be successfully completed in the desired manner.

Under the standard form building contract [27] between the owner and the contractor, to which the architect is not privy, the contractor is obliged to comply with all instructions issued to him by the architect as agent of the owner. Should such instructions prove faulty, and the contractor suffers loss as a result, the architect will not be personally liable due to the rights of agency. [28] This exemption extends even to those cases where in fact the architect had acted beyond the scope of his actual authority. Owing to the representation of authority in the building contract, [29] and to the practice in the trade that the architect speaks for the owner, [30] the architect possesses sufficient apparent authority [31] so as to render himself not liable. The contractor may, of course, bring an action against the owner, who may in turn sue the architect for lack of reasonable care and skill, but the architect will not be answerable directly to the contractor for his costly mistakes, nor even for breach of warranty of authority.

Tortious Liabilities

The celebrated case of *Clay* v. *Crump* [32] is illustrative of the liability of which architects appear to be most conscious – the tort of negligence. Applying Lord Atkin's test in *Donoghue* v. *Stevenson*, [33] the Court of Appeal held that it must have been reasonably within the contemplation of the architect that such a person as the plaintiff, a construction worker would be affected by his decision to leave the wall standing. It is not explicit, however, whether this duty of care owed to the workman could be extended also to members of the public who could have been injured by the falling wall. Surprisingly, there appear to be no cases giving a reply to this very important question. Therefore, as is the practice when there are no precedents for the Court to rely upon, the decision would depend upon public policy and Lord Atkin's "Neighbour Doctrine". The answer to this problem, it is submitted, would vary according to the act in question. Certain negligent handling of work would hardly be regarded as acts requiring the architect to owe a duty of care to the general public. When the act is a decision on whether to leave a wall standing in a position where passersby might be injured by its collapse, the Court would probably hold that the architect owed them a duty of care.

Public policy, as it now stands, would almost certainly make the architect's case even less favourable. In view of the general outcry after the Chong Hing Scandal and the Mid-Levels landslides, the courts would be loathe to appear to condone carelessness in the draughting office. However, if the architect is held to owe a duty of care to every member of the public who suffers injury (within the limits of remoteness of damage) as a result of his negligent act, then he would be faced with a multiplicity of actions in situations like the Kotewall Road landslides, where an alleged negligent cutting of a retaining wall [34] had widescale and tragic repercussions. This kind of catastrophe is all too latent in Hong Kong, where houses are packed too densely together, and slopes have already been indiscriminately cut with too little regard to the powdery soil and the local climate. [35] Local insurance companies, in view of these dis-

26 *Blair* v. *Alan S. Tomkins and Frank Osborne* (1971) 1 All E.R. 468, cf. *Stovin-Bradford* v. *Volpoint Properties. Supra.*

27 Agreement and Schedule of Conditions for Building Contract for use in Hong Kong, issued under the sanction of the Hong Kong Institute of Architects, the Royal Institution of Chartered Surveyors (HK & China Branch) and the Society of Builders.

28 Halsbury Laws Vol. 1 p. 208.

29 *Freedman & Lockyer* v. *Buckhurst Park Ppties (Magnal) Ltd*. [1964] 2 Q.B. 480.

30 *Gibson* v. *Pease supra*, footnote 12.

31 *Summers* v. *Solomon* (1857) 7 E.&B. 879.

32 (1963) 3 All E.R. 687.

33 (1932) A.C. 562.

34 This was alleged in the Last Report of the Commission of Enquiry into the 1972 Landslide Disasters.

35 Discussed in s. 6 Land Policy and Building Development Last Report of the Commission of Enquiry into the 1972 Landslide Disasters.

advantageous factors, have refused to underwrite professional indemnity policies,[36] and only those architects with good standing, preferably with British connections, have been successful in taking out policies with British insurers. Other architects, apparently, have to simply risk this professional hazard. Aside from not practising altogether, they have no other choice.

Apart from the planning and supervision of the construction of buildings, many architects also take on the profitable work of doing valuations and feasibility studies. In such undertakings, they bring themselves within the scope of liability for negligent misstatement. An architect–client relationship, it is submitted, would be regarded as a special relationship within the *ratio* of *Hedley Byrne* v. *Heller.*[37] The architect will be liable (independent of contract) for even pure pecuniary loss if, for example, in a valuation for a mortgagee, he makes a negligent misstatement about the cubic capacity of the mortgaged property, (affecting the amount of the Mortgage) and that statement is relied upon by the mortgagee who subsequently incurs loss at the sale of the property.

Besides the more obvious liabilities of negligence and negligent misstatement, the architect may also become liable for several other torts – under the Occupiers Liability Ordinance,[38] the rule in *Rylands* v. *Fletcher,*[39] for nuisance or for breach of statutory duty. The former two of these torts involve the use of land by an "occupier". Although both an owner not in actual possession of the land[40] and a contractor temporarily in charge of a site[41] have been regarded as occupiers, it has not been decided whether the third member of the "triumvirate" of the job, the architect, will also be potentially liable in the capacity of an "occupier". As expounded in *Wheat* v. *Lacon,*[42] "the foundation of occupiers' liability is occupational control, i.e. control associated with and arising from presence in and use of or activity in the premises". It is submitted that the architect, though not always physically present, does possess a certain degree of control associated with and arising from the activity in the site. Work there will cease and resume on his instructions to the contractor, and he is also strictly responsible for supervision of the mixing of concrete and the placing of steel bars. On this assumption of control, the architect will be liable if he fails in the "duty to take such care as in all the circumstances of the case, is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted to be there."[43] Fortunately for the architect, the law recognises multiplicity of occupancy, so that being deemed an occupier would not make him immediately answerable to all claims under the Ordinance. He will be liable only to the extent to which it would be reasonable to expect him to exert control. If, for instance, a lawful visitor to the site trips over a workman's helmet and sustains injury, the architect would not be liable to him as it would not be reasonable for him to exercise control over such matters.

Should an explosion cause injury to a passer-by outside the perimeters of the site and such explosion was the result of the non-natural user of the land, the architect may become even strictly liable – under the rule in *Rylands* v. *Fletcher.* Although the architect may well argue that the rule was formulated in respect of activities of adjoining landowners, it has been extended to where the defendant has merely a franchise to use the land.[44] It would not be surprising, therefore if the Court were to hold an architect in control of the site by the authorization of the owner liable as, in *Read* v. *Lyons* Viscount Simon referred to "occupation and control" rather than "ownership" in his definition of "escape". In normal practice, of course, claims under these torts would be directed against the owner of the site, but these

36 cf. Third Party insurance for accidents on the site is available.

37 (1964) A.C. 465.

38 Cap. 314 vol. 16 Laws of Hong Kong.

39 (1866) L.R. 1 Ex. 265.

40 *Wheat* v. *Lacon* (1966) A.C. 552.

41 *Bunker* v. *Charles Brand* (1969) 2 Q.B. 480.

42 *Supra*, footnote 40, *per* Pearson L. J. at 589.

43 s. 3(1) Occupiers' Liability Ordinance.

44 *Northwestern Utilities Ltd.* v. *London Guarantee* (1936) A.C. 108

remain liabilities which the prudent architect ought not to overlook or forget.

Although accidents, explosions or such similar incidents may be purely fortuitous, construction works inevitably bring dust, noise, traffic delays and other irritations to surrounding areas. Should these annoyances prove so pervasive as to materially affect the reasonable comfort and convenience of a class of inhabitants in the neighbourhood, e.g. noise from piling works, the Attorney-General may institute a prosecution for public nuisance.[45] If it is only the next-door neighbour alone who bears the brunt of the fumes and noise, he may sue either the creator of the nuisance or the occupier of the site, and it is possible that the architect may be construed as either or both. Happily the Court has conceded that as long as the permissible limit is not exceeded, temporary inconveniences must be endured.[46] However, a defence on this ground will not stand in cases relating to obstruction of right of way, or right to light. Infringements of such servitudes are actionable *per se*, with the complainant's interests paramount, so much so that if a building could not be completed without the infringement, then it would have to stay incompleted. In these cases of permanent injunctions, the most immediate victim of this rigid rule would of course be the owner of the site, but the architect also indirectly sustains loss – a premature dismissal.[47]

It is as yet uncertain whether a victim of the architect's failure to comply with duties arising by virtue of statute, has the right to bring an action against him for breach of statutory duty. Under section 4(3) of the Buildings Ordinance, an architect is under a duty to comply generally with the provisions of the Ordinance. Should he fail to provide fire escapes, for instance, he would have breached his duty as section 41(1) of the Building (Planning) Regulations expressly provides for escapes. He will of course be answerable to the Building Authority, but will he be responsible, besides in negligence, to a third party who had suffered injury as a result of his breach of statutory duty? The answer, it appears, depends upon the intention of the statute. As expounded in *Phillips* v. *Britannia Hygienic Laundry Co.*,[48] the test is: "Was (the intention of the statute) to impose a duty which is a public duty only or to impose in addition a duty enforceable by an aggrieved individual?" On the construction of the Buildings Ordinance, viewing its objective and taking into account the opinions of experienced members of the architectural profession, it is submitted that the duties of the architect go beyond a public duty and embrace liability to members of those classes of persons affected, such as owners, occupiers and visitors.

Criminal Liabilities

The offering of kickbacks to architects is a way of life in Hong Kong. The acceptance of these "gratuities", as has been seen in the section on contract, will make the architect answerable to his client under the rules of agency. Statute, however, has also tried to curtail this practice by imposing criminal penalties on the agent who corruptly sells his better judgment. The architect who, as his client's agent, solicits or accepts any advantage, and as a result of it, shows or forbears to show favour or disfavour to any person in relation to his principal's affairs or business, will be guilty of an offence under section 9(1) of the Prevention of Bribery Ordinance. Moreover even without detriment suffered by the client, the architect, once he had the requisite *mens rea*, may alternatively be charged under a Common Law offence – conspiracy to defraud.[49]

Apart from these offences, which are applicable to all agents, the Buildings Ordinance also prescribes a list of offences[50] which may be committed only by a specific group of individuals involved in building operations. Some of these offences are purely procedural improprieties, such as commencing building works before obtaining the consent of the Building Authority, altering openings and projections, not giving notice of change of contractors, and contravening the conditions of permits issued under section 42.

More understandably, also included are such offences as knowingly misrepresenting a

45 s. 13(1) Summary Offences Ordinance cap. 228 Vol. 12 Laws of Hong Kong.

46 *Andreae* v. *Selfridge & Co.* [1938] Ch. 1.

47 If the exercise of skill and care could have prevented this situation from arising, he might also be liable to an action instituted by his client.

48 [1923] 2 K.B. 832 at p. 841, followed in *Coote* v. *Stone* [1971] 1 All E.R. 657.

49 *De Kromme* (1892) 17 Cox. cc 492

50 p.40 Part IV.

material fact in documents submitted to the Building Authority, and obstruction of inspectors representing the Authority. By far the most interesting offences on the list, however, are indubitably sections 40(2A), (2B) and (2C). These provisions were enacted shortly after the Kotewall Road landslides and the imposition of extraordinarily heavy penalties reflect the anxiety on the part of the Government to show some positive action in restraining the wild growth of the building industry, a "boom" during which most architects were kept so busy that abuses inevitably passed unnoticed and uncorrected.

Under section 40(2A), the architect who permits defective or improperly prepared or applied materials to be used or who deviates in any material way from the approved plan would be liable on conviction to a fine of fifty thousand dollars and to imprisonment for two years, a remarkable penalty when one takes into consideration that under the repealed sections 40(2)(5) and 40(2)(7), the maximum sentence for the same offences had only been a fine of two thousand dollars and six months imprisonment. Moreover, the architect will also be liable to the same harsh penalty if he fails to notify the Building Authority of any works which contravene regulations under the Ordinance, even though such works may have been carried out in accordance with plans that had been approved by the Building Authority.[51] While this act of insurance or doublecheck may still be understandable, it does indeed seem anomalous that while the architect is thus liable for merely keeping silent on a contravention that might not cause any injury, the Government is expressly exempt, by virtue of section 37(1), from any liability, even in cases of actual damage, when the injury has been caused by the fact that building works had been carried out in accordance with and as a result of the provisions in the Ordinance.

The newest additions to the list of offences are sections 40(2B) and 40(2C) which illustrate the zealousness of the Government to protect the public from risk of injury caused by building works. Under subsection (2B), the architect will be liable if he carries out, or authorizes, or permits to be carried out, building works executed in such a manner as, in the opinion of the Building Authority, will be likely to cause a risk of injury to any person or damage to any property. Moreover, the Building Authority may, by virtue of section 24A (1), not only order remedial work in such circumstances, but also specify the manner in which such work is to be done, and impose a time limit on it. Should the architect, without reasonable excuse, fail to comply with such an order, he will be liable to a fine of fifty thousand dollars and imprisonment for two years. A fine of ten thousand dollars may also be levied for each day during which the failure to comply with the order has been continued.

The problem that has arisen as a result of these new provisions is: who will be liable if incorrect remedial work, carried out according to the specified manner, causes damage? The Government, by virtue of section 37(1) appears to be again exempt from liability; the architect, it is submitted, should also be exempt if only under the defence of mandatory order. Nevertheless, this remains an open question which has vexed many architects and which will probably not be resolved until an actual case arises.

Happily for the architect, section 40(2)(9) provides that in any prosecution, it shall be a defence for the person charged to prove to the satisfaction of the Court that he did not know, nor could reasonably have discovered, the contravention in question. Nevertheless, the Hong Kong Institute of Architects is still unsatisfied with the state of affairs regarding criminal liabilities. They have complained that the phrase "the opinion of the Building Authority" appears omnipotent, and point specifically to the absence of the word "reasonable". Moreover, they view the new provisions as being an over-reaction by the Government to the 1972 landslides, and believe that many situations in which Government intervention is at present possible should properly have been left to a private professional body with more investigative powers and control.

Quasi-Legal Sanctions

Although disciplinary proceedings may not strictly be regarded as liabilities in law, nevertheless they do sometimes affect the architect's career as effectively as his legal obligations. Under section 7(2) of the Buildings Ordinance, the architect may be liable to be struck off the register of architects for any period of time (during which he will not be allowed to practise) or to be reprimanded if the disciplinary board appointed by virtue of section 5 of the same

51 s. 40 (2A) (C).

Ordinance finds him guilty of negligence of misconduct that, *inter alia*, may simply render the architect "deserving of censure."[52]

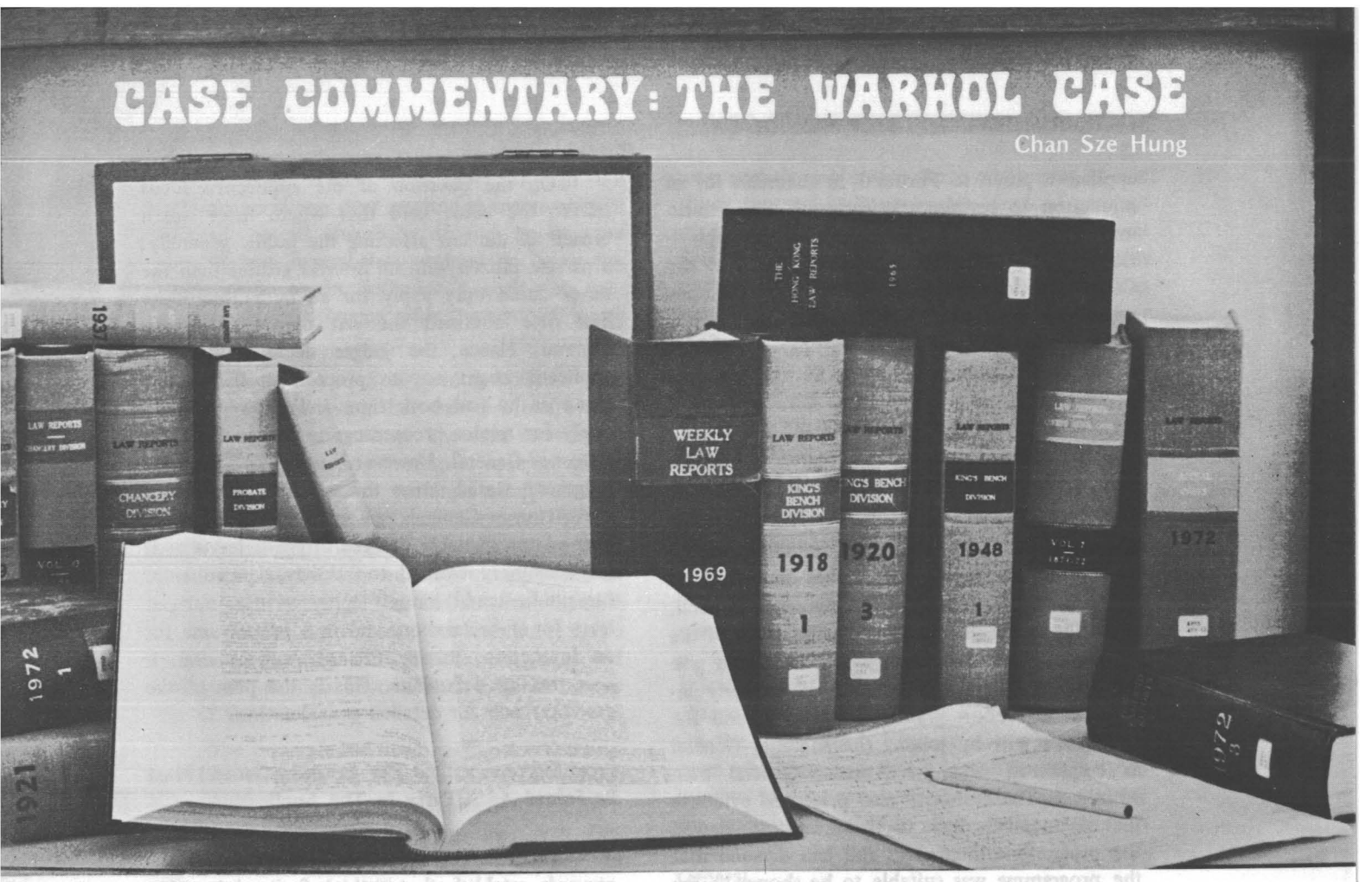
This same power of professional control is also assumed by the disciplinary committee of the Hong Kong Institute of Architects, a representative body, but not, in the strict sense of the word, a governing body of local architects. Unlike the Law Society, the Institute has no registration powers so that an architect may practise without being a member. Therefore, although it may theoretically be possible for an architect to be brought twice before two different disciplinary tribunals for the same act of misconduct, in practise, architects escape this procedure by simply resigning from the Institute when they are summoned by the disciplinary committee. As expected, the Institute is negotiating for full registration powers, which, if granted, would render the architect, in reality as well as in theory, liable under two separate disciplinary proceedings.[53]

Admittedly, with regard to liabilities, the lot of an architect is not an easy one. But in truth, his professional environment is so disorderly that a perpetual personal threat of liability may be the only immediate method by which any semblance of control can be brought at all to the local building industry. An ever-expanding population demanding modern housing and the lack of overall city planning have, in the past, led to hastily-constructed buildings springing up as a result of opportunistic investments by entrepreneurial developers. These buildings have been snapped up just as fast as they have been built by a new home-owning class ignorant of their rights and unmindful of safety standards. By the imposition of numerous liabilities on the architects, adding especially harsh criminal penalties, it is apparently hoped that reckless building will be curtailed. Though some architects have been tried for the new offences, Hong Kong will have to wait for the next of the building crazes that beset us every now and then before the genuine effectiveness of these liabilities could be positively ascertained.

52 s. 7(1) (c).

CASE COMMENTARY: THE WARHOL CASE

Chan Sze Hung



Introduction

A *TTORNEY-GENERAL ex rel. McWHIRTER* v. *INDEPENDENT BROADCASTING AUTHORITY*[1] deals with the controversial question whether an ordinary member of the public having no special interest can apply for an injunction or a declaration in respect of matter of public character without joining the Attorney-General. The Court of Appeal, while upholding the traditional view that the Attorney-General must be joined in cases where the private individual has only an interest in common with the other members of the public, stated *obiter* that, in the last resort, a private individual having no special interest may proceed alone. This dictum departs from the score of authorities in this area of the law and thus calls for detailed examination.

The Facts

The applicant, an ordinary member of the public, requested the Attorney-General to move *ex-officio* to stop a documentary programme about the American artist and film-maker, Andy Warhol, from being transmitted on the Independent Television network on the ground that its transmission would be a breach by the Independent Broadcasting Authority of its duty under section 3 (1) of the Television Act.[2] He based his request on three newspaper criticisms of a preview of the film which described incidents included in it, and also on the advertised preamble to the film which warned that "some people" might find aspects of it "offensive". After learning that the Attorney-General would not move himself, the applicant decided, in view of the shortness of time and his understanding as to the complexity of the requirements for instituting relator proceedings, to proceed on his own. He served a writ on the authority and

1 (1973) 2 W.L.R. 344.

2 Television Act 1964, s. 3: "(1) It shall be the duty of the authority to satisfy themselves that, so far as possible, the programmes broadcast by the authority comply with the following requirements, that is to say-(a) that nothing is included in the programmes which offends against the good taste or decency or is likely to encourage or incite to crime or to lead to disorder or is to be offensive to public feelings.

applied *ex parte* to Forbes J. in chambers for an injunction to restrain the authority from transmitting the film. The judge refused the application. The applicant immediately appealed to the Court of Appeal. The court, after reviewing the newspaper criticisms, held that there was prima facie evidence that the programme included matter which would contravene the requirements of section 3 (1) (a) of the Act, and by a majority, Cairns L. J. dissenting on the ground that the applicant had no *locus standi* in his own right, granted a temporary injunction.

Before the order of the court had been drawn up, the authority applied for the appeal to be restored to the list for further argument. At the resumed hearing, the Attorney-General, appearing as *amicus curiae* on the question of the applicant's *locus standi*, said that he would give his consent to relator proceedings properly instituted. The court granted leave to amend the applicant's writ by joining the Attorney-General as co-plaintiff and the Attorney-General then withdrew. The authority also presented evidence that its members had, in the meantime, viewed the programme themselves and had decided that the programme was suitable to be shown to the public.

The court, having reserved judgment, unanimously held that the injunction should be discharged as the members of the authority had, since the interim injunction, satisfied themselves that the programme did not contain anything offensive to the public by seeing the programme themselves. The court decided, on construction, that the Act in question conferred powers on the authority in "subjective terms" and it was therefore not open to the court to intervene unless the evidence indicated that the members of the authority had misdirected themselves or had acted unreasonably.[3] Hence, although all the members of the court made it clear that they would personally have reached a different conclusion, they still could not challenge the authority's decision as they were unable to conclude that the members of the authority had misdirected themselves by applying a wrong legal test or had arrived at a decision which no reasonable body of persons could have come to.

On the question of the applicant's *locus standi*, the court held that where there was a breach of the law affecting the public generally, a private citizen with no interest greater than the other could only apply for an injunction if he had first obtained the fiat of the Attorney-General. Hence, the judges decided that the applicant ought not to proceed in the matter alone as he had both time and opportunity to apply for relator proceedings in the name of the Attorney-General. However, Lord Denning, in his judgment, stated *obiter* that in the last resort, if the Attorney-General refused leave in a proper case or unreasonably delayed in giving leave, or if his machinery worked too slowly, a member of the public could himself apply to the court, at least for a declaration, and in a proper case for an injunction, joining the Attorney-General, if need be, as defendant. This is the part of the case that calls for detailed consideration.

Cases Suggesting That The Attorney-General Must Be Joined As A Party In The Application

The authorities from the Year Books onwards establish that actions for an injunction can only be brought by the Attorney-General where the matter is one of public import. A private litigant has no *locus standi* unless he first obtains the Attorney-General's fiat. He may only sue without joining the Attorney-General if he satisfies either of the two rules laid down in *Boyce* v. *Paddington B. C.*[4] : (a) if interference with the public right also constitutes an interference with the plaintiff's private right; (b) where no private right of the plaintiff is interfered with, but he, in respect of his public right, suffers special damage peculiar to himself in respect of the interference with a public right. In order to demonstrate how the rules operate, let us consider the cases of *Lyon* v. *Fishmonger*[5] and *Benjamin* v. *Storr*[6].

In *Lyon* v. *Fishmonger*, the defendant proposed to erect an embankment which, if completed, would have the effect of blocking the river and hence depriving the plaintiff of the use of it. The plaintiff thereupon applied for an injunction to restrain the defendant from carrying

3 (1973) 2 W. L. R. 346.
4 (1903) 1 Ch. 109.
5 (1876) 1 A. C. 662.
6 (1874) L. R. 9 C. P. 400.

on the work. It was held that although the blocking up of the river resulted in inconvenience suffered by all members of the public, the plaintiff was nevertheless entitled to bring the action alone as the defendant's work also constituted an interference with the plaintiff's private right.

In *Benjamin* v. *Storr*, the defendants were in the habit of leaving their vans just in front of the plaintiff's coffee shop. The vans intercepted the light to the plaintiff's shop to such an extent that he was obliged to burn gas nearly all day. Access to the shop was also obstructed by the horses standing in front of the door. It was held that the plaintiff was entitled to apply for an injunction without joining the Attorney-General to restrain the defendants from continuing to do so because the plaintiff had suffered a direct and substantial damage beyond that suffered by the rest of the public.

The principle laid down in *Boyce* v. *Paddington B.C.* also applies to cases where the private individual applies not for an injunction, but for a declaration. Take, for example, *Stockport District Waterworks* v. *Manchester Corporation.*[7] In that case, the plaintiffs were a company incorporated for the purpose of supplying the township of Stockport with water. Another company, the defendants' company, having parliamentary powers for supplying the same district with water, had already been in existence at the time of the incoporation of the plaintiffs' company. The power given to that other company was a power of deriving water from the River Mersey below a particular spot and using that water for the supply of the town of Stockport. The plaintiffs applied for a declaration to the effect that the power given to the other company was in fact the full limit and extent of the authority possessed by the company and that anything beyond that power was *ultra vires*. The court dismissed the plaintiff's application on the ground that the court would not entertain a suit at the instance of one rival company against another, alleging that the defendant's acts were in fact *ultra vires* and contrary to public interest but that the plaintiffs had sustained no private injury by the acts done. Again, in *L. P. T. B.* v. *Moscrop,*[8] Lord Maugham, in dismissing the respondent's application for a declaration to the effect that a condition in his terms of employment was unlawful, said: "What special interest has the plaintiff to enable him to bring this action? We are not here concerned with anything but the respondent's civil rights, if any, under the section. I think it is plain that there has been no interference with any private right of his, nor has he suffered any special damage peculiar to himself from the alleged breach of general prohibition".[9]

Cases Suggesting That The Attorney-General Need Not Be Joined As A Party In The Application

Hence, one of the judicial views is that where the duty is a public one, a member of the public acting on his own has no *locus standi* unless he can fit his case into one of the conditions laid down in *Boyce* v. *Paddington B. C.* On the other hand, however, there is a line of cases which suggests that a person having only an interest in common with the other members of the public is entitled to apply for an injunction or a declaration without joining the Attorney-General.

In *Dyson* v. *Attorney-General,*[10] the applicant, an ordinary member of the public applied for a declaration to the effect that a questionnaire sent out by the Commissioner of Inland Revenue was illegal. At the time of the case, the applicant could not sue the Commissioners of Inland Revenue themselves. So he sued the Attorney-General as representing them. The Attorney-General regarded his action as frivolous and vexatious. He sought to strike it out. It is plain that he would never have given leave to Mr. Dyson to bring the action. The Court of Appeal, however, refused to strike the action out and declared that the questionaire was illegal and that the applicant was under no obligation to comply with it.

Prescott v. *Birmingham Corporation*[11] is another case in point. In that case, the Birmingham Corporation proposed that a scheme should be put into operation to provide free travel on the corporation omnibuses for certain classes of old persons. In order to carry the scheme into effect, the corporation had to pay a

7 (1863) 7 L. T. 545.

8 (1942) 1 All E. R. 97.

9 *Ibid.*, at 104.

10 (1911) 1 K. B. 104.

11 (1955) Ch. 210.

very large sum of money out of the general rate fund to its transport undertaking to finance the scheme. This meant that the ordinary ratepayers would be required to pay an additional sum in rates each year. The applicant, one of the ratepayers, thereupon applied for a declaration to the effect that the scheme adopted by the defendant corporation was illegal and *ultra vires* and beyond the power of the defendant. It was held that the corporation had indeed exceeded its powers and a declaration was granted. The plaintiff's *locus standi* was not considered in the judgment of the court, nor was it raised by the counsel for the defendant. But did the plaintiff in fact have the requisite *locus standi* to entitle him to proceed alone? It is true that the applicant had to pay an additional sum of rate each year if the scheme had been implemented but so did all the ratepayers in Birmingham. The additional rates were therefore not peculiar to the plaintiff himself but were shared in common with the other ratepayers. The court, however, granted the declaration without considering the question whether the applicant had the requisite *locus standi.*

The Prescott case was followed in *Bradbury* v. *Enfield London B. C.*[12] where the court assumed the competence of ratepayers and a limited company representing organisation of objectors to challenge the validity of a scheme for comprehensive schools proposed by a local educational authority. Furthermore, in *Lee* v. *Enfield London B. C.,*[13] an injunction and a declaration were granted to a ratepayer who claimed that the local authority was acting *ultra vires.* The plaintiff's *locus standi* was questioned, but the court, after referring to the defendants' contention, proceeded to determine the substantive issue, thus impliedly acceding to the plaintiff's standing.

Which Of The Two Views Should Be The Correct Pronouncement Of The Law

There are hence two contrasting views on the interest required to invest an applicant for an injunction and a declaration with standing. Which of the two views, in the opinion of the three judges sitting in the present case, is the correct pronouncement of the law in this area?

Lord Denning, with Lawton L. J. concurring, stated that under certain circumstances, a private individual who has not suffered any special damage peculiar to himself can also apply for an injunction or a declaration without joining the Attorney-General. Lord Denning, after considering the decisions in *Dyson* v. *Attorney-General* and *Prescott* v. *Birmingham B. C.*, said: "In the light of all this, I am of the opinion that, in the last resort, if the Attorney-General refuses leave in a proper case, or improperly or unreasonably delays in giving leave, or his machinery works too slowly, then a member of the public who has a sufficient interest can himself apply to the court itself. He can apply for a declaration, and, in a proper case, for an injunction, joining the Attorney-General, if need be, as defendant."[14] A similar view was also expressed by Lawton L. J. In his judgment, the learned judge wrote: ". . . . . an injunction should be granted . . . . . the time has come to look at the procedural rules of law which hitherto seem to have restricted the right of the ordinary citizen to complain about their activities." Later, the same judge wrote: ". . . . . if at any time in the future (and in my time it is not the foreseeable future) there was reason to think that the Attorney-General was refusing improperly to exercise his powers, the courts might have to intervene to ensure that the law was obeyed." [15]

Cairns L. J., however, was of the opinion that the law laid down in *Boyce* v. *Paddington B. C.* must be strictly adhered to. In his judgment, the learned judge said: ". . . . . when Mr. McWhirter appeared before the court on January 16 to appeal against the refusal by Forbes J. to grant him an interlocutory injunction, I was of the opinion that he was not entitled to the relief he sought because his action was an action aimed at enforcing the public duty of the defendant and not at protecting the private right of the plaintiff. That being so, the proper plaintiff would be the Attorney-General suing on behalf of the public as a whole and not Mr. McWhirter or any other private individual." The learned judge then considered *Thorne* v. *B. B. C.*[16] and *Attorney-General* v. *Pontypridd Waterwork Co.*[17] and went on to state the reason underlying his judgment: "In adhering to the view that the Attorney-General must be a party to the action, and in holding that no application can be made before he is joined, I do not think that I am upholding a mere archaic piece of red tape. Everybody and every statutory authority is liable to be sued by any person who claims that his individual interest has been interfered with . . . . .

12 (1967) 1 W.L.R. 1311.

13 *The Times*, Sept. 14, 1967.

14 (1973) 2. W.L.R. 364.

15 *Ibid*, at 372.

16 (1967) 1 W.L.R. 1104.

17 (1908) 1 Ch. 388.

The requirement of consent is a useful safeguard against merely cranky proceedings and against a multiplicity of proceedings." [18] Cairns L. J. therefore favoured the view that a private individual is not entitled to apply for the remedies unless he has an interest over and above that of the public. Lord Denning and Lawton L. J., however, were of the opinion that under certain circumstances, a private individual may be entitled to proceed alone. But what are the respective merits of these two different views?

The Merits Of The Two Views

The rationale underlying the rule that the Attorney-General is generally the only competent person to bring the public action is that multiplicity of suits should be avoided. It is feared that if any member of the public were competent to sue in respect of a public delict, the floodgates of litigation would be opened, clogging both the judicial and administrative process. The Attorney-General's suit is therefore aimed at producing a check upon unnecessary and vexatious litigation. There is a further advantage in having the Attorney-General as a sieve of complaints; statutory bodies and local authorities can get on with the job parliament has given them to do without having to occupy themselves with fighting off "interfering busybodies".

The supporters of the contrary view, however, argue that the fear of the multiplicity of suits is more apparent than real. Public apathy, the expense and inconvenience of litigation are the inhibiting factors. Moreover, the decision of one court has a binding effect and little is served by seeking a further judicial pronouncement in the same area. Furthermore, the courts have a discretion to penalize such vexatious litigation with costs. It should be noted that the principle of avoidance of a multiplicity of action has its origin in actions for damages for a public nuisance involving obstruction to public highways. The principle is to protect the wrongdoer from a multiplicity of actions for damages for a single wrongful act. The rationale of the rule ceases to be valid where review proceedings and not damage actions are involved, since the relief awarded in review proceedings, such as declaration of invalidity, has equal effect on the applicant and all others seeking to bring the same challenge.

From the above, it follows that there is no good reason why we should still restrict the right to institute the public action to the Attorney-General or to persons who satisfy either of the two conditions laid down in *Boyce* v. *Paddington E. C.* Moreover, it should be noted that the office of the Attorney-General is political as well as legal. Hence, where the validity of the acts of the administration is in issue, there is likely to be a conflict between his political interest and his interest as the guardian of the rights of the public and he may hesistate before taking action. This may lead to a situation where the validity of an administrative action may be immunized from challenge should the Attorney-General refuse to intervene and members of the public are denied standing because their communal as opposed to their individual interest is involved. Take, for example, *David Marshall* v. *Ponnuduray Returning Office* [19] where a candidate unsuccessfully sought an order requiring the returning officer to cancel the polling date and to nominate another day on the ground that the order appointing polling day failed to give the minimum period of notice prescribed by statute. The action was dismissed on the ground that the applicant had no *locus standi* to vindicate public rights. Thus, in this kind of situations, unless the Attorney-General, who is the only competent authority, institutes proceedings, administrative illegality cannot be impugned.

In the light of the above, it is submitted, with great respect to Cairns L. J., that the principle laid down in *Boyce* v. *Paddington B. C.* to the effect that a private individual is not entitled to apply for an injunction without joining the Attorney-General unless his damage is over and above that of the general public or unless his private right has been interfered with is too narrow and ought to be extended. It is submitted that the interest of the public can only best be served by permitting any member of the public to apply for a declaration or an injunction instead of confining competence to bring such suits to the Attorney-General or persons who satisfy the stricter standards of *locus standi*. This will do away with the danger of the Attorney-General exercising his discretion wrongly or declining to intervene for no good reasons or on entirely wrong grounds. Indeed, in the United States, some states have permitted a party who has no personal interest at stake to institute

18 (1973) 2 W.L.R. 653-4.

19 (1963) M.L.J. Ixxxv.

proceedings in the interest of the public.[20] Moreover, in Italy and Germany, statutes have provided for the *actio popularis* in respect of certain delicts relating primarily to the administration of election laws. In France, the range of interests that provides standing is very wide. Even the interest of a consumer has been recognized as sufficient. Why should not England adopt a similar system?

Lord Denning, however, did not attempt to state that a person having a special interest is entitled to apply for the discretionary remedies in all cases. In fact, he was reluctant to depart radically from the principle established in *Boyce* v. *Paddington B. C.* and suggested that a private individual is only entitled to proceed alone in the last resort, or in cases where the Attorney-General exercises his discretion wrongly or where his machinery works too slowly. Moreover, it should be noted that Lord Denning's statement is purely *obiter* and has no binding effect. It would not be surprising if the court in a subsequent similar case refused to follow Lord Denning's *dictum* and reverted to the principle laid down in *Boyce* v. *Paddington B.C.* The effect of Lord Denning's *dictum* on the law concerning the *locus standi* of the declaration and injunction applicant remains to be seen.

Effect Of Lord Denning's Dictum

We still have to consider the effect of Lord Denning's *dictum* on the old contitutional principle that the Attorney-General has an absolute discretion in deciding in what cases it is proper for him to sue on behalf of the relator. In *L. C. C.* v. *Attorney-General* [21], Lord Halsbury L. C. unequivocally affirmed that the discretion of the Attorney-General is absolute and is not subject to review by the courts. This principle had been followed in *Attorney-General* v. *Westminister City Council* [22] and *Attorney-General* v. *Sharp* [23] and had not been seriously challenged till the *Warhol* case. Lord Denning's statement that a private individual may be entitled to proceed alone in the event of the Attorney-General refusing leave in a proper case is tantamount to suggesting that the exercise of the discretion may be subject to judicial review. This suggestion raises an interesting constitutional point. The Attorney-General's discretion is derived not from statute but from the royal prerogative and it has hitherto been assumed by the courts in the majority of cases that the grounds for exercise of a prerogative power are absolutely unreviewable. For example, in *Rustomjee* v. *R.*[24], a case concerning the exercise of the treaty making power by the Queen, Lord Coleridge C. J. said: "..... as in making the treaty, so in performing the treaty, she is beyond the control of municipal law, and her acts are not to be reviewed in her own courts." The correctness of this view, however, has been questioned. In *Chandler* v. *D.P.P.*,[25] for example, Lord Devlin stated *obiter* that the exercise of a prerogative discretion might be reviewable by a court. A similar view was also expressed by D.G.T. Williams. In his article, the learned author said: "..... there is indeed no adequate ground for drawing so sharp a distinction between review of statutory powers, on the one hand, and prerogative powers, on the other. The person entrusted with the exercise of statutory powers may go wrong but so may the person entrusted with the exercise of prerogative powers ..... Hence, there is no reason why the former should be subject to judicial review while the latter should not." [26] On this basis, it is submitted that Lord Denning's *dictum* to the effect that the courts may have the power to review the grounds for the exercise of prerogative power is very desirable. It should be noted that the power of the court to review the exercise of the statutory discretionary power is a useful safeguard to prevent the abuse of that power and there is no reason why there is no such safeguard to check the exercise of the prerogative power. In both cases, the persons entrusted with the exercise of the discretionary powers may be biased. Hence, there is no reason why the exercise of the discretion to sue on behalf of the relators should be immunized from judicial review.

In the present case, Lord Denning and Lawton L.J. restricted themselves to cases where the private individual applies for a declaration or an injunction, but let us consider whether their judgments can have any effect on the cases where the private individual applies for other prerogative remedies such as the orders of *certiorari* and *mandamus*.

20 See collection of cases in K.C. Davis, *Administrative Law Treaties*, iii, ss. 22.10. (1965 Supp.).

21 (1902) A. C. 165.

22 (1924) 2 Ch. 416.

23 (1930) 99. L.J. Ch. 441.

24 (1876) Q.B.D. 69 at p. 74.

25 (1964) A.C. 763.

26 1971 C.L.J. 178.

Effect Of Lord Denning's Dictum On The Law Concerning The Locus Standi Of A Certiorari Applicant.

The rules governing the locus standi of a private applicant for an order *certiorari* are conflicting. On the one hand, there is a body of cases which establishes that an applicant need not have any interest in the order sought to be quashed to have standing. In *R.* v. *Surrey*,[27] it was provided that: ". . . . . where the application is by a party grieved . . . . . we think it ought to be treated . . . . . as *ex debito justitia*; but where the applicant is not a party grieved but comes forward as one of the general public having no particular interest in the matter, the court has a discretion . . . . . it is not bound to grant it at the instance of such a person.[28] " From this premise, it follows that the status of the applicant is only relevant to the question whether the remedy is to be granted as of right or as a matter of the discretion of the court. On the other hand, however, there are cases which indicate that the applicant must show some interest before he is entitled to seek the remedy. In *R.* v. *Groom*,[29] it was explicitly stated that an applicant must have a sufficient interest in the subject matter of the proceedings sought to be impugned in order to move the court for *certiorari*. It is submitted, however, by de Smith that *R.* v. *Surrey* remains good law. The learned author said: "It is thought that the present law may properly be stated as follows. *Certiorari* is a discretionary remedy, and the discretion of the court extends to permitting an application to be made by any member of the public." [30] If de Smith is right, Lord Denning's *dictum* would have little effect on the law concerning the locus standi of the certiorari applicant since every private individual would be entitled to apply for the remedy.

Effect Of Lord Denning's Dictum On The Law Concerning The Locus Standi Of The Mandamus Applicant.

The law here is just as uncertain. While there have been cases in which it has appeared that the court believes that it has a complete discretion as to the issue of the writ of *mandamus* and while academic opinion has similarily subscribed to a belief in liberal availability of this prerogative order, *mandamus* has been refused because the applicant lacked a specific legal right over and above that shared by the public at large. Professor de Smith recognises that the nature of the interest required to support an application for an order of *mandamus* cannot, in the existing state of authorities, be defined with any degree of confidence, but finds that there is a good deal of judicial support for the view that a mere stranger has no *locus standi*.[31] According to de Smith, a private individual is not entitled to apply for *mandamus* unless he can establish that he is specifically aggrieved by the non-performance of the duty. Suppose a private individual is anxious to secure the performance of a duty but he cannot apply for the order of *mandamus* because he is not the person specifically aggrieved; what should he do? It would appear that under certain circumstances, he can apply for *mandamus* without joining the Attorney-General. Take the recent case of *R.* v. *Commissioner of Police of Metropolis, Ex parte Blackburn*.[32] In that case, Mr. Blackburn applied for *mandamus* compelling the Commissioner of Police to perform his statutory duty. He had a sufficient interest, but his interest was shared with thousands of others. He was therefore not the person specifically aggrieved. The Court of Appeal, however, heard the application and *mandamus* was not granted, not because the applicant had no *locus standi*, but because the Commissioner of Police had, shortly before the action, agreed to enforce that duty.

Conclusion.

What the majority of the court held in the present case is that under certain circumstances, a private individual having no special interest in the matter can also apply for a declaration or an injunction in respect of a public duty without joining the Attorney-General. This decision in fact reasserts the principle laid down in *Dyson* v. *Attorney-General* and *Prescott* v. *Birmingham B. C.* The effect of the decision on the question of the locus standi of the *mandamus* and *certiorari* applicant is still uncertain since there have been cases which suggest that a private individual having no special interest is also entitled to apply for these prerogative orders.

---

27 (1870) L.R. 5 Q.B. 466.

28 (1870) L.R. 5 Q.B. 470.

29 (1901) 2 K.B. 157.

30 De Smith, *The Judicial Review Of Administrative Action*, (3rd ed.) p. 369.

31 De Smith, *The Judical Review of Administrative Action*, (3rd ed.) p. 491.

32 (1968) 2 Q.B. 114.

URBAN CLEARANCE

Wally C.K. Yeung

By courtesy of H.K.G.I.S.

Introduction

Urban squatting is one of the most vital problems that Hong Kong is facing. Like most rapidly urbanising countries, the imbalance between housing stock and population growth has given rise to a tremendous number of illegal squatters and illegal structures in urban areas. Urban squatting often hinders the urban development in that most urban squatters are illegal structures that occupy vast area of Crown land. At the same time, the living standard in squatter areas is generally much lower than that of the society as a whole. Thus most squatter areas are considered as sources of various social problems.

The government of Hong Kong, on the one hand, has tried hard to eliminate these urban squatters, but on the other hand, she is at pains to find means to accommodate the vast number of people from demolished squatter areas.

In this aspect, the government of Hong Kong is often regarded as successful for her massive resettlement programme. She is now the landlord of more than one million people. In his annual speech, the Governor said that in the next ten years, the government will provide housing for another one million and eight hundred thousand people.

Urban Clearance is basically the relocation of people from squatters and other unlawful structures to resettlement areas. In the process of this, legal and socio-economic problems arise- these form the basic aim of the present dissertation.

Legal Position of Squatters

(i) *Introduction:*

To study the legal position of squatters, we must firstly try to make clear the different nature of interest or ownership of land on which structures in question were built. Basically, all land in Hong Kong is said to be Crown land. But there is Crown land that is unleased and belongs absolutely to the Crown. At the same time there is Crown land which is subjected to lease or permit (licence). Thus when urban clearance is in

question, people occupying structures on different types of Crown land are in different legal positions.

The following classification is desirable:–

1. Crown land illegally occupied by squatters.
2. Licensed and Resite areas.
3. Legal and illegal structures on Crown land subjected to permit.
4. Legal and illegal structures on Crown land subjected to lease.

(ii) *Crown land illegally occupied by squatters:*

All structures on Crown land illegally occupied by squatters are illegal structures and occupants of these illegal structures are absolutely deprived of any legal right. Although some of them have been occupying these structures for a long time, there is no means through which they can acquire any right. The government divides these illegal structure into tolerated and untolerated structures. They are "tolerated" if they were included in squatter surveys made by the Resettlement Department in 1959 and 1964. When the land on which they stand is needed for development, they are cleared and if possible their occupants resettled. Occupants of these "illegal structures do not have any ground on which they can challenge the government's action because they are all unlawful occupants of unleased Crown land. As it was commented, "over half a million squatters on Crown land including the erectors and inhabitants of all tolerated structures, are in breach of the law." [1]

(iii) *Licensed And Resite Areas:*

People who are homeless for any reason can apply to build a hut in a licensed area controlled by the Resettlement Department, where a license fee is charged. These licensed areas are of two kinds, [2] Class 1, which are generally better located and intended for people with a priority for resettlement who cannot be resettled immediately and Class II for the genuinely homeless, comprising mainly squatters who have their homes destroyed at clearances, and boat squatters accepting sites in licensed area under the voluntary clearance programme of the Marine Department.

Licensed areas have existed since the beginning of 1967, replacing the old resite areas, which were similar to licensed areas except that no licence fee was charged. Most resite areas have been cleared and the people living there resettled over the last 3 years. According to the statistic supplied by the Resettlement Department on the 31st December 1971, the resite areas held 582 people, compared with 35,458 in licensed areas. There is a fairly rapid turnover from Class I areas, but Class II areas are only turned over when the sites are required for development or when they are needed to house yet another generation.

Though the government seldom interfere with occupation of structure in licensed or resite areas, strictly speaking, all occupants of the licensed and resite areas are also illegal squatters. "All occupants of the present Resite areas are also illegal squatters." [3]

The government is never under any legal duty to provide land for the squatters to construct any structures as accomodation. She is doing this merely for humanitarian and compassionate reasons. Thus if the Licensed or Resite areas are needed for development, the government can always clear the structure there. The unlawful squatters on Licensed or Resite areas can hardly find any cause to challenge the government's action.

Strictly speaking, people on Licensed or Resite areas have no right at all except that they can find shelter at the mercy of the government.

(iv) *Illegal and legal structures on Crown land subjected to permit:*

This includes mainly urban cottage areas and farm houses in the New Territories.

Cottage areas were mainly developed in the early 1950's, whether privately or by charitable organizations. Ownership of many of them was then transferred to the government. Occupants of these cottage areas and farm houses are allowed to build structures of limited area. Structures exceeding this limited area are illegal structures and occupants of illegal structures on Crown land subjected to permit are not in any better

---

1 Report on "*Review of Policies for Squatter Control, Resettlement and Government Low-Cost Housing*" 1964, pp. 11.

2 S. 50*A*. (1), Resettlement Ordinance, Laws of Hong Kong, Chapter 304.

3 Report on "*Review of Policies for Squatter Control, Resettlement and Government Low-Cost Housing*: 1964. pp. 11.

position than squatters in the sense that the government can always clear the illegal structures infringing the right of anyone because occupants of these illegal structures simply do not have any legal right at all.

S.9 of the Resettlement Ordinance[4]

"A competent authority may take possession of, demolish and remove any unlawful structure upon Crown land", and unlawful structure includes-according to the definition of this term in S. 2 of the Ordinance, "any temporary or permanent structures or part thereof erected or maintained otherwise than in accordance with terms of the lease or permit on land held on lease or permit from the Crown."

Even occupants of lawful structures– structures erected with the permission of the competent authority do not have too strong a legal right on the structures they occupy. The permit was granted on condition that the competent authority can cancel it with one month's notice.[5] Thus any legal right of occupants of lawful structure on Crown land subjected to permit can be defeated by one month's notice from the competent authority. On the expiry of the one month notice, all lawful structures automatically become unlawful and can be dealt with under S.9 of the Resettlement Ordinance.[6]

(v) *Legal and illegal structures on Crown land subjected to lease:*

Legal structures on Crown land subjected to lease has nothing to do with urban clearance except in case of dangerous buildings governed by the Building Ordinance.[7] Legal right of occupants is that of lessee which is outside the scope of the present research.

For illegal structures on Crown land subjected to lease, which are mainly on tenement rooftops, their occupants' position is the same as that of all other unlawful structures and the relevant competent authority is entitled to deal with them under the Resettlement Ordinance.[8]

So far, we can see that occupants of squatter huts and other unlawful structures do not have any legal right at all against the clearance action of the clearance section of the Resettlement Department. All the Competent Authority has to do is to give notice and on the demolition day, all unlawful structures within the prerequisite site will be cleared.

(vi) *Common Law Doctrine Of Prescription:*

At common Law, squatters may sometime acquire certain right through long occupation. This is known as the Doctrine of Prescription. The basis of prescription is that if long enjoyment of a right is shown, the court will strive to uphold the right by presuming that it had a lawful origin.[9] A user can support a prescriptive claim if he can show that he is a user without force, without secrecy, and without permission.[10] Prescription must have positive operation so as to create a new title. This is brought about by presuming a grant. Every prescription presupposes a grant to have existed. At Common Law a grant would be presumed only if the user, as of right, had continued from time immemorial. For this purpose the year 1189 was fixed as the legal limit of memory.[11] It is clearly impossible in most cases to show continuous use since 1189, the rule that if user as of right for twenty years or more is shown the court will presume that user has continued since 1189[12] have been adopted by the court.

Thus at common law, if a squatter has occupied the land for more than twenty years, he should obtain certain right against the owner. But this Common Law doctrine of prescription never applies in Hong Kong. An official of the Clearance Section of the Resettlement Department says, "Our clearance action has never been challenged by any person with the Common Law Doctrine of prescription."[13] It is probably due to the following reasons:–

1. Very few squatter huts have existed for more than twenty years.

---

4 Laws of Hong Kong, Chapter 304.

5 S. 500. 5(*b*) of the Resettlement Ordinance.
"Without prejudice to paragraph (a), the competent authority may at any time revoke a licence granted under this part of this Ordinance after giving to the licensee one month's notice of his intention to do so."

6 Laws of Hong Kong, Chapter 304.

7 Laws of Hong Kong, Chapter 123.

8 Laws of Hong Kong, Chapter 304.

9 *Clippens Oil Co. Ltd.* V. *Edinburgh and District Water Trustees* [1904] A.C. 64 at 69, 70.

10 *Modern Real Property*, Meggary and Wade, pp. 838.

11 Statute of Westminister I 1275, C. 39.

12 *Darling* v. *Clue* (1864) 4 F & F. 329 at 334.

13 from an interview undertaken by the writer.

2. There is local statutory provision-the Limitation Ordinance[14] which stipulates that only after the expiration of 60 years will the Crown's right to recover any land be barred .....

According to the Application of English Law Ordinance,[15] English Common Law only applies in Hong Kong when it is not in contravention of the local statutory provisions. Thus the Limitation Ordinance[16] will prevail over the English Common Law Doctrine of Prescription and it is not applicable in Hong Kong.

(vii) *The Limitation Ordinance:*

According to section 7(1) of this ordinance, the Crown cannot take action to recover from any squatter the land that the squatter have been occupying for more than 60 years. Of course no squatter in Hong Kong has been occupying land for more than 60 years and any question relating to this is merely of academic interest. But I am just puzzled if there is a squatter who has been occupying a certain piece of land for more than 60 years and the government wants to get back that piece of land for development. Can the squatter challenge the clearance action of the government? According to the Crown Land Ordinance[17] :

S.6(1) "If unleased land is occupied, otherwise than under a licence or a deed or memorandum of appropriation, the Authority may cause a notice, requiring the occupation of the land to cease before such date as may be specified in the notice, to be posted in one or more places .....

(2) If the occupation of unleased land does not cease as required by a notice under subsection(1), any public officer, or other person, acting on the direction of the authority may, with the assistance of such other public officers or other persons as may be necessary.

Which Ordinance is going to prevail? The Limitation Ordinance or The Crown Land Ordinance?

The Need For Urban Clearance In Hong Kong:

(i) *For urban Development:*

Crown land is valuable in Hong Kong. This can be shown by the tremendous income of the government from the sale of Crown land. At the same time, due to the increase of population and the advancing economic prosperity in Hong Kong, large area of Crown land is required for all sort of urban development.

Limitation of relief and the occupation of valuable Crown land by squatters made large scale development such as large scale housing programme or large scale road network system impossible. This tie the government must solve and the method adopted by the government is large scale urban clearance.

Section 4(2) of the Town Planning Ordinance:[18]

"The Board may recommend to the Governor in Council the resumption of any land, interfering with its plans for the lay out of any area, and resumption to avoid such inference shall be deemed to the resumption for a public purpose within the meaning of the Crown Land Resumption Ordinance"[19].

Urban clearance is mainly the demolition of squatter huts and other unlawful structures on Crown land. The present policy with regard to squatter areas on Crown land is that when land is wanted for development, any squatter on it are cleared.[20]

Recently, cottage area in Ho Man Tin, Kowloon was cleared for the building of large scale low-cost housing scheme and squatter area along Lung Cheung Road, Kowloon was also cleared for the large scale road extension along Lung Cheung Road.

Urban clearance is an effective way to free land illegally occupied by squatters who had a strange hold on land urgently required for permanent development.

---

14 Laws of Hong Kong Chapter 347 S. 7(1),
"No action shall be brought by the Crown to recover any land after the expiration of sixty years from the date on which the right of action accrued to the Crown or, if it first accrued to some person through the Crown claims, to that person."

15 Laws of Hong Kong Chapter 88.

16 Laws of Hong Kong Chapter 347.

17 Ordinance No. 54 of 1972.

18 Laws of Hong Kong, Chapter 306.

19 Laws of Hong Kong, Chapter 124.

20 Report on *"Review of Policies For Squatter Control, Resettlement and Government Low-Cost Housing,* 1964. pp. 16.

(ii) *To Maintain Hong Kong's name as The Pearl Of The Orient:*

Lingering proverty among the majority in the shadow of unrivalled affluence is a painful paradox in the Hong Kong life of today. The squatter areas are the most vivid relfection of this. The Government has been trying hard to present Hong Kong as a stable, clean, and secure rich place in view of the effect on the encouragement of trade and foreign investment. The existence of the squatters has an adverse effect on this because squatters are known to be dirty, insecure and dangerous.

(iii) *To Rid The Colony Of the Risks Of Squatter Fires Which can Lead To High Cost In Welfare Relief And Risk Of Political Disorder:*

The Christmas Fire in 1953 at Shek Kip Mei coupled with many other subsequent fires in squatters areas had brought the government to face the fact that squatters can at times cause great trouble. In fact, due to the tremendous number of victims in these squatter fires the government just cannot handle effectively when welfare relief is concerned. It is the government's belief that, to prevent is better than to cure, and the method adopted for prevention is by clearance of urban squatters. Although clearance will usually lead to resettlement which demands large amount of money, it is assessable beforehand and is a permanent mode of investment.

(iv) *Other Miscellaneous Reasons For Urban Clearance:*

Sometimes the government had to carry out certain clearance action at the request of the public. For instance, in March 1971, following a local newspaper's revealing of the fact that Ma Shan squatter area had been used as a Drug Den, action was later taken. Sometimes offensive trades such as the keeping of hogs were carried out in squatter areas and such offensive trades may amount to public nuisance and they would be cleared. Squatters were also cleared for other sanitary reasons.

Grounds On Which The Government Justify Her Clearance Action:

(i) *Squatter Huts And Unlawful Structures – A Breach Of The Law:*

All occupants of unleased Crown land and other unlawful structures are considered to be in breach of the law and they do not have any legal right in relation to their unlawful structures.[21] Report on "*Review of Policies For Squatter Control, Resettlement and Government Low-Cost Housing.*" comments on this:

"With regard to the present legal background of Squatters,

1. Over half a million squatters on Crown land including the erector and inhabitants of all tolerated structures, are in breach of the law.
2. All occupants of the present Resite Areas are also illegal squatters.
3. The Commissioner for Resettlement is technically ultra vires whenever he directs anyone to exercise any control over any Resite Area.
4. Every landlord and any other lessee or permittee of Crown who since 8th August, 1958 has not promptly reported the erection of any new illegal structures on his land, or on any building on that land, is in breach of the law.

Section 6(4) of the Crown Land Ordinance.[22]

"Any person occupying unleased land, other than under a licence or a deed or memorandum of appropriation, who without reasonable excuse does not cease to occupy the same as required by a notice under subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine of ten thousand dollars and to imprisonment for 6 months.

Section 11(1):

"If it comes to the knowledge of a lessee or licensee that in breach of the Crown lease or license, a structure

(a) is being erected or placed on the land or on any building on the land or

(b) has been erected or placed thereon since 22nd December 1965.

otherwise than by him or on his behalf, the lessee or licensee shall notify the Authority within forty-eight hours.

(2) any person who without reasonable excuse contravenes subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine of one thousand dollars"

Thus illegal occupation of unleased land or unlawful structures on leased land or land occupied under a license are now offences under statutes and people who commit these offences are liable.

Almost all the illegal structures are of flimsy construction, only a minority are sizeable

21 *Ante.* CAP. 5.

22 Ordinance No. 54 of 1972.

and solidly built of stone and bricks. They have not complied with Section 14(1) of the Building Ordinance [23] which reads: "Save as otherwise provided, no person shall commence or carry out any building works or street works without having first obtained from the Building Authority–

(a) his approval in the prescribed form of documents submitted to him in accordance with the regulation and

(b) his consent in the prescribed form for the commencement of the building works or street works shown in the approved plan"

At the same time, all illegal structures are unplanned and they failed to reach the safety standard as required by the Fire Service Ordinance, [24] or the Public Health and Urban Service Ordinance [25]

So far as we can see, the unlawful structures are in breach of quite a number of Ordinances, nevertheless, government's clearance action was mainly justified by Part II of The Resettlement Ordinance [26] which deals with clearance of structures.

Generally speaking, this part of the ordinance is rather substantial and comprehensive as far as justification for the government's clearance action is concerned. Under section 9 of the Resettlement Ordinance(7) which concerns the clearance of squatters on Crown land, the competent authority's power is surpreme. He may evict from any unlawful structure upon Crown land any squatter or other occupants thereof, evict from any structure in an area set aside under section 50A any squatters. Section 50A deals with the power of the governor to set aside areas of land for occupation by homeless persons and certain others. The competent authority can also remove from Crown land or from any portion thereof any squatter or trespasser and take possession of, demolish and remove any unlawful structure upon Crown land.

Squatters and unlawful structures subjected to lease on permit are in no better position.

Section 11 provides the competent authority with power to require the lessee of land held on lease from the Crown or the permittee of land held on permit from the Crown to evict from any unlawful structure upon such land any squatter or other occupants thereof to remove from such land or from any portion thereof any squatter or trespasser and to take possession of, demolish and remove any unlawful structure upon such land.

If the lessee or permittee fail to comply with the requirement of the competent authority, he can always exercise the clearance himself under section 12 of the ordinance.

Section 12 (1) When–

(a) a lessee or permittee cannot readily be found or for any other reason notice cannot be given as provided in subsection(1) of section 11; or

(b) a competent authority is satisfied that it is necessary or desirable that such notice should be dispensed with; or

(c) a lessee or permittee does not comply with such notice, a competent authority may, without giving such notice or any further notice, as the case may be, enter upon land held on lease or permit from the Crown, and exercise thereon the powers provided by paragraphs *(a)* *(b)* and *(c)* of subsection (1) of section 11 that are

(a) to evict from any unlawful structure upon such land any squatter or other occupant thereof

(b) to remove from such land or from any portion thereof any squatter or trespasser;

(c) to take possession of, demolish and remove any unlawful structure upon such land, respectively.

Although Part II of the Resettlement Ordinance was rather substantial, it fails to cover a few minor points.

1. Unlawful erection of structures on unleased Crown land was not an offence, thus people are not deterred from erecting unlawful structures. It was only after the erection of unlawful structures that the government can take action to clear them.

2. The Resettlement Ordinance was not wide enough to ensure that the Competent Authority will be free from some common liability when carrying out the clearance work.

---

23 Laws of Hong Kong Chapter 123.

24 Laws of Hong Kong. Chapter 95.

25 Laws of Hong Kong, Chapter 132.

26 This part of the Ordinance was repealed on 16th August, 1972 by the Crown Land Ordinance.

e.g. damage to property. During the process of clearance, damage to property belonging to squatters or belonging to finance companies under hire-purchase terms were often. As damage to property belonging to another is a civil offence, people whose property was damaged can always bring an action against the government.

3. Large expense may be incurred in clearing squatters. This was considered to be a waste. Both the government and the squatters suffer great loss. This situation could be much improved if the squatters were allowed to clear their own unlawful structures.

Thus though the Resettlement Ordinance Part II was working quite effectively since 1954,[27] it was repealed in August 1972 by the Crown Land Ordinance.[28]

(ii) *The Crown Land Ordinance:*

This ordinance, taking the place of Part II of the Resettlement Ordinance, mainly deals with clearance of squatters and unlawfully structures. It is more comprehensive and consideration is being paid to the most minor details.

Section 4- section 6 of the Crown Land Ordinance deals with squatters and unlawful structures on unleased Crown land.

S.4 Unleased land shall not be occupied except under a licence or a deed or memorandum of appropriation.

S.5(1) The Authority may, on payment of the appropriate prescribed fee, issue a licence to occupy unleased land . . . . .

(3) A licence may be terminated by the licensing authority by giving such notice as may be specified in the licence.

S.6(1) If unleased land is occupied, otherwise than under a licence or a deed or memorandum of appropriation, the Authority may cause a notice, requiring the occupation of the land to cease before such date as may be specified in the notice, to be posted in one or more places

(a) on or near the land or
(b) on any property or structure on the land.

(2) If the occupation of unleased land does not cease as required by a notice under subsection (1), any public officer, or other person, with the assistance of such other public officers or other persons as may be necessary –

(a) remove from the land the person (if any) thereon and
(b) take possession of any property or structure on the land.

(3) Any property or structure of which possession is taken under subsection (2) *(b)* shall become the propery of the Crown free from the rights of any person and may be demolished or otherwise dealt with as the Authority thinks fit.

(4) Any person occupying unleased land, otherwise than under a licence or a deed or memorandum of appropriation, who without reasonable excuse does not cease to occupy the same as required by a notice under subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine of ten thousand dollars and to imprisonment for 6 months.

(5) The Authority may recover from any person convicted of an offence under subsection(3) and the exercise of the powers conferred by this section.

This three sections can be examined in the light of Section 9 of the Resettlement Ordinance.

S.9 A competent authority may–
(a) evict from any unlawful structure upon Crown land any squatter or other occupant thereof;
(aa) evict from any structure in an area set aside under section 50A any squatter;
(b) remove from Crown land or from any portion thereof any squatter or trespasser;
(c) take possession of, demolish and remove any unlawful structure upon Crown land.

Sections 4, 5 & 6 of the Crown Land Ordinance differ from Section 9 of the Resettlement Ordinance in the following aspects:

1. Illegal occupation of unleased Crown land is now a offence under S. 6(4). Under the Resettlement Ordinance, squatters and unlawful structures on Crown land will be demolished at the discretion of the competent authority, but person occupying these illegal structure will not be prosecuted or punished by the court. Now under the Crown land Ordinance, any persons who unlawfully occupy unleased Crown land shall be liable to a fine of ten thousand dollars and to imprisonment for 6 months.

27 The Resettlement Ordinance was enacted in 1954.
28 Ordinance No. 54 of 1972.

2. Under S.6(2) of the Crown Land Ordinance, demolition of squatters on Crown land can be carried out by any public officer, or other person, acting on the direction of the authority. This enlarges greatly the scope of people who are entitled to carry out the clearance action. Under S. 9 of the Resettlement Ordinance, only a competent authority who is a person appointed by the governor as competent authority can have the right to carry out the clearance action.

3. Under S. 6(3) of the Crown Land Ordinance, property or structure of which possession is taken by the authority under the clearance action shall become the property of the Crown free from the rights of any person and may be demolished or otherwise dealt with as the Authority may think fit. This provision on the one hand protects the authority from any cause of action that the owner of those property or structure might bring for any damage to their property against the authority. On the other hand it deprives those people's chance of reusing the property or structures unlawfully on Crown land again.

S.18 of the Crown Land Ordinance is an even more clear and precise provision which enables the authority to carry out the clearance without the danger of being sued for damage to property.

S.18 "Neither the government nor the authority shall be liable for any loss or damage suffered by any person in consequence of anything done under s.6, 8 or 12 of the ordinance by the authority.

What is more under S.6(5)
"The authority may recover from any person convicted of an offence under subsection (4) any cost incurred in or arising out of the demolition of any property or structure under subsection (3) and the exercise of the powers conferred by this section.

All these show vividly the government's determination to curb down any unlawful structures on unleased Crown land.

In future, no squatters or unlawful structures on unleased Crown land can survive the provisions of the Crown land Ordinance.

With regard to unlawful structures on leased land or land occupied under a licence, provisions in the Crown Land Ordinance are virtually the same as those in the Resettlement Ordinance.

The Crown Land Ordinance:
S. 11(1) If it comes to the knowledge of the licensee or the lessee that, in breach of the Crown lease or licence, a structure –

(a) has been erected on place thereon since 22nd October, 1965, or
(b) is being erected or placed on the land or on any building on the land otherwise than by him or on his behalf, the lessee or licensee shall notify the authority within forty-eight hours.

(2) any person who without reasonable excuse contravenes subsection(1) shall be guilty of an offence and shall be liable to a fine of one thousand dollars.

(3) In proceedings for an offence under subsection (2), the lessee or licensee shall be presumed to have known that the structure was being or had been erected or placed on the land unless he proves that he did not know, and could not reasonably have known, of the same.

12(1) if a structure is being or has been erected or placed on leased land, or have occupied under a licence, in breach of a Crown lease or licence, the authority may, by notice in writing served on the lessee or licensee, require him to demolish the structure before such date as may be specified in the notice.

(2) If a lessee or licensee does not comply with a notice served on him under subsection (1), any public officer or other person, acting on the direction of the authority may, with the assistance of such other public officers or other persons as may be necessary, enter on the land and demolish the structure.

(3) A lessee or licensee (for the purpose of complying with a notice under subsection (1) and (for the purpose of subsection (2) any authorized person may–

(a) remove from the structure any person or property therein and
(b) take possession of such property and of any property resulting from the demolition of the structure.

(4) Any property of which possession is taken under subsection (3)(*b*) by an authorized person shall become the property of the Crown free from the rights of any person and, subject to subsection (5) may be dealt with as the authority thinks fit.

(5) The governor may order that
(a) the whole or a part of any property which has become the property of the Crown under subsection (4) or
(b) The whole or a part of the value of any such property shall be delivered or paid to any person who appears to him to have a moral claim thereto.

(6) The Authority may recover from the lessee or licensee any cost incurred in or arising out of the demolition of a structure under subsection (2) and of the exercise of the power conferred by subsection (3)

(7) A notice under subsection (1) may be served by–
(a) delivering it to the lessee or licensee,
(b) posting it to him by registered post addressed to his last place of business or residence known to the authority, or
(c) posting the notice in or on the land or structure to which the notice relates.

All these are virtually the same as those provided by the Resettlement Ordinance. But there-are a few points worth noticing.

1. Under S. 11(2) punishment for offence against subsection(1) is now $1,000 which is the double of that under S.10(2) of the Resettlement Ordinance.

2. Under the Crown Land Ordinance, clearance of unlawful structure on leased land or land occupied under a licence can now be carried out by any public officer or other person, acting on the discretion of authority with the assistance of such other public officer or other person as may be necessary. This again enlarges greatly the scope of people who can carry out the clearance action. Under the Resettlement Ordinance, only the competent authority is entitled to do the clearance work.

3. S. 18 of the Crown Land Ordinance provides:
"neither the government nor the authority shall be liable for any loss or damage suffered by any person in consequence of anything done under S. 12 by the authority."

This protects the government and the authority from any cause of action that might be brought by the person who suffers any damage as a result of the clearance action.

The Crown Land Ordinance, taking the place of Part II or the Resettlement Ordinance, includes all minor details to facilitate the clearance action carried out by the Government. As far as illegal occupation of unleased Crown land or land occupied under a license is concerned, the government's power of clearance is so great that no one can have any ground to challenge its action.

(ii) *Other Ordinances to Justify The Government's Clearance Action:*

Apart from the Crown Land Ordinance, there are quite a few other statutory provisions to justify the government's action.

(a) Crown Land (Resumption) Ordinance[29]

S. 3 "Whenever the Governor in Council decides that the land is required for a public purpose, the Governor may arrange for the purchase thereof by negotiation with the owner or may order the resumption thereof under this ordinance."

S. 5 "On the expiration of one month, or the longer period as aforesaid, the land shall revert to the Crown and all the rights of the owner, his assigns or representatives and of any other person in or over the land or any part therof shall absolutely cease."

(b) Town Planning Ordinance (30)[30]

S. 4(2) "The Board may recommend to the Governor in Council the resumption of any land interfering with its plans for the lay out of any area, and resumption to avoid such interference shall be deemed to be resumption for a public purpose within the meaning of the Crown Land (Resumption) Ordinance." [31]

(c) Crown Rights (Re-entry and vesting Remedies) Ordinance[32]

S. 4(1) Whenever it is necessary to enforce a right of re-entry by the Crown upon any lands or

29 Laws of Hong Kong, Chapter 124.
30 Laws of Hong Kong, Chapter 131.
31 Laws of Hong Kong, Chapter 124.
32 Laws of Hong Kong, Chapter 126.

tenements for the breach of any covenant in the Crown lease therof, or for the breach of any condition or stipulation of any tenancy thereof, a memorial of an instrument of re-entry, under the hand of any public officer authorized by the Governor to sign such instruments, may be registered in the Land Office.

(2) Immediately on the registration of such a memorial, the Crown shall be deemed to have re-entered upon the lands or tenements described therein and in respect of which the right of re-entry has accrude, and the said land tenement shall thereby become re-vested in the Crown as fully as if the Crown lease thereof had determined, or, as fully as if the tenancy had determined, as the case may be.

(d) Building Ordinance[33]

S. 24(1) "Where any building has been erected, ... in contravention of any of the provisions of this Ordinance the Building Authority may be order in writing required–the demolition of the building .....

(3) if an order made under subsection (1) is not complied with, the Building Authority may demolish, removed or alleged such building works....."

All the above statutory provisions, not only apply to squatters, but also to other lawful or unlawful structures on leased land or land occupied under a licence. Of course, urban clearance mainly concerns with the clearance of unlawful structures on unleased Crown land or leased land or land occupied under a licence and can be sufficiently dealt with under the Crown Land Ordinance.[34] The above statutory provisions only apply to special, independant and individual cases and to a certain extent are beyond the scope of this present dissertation. But they are here just to show that the Crown can always re-possess any right in relation to any land within the Colony to justify the Government's clearance action.

Remedies Provided By The Government After Clearance

(i) *Introduction:*

Clearance of squatters and other unlawful structures means depriving the occupants of their living places. As we have seen, all these squatters and other unlawful structures are in breach of the law. The government is under no legal obligation to provide any remedy after the clearance, nevertheless, the government is not to leave those people whose homes have been destroyed hanging around homeless and helpless and certain remedial work is provided. But the Authority repeatedly says that the government is providing these purely for humanitarian and compassionate reasons and that the government is under no legal obligation to provide any of these remedies.

Remedies for squatters and other unlawful structures after clearance is mainly provided by Part III and Part V of the Resettlement Ordinance[35]

(ii) *The Resettlement Ordinance:*

S.22 (1) If a competent authority or an authorized officer is satisfied that a person is eligible for accommodation in a cottage resettlement area or in a resettlement estate, he may issue to him a resettlement card in accordance with such form as may be prescribed by regulations made under section 51. .....

S.40 (1) A competent authority may authorize by permit in writing the erection by any person of any building in any cottage resettlement area subject to the conditions as set forth in such permit.

(2) An erection permit may stipulate that the building may be occupied by the person who has erected the building to let the building or to sell the building whether for a cash payment or by a hire-purchase agreement in a form to be approved by the competent authority to a person authorized to occupied such building in accordance with the provisions of section 43 .....

S. 50C. (1) A competent authority may grant –

(a) to any person whom he is satisfied is homeless and from whom a sum has been accepted under subsection (2) of section 35A by way of an advance payment of rent; and

(b) to such other persons as the Governor may allow, either generally or in any particular case, a licence to occupy land in a Class I area for the purpose of residence or the carrying on of retail trade or for such other purpose as the Governor

33 Laws of Hong Kong. Chapter 123.

34 Laws of Hong Kong. Ordinance No. 54 of 1972.

35 Laws of Hong Kong. Chapter 304.

may allow, either generally or in any particular case.

(2) competent authority may grant –

(a) to any person whom he is satisfied is homeless; and

(b) to such other persons as the Governor allow, either generally or in any particular case, a licence to occupy land in a class II area for the purpose of residence or the carrying on of retail trade or for such other purpose as the Governor may allow, either generally or in any particular case.

(2A) A competent authority may grant to such persons as the Governor may allow, either generally or in a particular case, a licence to occupy land in a Class III area for the purpose of storage and processing of goods and for such residential purpose connected therewith as may be approved by the competent authority.

Characteristic of these sections is that the authority has wide discretion of action under them. This can be shown by the predominance of the word "may". The authority may do this and may do that. This shows how persistent is the government's belief that the government is under no legal obligation to provide any of these remedies.

Relocation of people to resettlement estates, cottage resettlement areas and licensed areas is the remedy provided after the clearance of Squatters on unleased Crown land and other unlawful structures under the Crown Land Ordinance.[36]

As for clearance action taken under other statutory provisions, special remedy is usually provided under that particular ordinance.

e.g. Crown Land (Resumption) Ordinance[37]

S. 6(1) After the reversion to the Crown as aforesaid a Board of three memebers shall be approved to determine the amount of compensation to be paid in respect of such resumption.

36 Ordinance No. 54 of 1972.

37 Laws of Hong Kong, Chapter 124.

LEGAL ASPECTS OF GRATUITOUS UNDERTAKINGS

Macy M.S. Kwan

A. Introduction

While people constantly make or promise gifts and do and promise favours, these benevolent activities have no official rubric in English law, nor do those who promise them realise or give any second thought to the legal consequences that may arise from such gratuitous undertakings. Thus, the average man feels that while it is out of his own benevolence that he makes a gratuitous promise, it is within his rights to choose not to carry it out. So also, the English law will not enforce a promise made without consideration, unless this be made by deed; nor will it disturb an executed benefaction however ungrateful the beneficiary may be. The legal justification for these rules have not been anywhere clearly given, though it is to some extent implicit: since gifts and favours are purely private and sentimental arrangements, no useful purpose would be served by legal intervention.

However, it is simply not true that informal gratuitous arrangements have never been given positive legal treatment, though, instead of being open and direct, this treatment has been *ad hoc* and sporadic, and peculiarly involved within more prominent fields of legal commerce. These areas include the law involving gifts and the doctrine of consideration, bailment and the law of agency, tort problems arising from promises of things or services, and, finally, the law of trusts.

This dissertation seeks to conduct a research into the present state of the law in connection with this subject and examine the possibility of reform, where necessary.

B. Enforcement

The enforcement of business transactions was, on the threshold of modern times, a social necessity, whereas the enforcement of gift promises was not, and might even be a social mischief. There is, therefore, a need to limit promises that should be binding within a defined scope. This may be done in one of two alternative ways. The defendant might be held liable just because he had made a serious promise or the plaintiff might be required to prove that this was part of a transaction to which he had contributed a material share.

Most Continental systems adopt the first alternative.[1] However, English law has never recognised the binding force of agreement as such: it requires either the observation of a form, i.e., by deed, or consideration.

A gratuitous promise is one for which no or no sufficient consideration has been given. The mere desire or motive to make the promise, standing alone, will not make it binding,[2] nor, according to the traditional view of the common law, will the fact that a man is morally obliged to keep his word make it so.

---

1 See *Code Civile* art. 1101; Amos and Walton, *Introduction to French Law*, pp. 144-6.

2 "Natural affection of itself is not sufficient consideration." *Bret* v. *J.S.* (1600) Cro. Eliz. 756; *cf. Thomas* v. *Thomas* [1842] 2 Q.B. 851; *White* v. *Bluett* (1853) 23 L.J. Ex. 36.

What, then, is sufficient consideration, which makes a promise enforceable?

1. *The Doctrine of Consideration*

Many attempts had been made to define the "doctrine of consideration", but the traditional view seems to be that it is some detriment to the promisee, or some benefit to the promisor. [3]

The antithesis of benefit and detriment, though reiterated in the courts, is not altogether satisfactory, as this dissertation will point out later, but conventional lawyers have developed too much respect for this outmoded doctrine which only serves to complicate the law. They have resigned to the view that the traditional definition of consideration is probably the best compromise between the requirements of certainty and flexibility in this field, and it has in any case been too often repeated by the courts to be ignored, though it no doubt requires further elaboration. However, a study of the authorities will serve to pinpoint its inadequancies.

2. *Function of the Doctrine*

How consideration became an element of contract is not clear. Some say that it was a historical accident,[4] and some say to the contrary.[5] Be it as it may, its development was based upon commercial needs, which included, as an indispensable element, the idea of a bargain. Consideration was to provide the test that a bargain was concluded.

Champions of the doctrine of consideration have submitted that it is still fulfilling its original role in the law of contract, namely, to establish the seriousness of a promise, to provide evidence of a contract, and to establish fairness in dealings.

However, if we examine the present state of the law, it may be argued that no satisfactory reason for the existence of consideration can be found.

Seriousness of a promise is already required by law by the rules relating to the intention to create legal relations. [6]

Secondly, the purpose of consideration is not to provide evidence of a contract, for though there may be ample evidence of serious intention on both sides to an agreement, that agreement will fail if there is no consideration.

Finally, fairness in dealings is irrelevant, for the principle of the law is that consideration need not be adequate and nominal consideration is good consideration.

One particular view holds that consideration distinguishes between promises recognised by the law and those that remain outside it.[7] But this is just begging the question – it is the inevitable consequence and the result of consideration that some promises are valid whereas others are not; but it is not the object of consideration. Thus as Professor Lawson puts it with regard to consensual contracts, "..... consideration is not a requirement of such contracts, it is an inevitable element." [8]

3. *The Judicial Practice*

The courts, throughout the checkered history of consideration, has assumed the function of minimising its effects and sacrificing the logical consistence of the doctrine to common sense. Thus, where a party could take advantage of the absence of consideration to evade undertakings which have been solemnly entered into, the courts followed an elaborate process of conscious adaptation of existing rules with a view to avoiding injustice in individual cases.

---

3 "A valuable consideration in the sense of the law consists either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." – *Currie* v. *Misa* (1875), L.R. 10 Exch. 153; *cf. Bolton* v. *Madden* (1873), L.R. 9 Q.B. 55.

4 See Jenks, *Doctrine of Consideration.*

5 W. Stern, *Consideration and Gifts*, 14 Int. & Comp. L.Q. 675, at p. 677.

6 *Balfour* v. *Balfour* [1919] 2 K.B. 571.

7 R. David, *Cause et Consideration in Me'langes Maury* (1959) Vol. II, at pp. 111, 119.

8 F.H. Lawson, *A Common Lawyer looks at the Civil Law*, 1953, at p. 118. (The Thomas M. Cooley lectures, 5th series, University of Michigan Law School).

a. "Invented" Consideration

English courts, unlike American courts, do not insist on the requirement that "Nothing is consideration that is not regarded as such by both parties."[9] and often regard an act or forbearance as the consideration for a promise even though it was not the object of the promisor to secure it.[10] In some cases, consideration is found though the promisor has no factual benefit, and the promisee has suffered no factual detriment, where the courts found that the defendants might benefit as a result of the plaintiffs' act, whether or not the latter would be prejudiced by it.[11] These practices may be called "inventing" consideration.

In the case of *Shadwell* v. *Shadwell*,[12] the question was whether a promise by an uncle of an annuity to his nephew after he got married was enforceable. Looking at the facts without legal pre-conceptions, it is clear that this was a typical gift situation. There was here no element of bargain, no sly calculation to procure a marriage: the promise was just an "act of kindness", a "mere voluntary courtesy";[13] thus there was no room for consideration. However, the courts ingeniously found consideration, which was the only way to enforce this promise. The nephew was said to have suffered a detriment in that he had "made the most material changes in his position,"[14] and the uncle was attributed with a benefit in that the marriage "may be an object of interest to a near relative."[15]

Thus the common law was prepared to clothe a gift with the vestments of a bargain to fill the gaps of *nudum pactum*.

Though these practices may remedy some of the rigid qualities of the doctrine of consideration, they may also be criticised[16] on the ground that it gives the courts a virtually unlimited discretion to hold promises binding or not as they please. There are very few situations in which it is utterly impossible to "invent" or "find" some consideration, but there is no compulsion on the courts to do so. Thus the argument that the promisee might have suffered prejudice by acting in reliance on a promise is in some cases made a basis of decision, while in others, precisely the same argument is rejected.[17] The courts have not been very consistent in the exercise of this discretion and its existence is a source of considerable uncertainty in this branch of the law.

b. Reliance

A more direct approach to gratuitous promises taken by the courts can be found in situations in which reliance on a promise is treated as a substitute for consideration so as to make the promise legally enforceable, and these fall into well-recognised categories.

First, the action in reliance doctrine applies to agreements modifying an existing contract in which the duties only on one side are changed. Since the duties of the other party are left as they were, it is impossible to find any consideration for the new undertaking. Yet if the promisee of such void promise, in reliance on it, omits to perform as specified in the contract while he could have performed, thus changing his position substantially, the promisor will now be precluded from asserting a forfeiture, or claiming such

---

9 *Philpot* v. *Gruninger* (1872) 14 Wall. 570, at p. 577; *American Law Institute's Restatement of the Law, Contracts*, s. 75(1): "bargained for and given in exchange for the promise."

10 A possible reason for the rule is that the person forbearing suffers detriment because "he gives up what he believes to be a right of action" – *Callisher* v. *Bischoffsheim* (1870) L.R. 5 Q.B. 449, but in general, consideration must be something of value, not something believed to be of value; see also *Cook* v. *Wright* (1861) 1 B. & S. 559.

11 In *De la Bere* v. *Pearson Ltd.* [1908] 1 K.B. 280 and *Chappell & Co. Ltd.*v. *Nestle* [1960] A.C. 87, consideration was found in the possibility of promoting sales.

12 (1860) 9 C.B. (N.S.) 159.

13 *Cf. Lampleigh* v. *Braithwait* (1615) Hob. 105.

14 *Supra*, footnote 12, at p. 174, *per* Erle C.J. (and Keating J.)

15 *Ibid.*

16 See criticisms by Holmes, *The Common Law*, at p. 292.

17 *Offord* v. *Davies* (1862) 12 C.B. (N.S.) 748.

omission as a discharge. The promise may be express or implied.[18]

An obvious example of this is in a sales contract, a buyer's gratuitous promise to extend the contract date for delivery of goods becomes binding by the seller's reliance on the promise and the buyer may not thereafter claim that his duty under the contract is discharged by the seller's late delivery.[19]

The changed legal relations between the parties may be effected by an assurance or representation on the part of the defendant rather than by a promise, where the plaintiff changed his position in reliance. In such a case, the doctrine of "promissory estoppel" may be applicable.

The rule,first propounded in *Central London Property Trust Ltd.* v. *High Trees House, Ltd.*,[20] is as stated by Lord Denning in *Combe* v. *Combe*:[21]

> ".... Where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualifications which he has himself introduced, even though it is not supported in point of law by any consideration but only by his word."

Under the English cases, the detrimental action in reliance principle is applied to render enforceable a gratuitous promise by a creditor to forgo all or part of a debt,[22] and that by a landlord to reduce rents as in *Central London Property Trust Ltd.* v. *High Trees House Ltd.*[23]

Lord Denning, in *Combe* v. *Combe*, however, limited the *High Trees' Case* principle and said that it will not give rise to a cause of action but must be used only as a defence. As Birkett L.J. stated, the principle must be "used as a shield and not a sword."

The principle of "promissory estoppel" is also found in American law, as embodied in section 90 of *the Restatement of Contracts:*

> ".... a promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

This estoppel is wider than that which the English law applies, since it can give rise to an action and is not only a means of defence, and one wonders if the English system should also apply this wider principle to work justice, since the distinction between creation on the one hand, and modification and discharge on the other, is merely an artificial one[24] and is not justified by any rational explanation. It has also been submitted that it is not consonant with precedent.[25]

Despite these criticisms, the doctrine of "promissory estoppel" is the first frank recognition in Anglo-American law that at least some gratuitous promises are enforceable, i.e., enforceable in their own right as gifts and not as artificial or simulated bargains.

c. Principles of Equity

Beside the doctrine of "promissory estoppel", which is an equitable principle, equity has also provided other devices for the enforcement of gratuitous promises otherwise unenforceable for lack of consideration.

---

18 *Hughes* v. *Metropolitan Railway* (1877) 2 A.C. 439; *Birmingham Land Co.* v. *London & Western Railway* (1889) 40 Ch.D. 268.

19 *Charles Richards Ltd. v. Oppenheim* [1950] I K.B. 616.

20 [1947] K.B. 130.

21 [1951] 2 K.B. 215.

22 *Re William Pocter & Co. Ltd.* [1937] 2 All E.R. 36; *Ledingham* v. *Bermejo Estancia Co. Ltd.* [1947] 1 All E.R. 749.

23 *Supra*, footnote 21. Here the court held that the landlord was bound by his promise, though lacking consideration, to accept the lesser sum in full, so long as the vacancy of the flats continued. Since the promise was intended to be acted upon and was acted upon, it became binding.

24 See criticisms of *Combe's* case by A.L. Goodhart (1951) 67 L.Q.R.

25 In *Powtuary* v. *Walton* (1598), 1 Roll. Abr. 10 and *Coggs* v. *Barnard* (1703) 2 Ld. Raym., an action in assumpsit for damages has been sustained against a gratuitous bailee of chattels guilty of misfeasance. There are cases in which a promise to transfer land as a gift has been specifically enforced because of action by the promisee in reliance – *Dillwyn* v. *Llewellyn* (1862) 4 De G.F. & G. 517; *Crosbie* v. *Mcdoual* (1806) 13 Ves. Jr. 149.

(i) Declaration of trust

The law is that where A expressly declares that he or somebody else holds property in trust for B, a trust is completely constituted with two precise effects: A's declaration becomes irrevocable and, concomitantly, B can claim specific execution of the gift, since the declaration is sufficient to give the donee the equitable title to the subject-matter of the gift, be it a chose in possession or a chose in action, without any delivery, deed, or even writing, and in the absence of consideration, for in the case of pure personalty, with the possible exception of equitable interests therein,[26] a trust may be created by word of mouth. Difficulty may arise, however, as to what words will be construed as an irrevocable declaration[27].

Where, however, the trust has not been completely constituted, as for example, where the settlor has not conveyed the trust property to the trustees, but has merely promised to convey or to give, this operates as a contract to create a trust, and the well-known rule is that the intended beneficiary cannot, without valuable consideration, enforce the settlor's promised gift, for equity neither assists a volunteer nor will it perfect an incomplete gift.

Here, it seems one is back in the original position of trying to enforce a gratuitous promise. However, one interesting feature in equity is that there is an extended scope of consideration to include the so-called marriage-consideration.[28]

(ii) The Remedy of Specific Performance

This method of enforcing gift-promises was exemplified by *Dillwyn* v. *Llewellyn.*[29] While recognising the gratuitous nature of the father's promise, Lord Westbury L.C. argued that "the subsequent acts of the donor may give the donee that right or ground of claim which he did not acquire from the original gift."[30] The subsequent acts were the "expenditure by the son with the approbation by the father, (which) supplied a valuable consideration originally wanting."[31] This again savours of the patent artificialities which was an inevitable outcome of the consideration doctrine, but the practical result is clear: a parental gift-promise will be specifically enforced, if followed by the promisee's entry and his expenditure and improvements.

(iii) Equitable Licence

This achieves similar results. In *Errington* v. *Errington,*[32] the promise was held to be binding since the promisees, having acted on the promise, became equitable licensees, with an irrevocable right of occupation so long as they made repayments.

Though this helps enforce promises for the sake of justice, it is odd that the licence should be used to protect such gratuitous family arrangements; it is odder still that the court should have extended the scope of the equitable licence to protect volunteers to whom equity has vowed not to render assistance.

Such judicial practices, indicative of a change of approach from the conven-

---

26 Under s. 53(1) (*c*) of the Law of Property Act 1925 (the corresponding section in Hong Kong being s.6(1) (*c*) of the Law Amendment and Reform (Consolidation) Ordinance, Cap. 23 – "A disposition of an equitable interest or trust subsisting at the time of the disposition , shall be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorized in writing or by will."

27 See *Jones* v. *Lock* (1865) L.R. 1 Ch. 25; *Richards* v. *Delbridge* (1874) L.R. 18 Eq. 11.

28 *Re Plumptre's Marriage Settlement* [1910] 1 Ch. 609.

29 (1862) 4 De G.F. & J. 517.

30 *Ibid.*, at p. 521.

31 *Ibid.*, at p. 522.

32 [1952] 1 K.B. 290 – a promise by a father to allow his son and daughter-in-law to occupy a house he bought and furthermore orally promising them complete legal ownership provided they regularly paid off the mortgage.

tional view, is symptomatic of the change which has developed in the way lawyers think about consideration. It is no longer thought that consideration is compendious word simply indicating a a compendious word simply indicating whether there are good reasons for enforcing a promise; it is assumed that consideration is a technical requirement of the law which has little or nothing to do with the justice or destrability of enforcing a promise. Modern lawyers thus see nothing incongruous in asserting that a promise not made for good consideration should nevertheless be enforced, though to others this may seem something almost akin to heresy.[33]

C. Liabilities

Combining the principle that one has no duty to aid another with the rule that a gratuitous promise is not binding, it would have appeared that one who does nothing other than to make a non-binding promise would not be responsible for the harm resulting from his undertaking and his failure to perform.

However, with the development of the doctrine of "promissory or equitable estoppel", one is tempted to examine the obligations of the person undertaking to give the service, the enforceability of and the liability arising from:–

1. promises of things,
2. promises of services.

1. *Promises of things*

In contrast to Roman and Continental law, English law before *Donoghue* v. *Stevenson*,[34] regarded any tortious liability of the gratuitous transferor of things as being dependent on, and therefore governed by, a contractual relationship between the transferor and transferee,[35] and the duty only existed if either the chattel causing the damage was of the class of dangerous chattels or if it was dangerous for some reason actually known to the defendant.[36] According to Sir John Salmond,[37] ".... in the case of a gratuitous loan or gift of a chattel .... there is not even the duty of reasonable care. The donor or lender of a chattel owes no duty except to give warning of any dangers actually known to him." Sir Percy Winfield[38] also recognises a limited liability on the lender or donor, who, he says, is "liable only for wilfulness or gross negligence in not revealing a defect of which he knows .... It is proverbial that one must not look a gift horse in the mouth."[39]

The decision in *Donoghue* v. *Stevenson*, however, changes the position,[40] and there is no reason today for holding that the defendant's ignorance of the danger is in itself sufficient to protect him from liability if in the circumstances he ought to have known of it. The fact that the transfer is gratuitous is certainly an important matter to be taken into account in assessing the standard of care required of the transferor, but it does not have the result that the gratuitous transferor owes no duty of care to the transferee.[41]

If, however, the plaintiff has opportunity to examine the property before use, or himself actually knows of the danger and disregards it, the defendant is not liable,[42] unless he should have foreseen that the plaintiff was bound to disregard it[43].

Decisions since *Donoghue* v. *Stevenson* have, however, made it clear that the mere existence of an opportunity for inspecting the goods after the defendant has parted with them is not enough to exonerate him.[44]

---

33 This is fully borne out by the initial reactions to the *High Tree's* case which was originally looked on with great sceptism by the legal profession as an instance of Lord Denning's advanced and "unsound" views.

34 [1932] A.C. 562.

35 *Winterbottom* v. *Wright* (1842) 10 M. & W. 109.

36 *Dominion Natural Gas Co.* v. *Collins & Perkins* [1909] A.C. 646, *per* Lord Dunedin.

37 Salmond, *Law of Torts*, 10th ed., at p. 568.

38 *Text-Book on the Law of Tort*, 4th ed., at p.539.

39 Whatever the law, this saying makes an unsatisfactory legal proposition, as it lacks clarity. It is one thing to say that the donee has no ground for complaint if the gift horse is suffering from a disease and dies within a week of the gift, it is another thing to say that the donor is similarly free from liability if the horse infects another horse belonging to the donee. Sir Percy Winfield applies it in the second sense, but in popular usage it is generally limited to the first sense.

40 *Hawkins* v. *Coulsdon U.D.C.* [1954] 1 Q.B. 319, at p. 333, *per* Denning L.J.; *Griffiths* v. *Arch Engineering Co. Ltd.* [1968] 3 All E.R. 217, at p. 220, *per* Chapman J.; Marsh, *Liability of the Gratuitous Transferor* (1950) 66 L.Q.R. 39.

41 The duty of care, would seem to be that stated by Lord Atkin in *Donoghue* v. *Stevenson* , namely, that "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in".

The only way in which liability could conceivably be excluded in the case of a gift and, it is submitted, in that of a gratuitous loan, is by the doctrine of *volenti non fit injuria*. This doctrine presupposes not merely acceptance of a risk, but also knowledge of the risk. Such knowledge is lacking *ex hypothesi* where the chattel with a hidden defect is lent to a transferee, and it is sought to make the transferor liable because he ought to have known of the defect and warned the transferee of its existence. A gratuitous lender or donor of a chattel must, therefore, in accordance with the principle of *Donoghue* v. *Stevenson* use reasonable care if he chooses to put the chattel into circulation.

2. *Promises of service*

a. Undertakings of services.

In the case of a gratuitous bailment,[45] as illustrated in the famous case of *Coggs* v. *Barnard*,[46] which arose out of A's gratuitous carriage of B's brandy, two things are implicit: the bailee must use at least some care and skill towards B's property; and more important, he can be under no duty before he becomes bailee.

The standard of care of a bailee depends on the nature of the bailment, and in the case of a gratuitous bailee, he is only liable for gross negligence, though there is some difficulty as to what is gross negligence as distinguished from ordinary or slight negligence. If his situation or profession is such as to imply skill, he is bound to use such skill and is guilty of culpable negligence if he does not, despite the fact that the bailment is gratuitous.[47] It is no answer to a charge of negligence for a bailee to show that he kept the goods with as much care as his own. He must show reasonable care assessed by the prudent man.[48]

Since B can be under no duty before he becomes bailee, it follows that while the law has thus watched the manner of A's performance, it has not enforced a completely executory favour. These principles were carried over to gratuitous agency through the decision in *Wilkinson* v. *Coverdale*[49] where Lord Kenyon C.J. ".....acquiesced in the distinction", that even though A is not liable for an initial failure to perform, he is liable for negligent performance.

Nevertheless, this distinction can often be unfortunate. What valid distinction is there where A has promised to take a policy of insurance on B's house and takes none, and a case where he makes such a promise and takes one so improperly drawn that it proves uncollectable when the property burns? It is often impossible to draw any logical line between affirmative and negative conduct, or, that is, between misfeasance and nonfeasance.

To avoid this or similar results, *the Restatement of Agency* has, in section 378, provided that even a gratuitous agent must perform his promise, if the principal relying on the agent refrains from taking other steps to secure performance or if the agent does not notify the principal of his intention not to perform while the latter still has available means to secure performance; the agent, however, is under no duty to his principal if at the time of his promises the principal would have had no other person to perform the service except that particular agent. This is not in conflict with English authority. Even the principle laid down in *Elsee* v. *Gatward*,[50] to the effect that a voluntary promisor may abandon his service if and when he wishes, can easily be reconciled with that section. For when *Gatward* refused to complete his gratuitous labour, *Elsee* was not only notified of his refusal but was then also able to secure performance. In these circumstances, *Elsee* had only himself to blame if he subsequently suffered damage.

Since *Donoghue* v. *Stevenson*, many problems of nonfeasance may be discussed by the courts as though they simply raised the issue of foreseeability, and the dis-

42 *Farr* v. *Butler Brothers & Co.* [1932] 2 K.B. 606. Perhaps in cases of this kind the damages should now be apportioned under the Law Reform (Contributory Negligence) Act 1945.

43 *Denny* v. *Supplies and Transport Co. Ltd.* [1950] 2 K.B. 374.

44 *Griffiths* v. *Arch Engineering Co. Ltd.* [1968] 3 All E.R. 217.

45 See Paton, *Bailment in the Common in the Common Law* (1952) 93 *et seq.*; 2 *Halsbury's Laws of England* (3rd ed. 1953) 97 *et seq.*; Crossley Vaines, *Personal Property* (4th ed.) p. 75 *et seq.*

46 (1703) 2 Ld Raym. 909.

47 *Wilson* v. *Brett* (1843), 11 M & W. 113; *Shiells* v. *Blackburne* (1789), 1 Hy. Bl. 158.

48 *Doorman* v. *Jenkins* (1834), 2 Ad & El. 256.

49 (1793) 1 Esp. 75.

50 (1793) 5 T.R. 143.

tinction between nonfeasance and misfeasance has now been thrown into judicial disregard.

If such be the operative rules, the law is by no means unsatisfactory. There is obviously a a real difference between a favour and paid-for service, and one cannot attach the same obligations to a courtesy as one attaches to a valuable bargain. Only where non-performance of a favour would cause unavoidable harm does legal intervantion seem appropriate or needful. [51]

Again, it is mainly in connection with favours that the usual arguments directed against the enforceability of gratuitous promises find their proper application, *i.e.*, the argument that a gratuitous promise is often careless, and the argument that, outside bargains, we need a sphere where promises can be revoked with impunity. Suppose the simple case where A promises B a lift and A then discovers his inability to do so because of a previous engagement. We all accept A's right to revoke his promise, though we may not like it to occur "at the last moment." But why do we accept this? The answer is briefly that people (relatives, friends, acquaintenances and even strangers) often promise favours, and that in making such promises they may often forget previous and more pressing engagements. It is principally in this sense that a gratuitous promise can be sufficiently careless to require a right of revocation. Thus, the rationale applicable to favours is not at all identical with that applying to gifts, for people will more readily, and often rashly, promise kindly turns than gifts. Furthermore, even where the promisor does not do the good turn, the promisee is usually still able to buy other and equivalent service; but in the case of those parental or friendly gift-promises which we have seen to be enforceable, the promisee has no alternative source of support or help apart from those persons from whom such help can be expected.

b. Free Advice

Before *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*, [52] the position with regard to advice, or statements in general , was that there could be no tortious liability of any kind for a misstatement so long only as it was not dishonest, and there could be no liability with regard to negligent misstatements apart from contract or fiduciary relations, or, perhaps, in a case of physical damage to person or property.

After *Hedley Byrne's case,* it is clear that a duty of care may exist in other circumstances, but the scope and extent of the duty remains obscure.

Generally speaking, foreseeability of harm, or at least of physical harm, is sufficient to establish a duty to act with reasonable care. It is clear from *Hedley Byrne* itself that for a duty of care in speech or writing, there must be a special relationship between the parties, [53] which existence must be determined by the courts. Without such a limitation, there would be liability "in an indeterminate amount, for an indefinite time and to an indeterminate class." [54]

The core of the reasoning in *Hedley Byrne* is that the duty of care arises from an undertaking, express or implied, by the defendant that he will exercise care in giving information or advice and that this undertaking need not be supported by consideration. In these situations, it was both foreseeable by the defendant that the plaintiff would rely upon his statement and reasonable for the plaintiff to do so; if in a given case, either of these elements is lacking, as they would be if the statement were made on a social occasion, it can confidently be predicted that no duty of care will be held to exist. [55]

It may be, that a duty would be imposed if the defendant has held himself out in some way as possessing skill or knowledge relevant to the subject matter of the plaintiff's inquiry, [56] and it is probably necessary that the defendant should be able to foresee not merely reliance of some kind by the plaintiff, but the particular transaction which he has in mind. [57] The duty,

51 Such, it is submitted, is the concise effect of s. 378 of *the Agency Restatement*.

52 [1964] A.C. 465; Weir, *Casebook on Tort*, 2nd ed., at p. 38.

53 *W.B. Anderson & Sons Ltd.* v. *Rhodes (Liverpool) Ltd.* [1967] 2 All E.R. 850, at p. 853, *per* Cairns J.

54 *Ultramares Corporation* v. *Touche* (1931) 255 N.Y. Rep. 170, *per* Cardozo C.J.

55 See *Mutual Life and Citizens' Assurance Co. Ltd.* v. *Evatt* [1971] 2 W.L.R. 23, at p. 36, *per* Lord Reid and Morris.

56 This seems to be the view of Lords Morris, Hodson, and Pearce in *Hedley Byrne*, and all cited with approval the statement of Lord Loughborough in *Shiells* v. *Blackburne* (1789) 1 H. Bl. 158 that "if a man undertakes gratuitously to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence".

57 Or a transaction substantially identical therewith: *Restatement* s. 552.

where it exists, is a duty to take reasonable care.

Inevitably, a defendant should incur no liability if he makes it clear from the outset that he accepts no responsibility for his statement,[58] subject to certain qualifications.[59]

In conclusion, it may be observed that this is a somewhat hazy and undeveloped part of the law, and the problems raised are purely policy questions. It may also be observed that there are good policy reasons for imposing liability in many cases of this kind, namely, that the gratuitous undertakings of service leads other people to rely on it and so create damage which would not have arisen without it. However, another consideration of policy which points in the opposite direction is that people may simply become less willing to undertake voluntary gratuitous services for their neighbours if they thereby come under legal liabilities.[60]

In any case, the proper situation should be that, where a person represents by word or act that he has done or will do something upon the performance of which he should realize that others will rely, he is liable for expectable harm caused by the reliance of others and his failure of performance, if his representation was negligently or intentionally false, or if without excuse he fails to perform.

c. Rescurers and Good Samaritans

There is no general duty to assist anyone in any circumstances.[61] However, there is little doubt today that if a person voluntarily and gratuitously starts carrying out some operation by way of assistance to another, he will be liable if by his affirmative negligence he then causes physical injury or damage, but not if he failed to help at all, even after agreeing to do so.

Thus, a doctor who sees a man injured in a road accident may walk by without incurring any legal liability; but if he actually starts to render assistance, he may well be liable for failing to act according to reasonable care and skill.

Thus, once someone starts giving assistance or undertakes a rescue, he not only risks injury to himself, he may also be responsible in tort to the person he tries to rescue if the effort is bungled. Though such a rule would be rather hard on the well-meaning rescuer and might tend to discourage potential Good Samaritans, nevertheless, it seems to be the law.

In *East Suffolk Rivers Catchment Board* v. *Kent*,[62] however, the defendant agency was relieved of liability on the ground that it had exercised its discretion in an acceptable way. Despite the fact that the plaintiff was not well served, his position was not worsened by their actions. This test was also adopted by Justice Jessup in the Court of Appeal in *Horsley* v. *MacLaren*.[63] He contended that "where a person gratuitously and without any duty to do so undertakes to confer a benefit upon or go to the aid of another, he incurs no liability unless what he does worsens the condition of that other."[64]

This seems to be a wise policy so long as it does not foster careless rescue operations. It is possible to mismanage a rescue attempt horribly and yet not worsen the position of the already doomed man. The law must fashion a rule that does not inhibit would-be rescuers and yet does not invite well-meaning bunglers to interfere.[65]

It is hard to tell whether the above test will really increase the frequency of rescue efforts, but a least the excuse of fear of liability will be unavailable to Bad Samaritans in the future.

---

58 *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964]A.C. 465, at p. 533, *per* Lord Devlin.

59 *Cf. Winfield and Jolowicz on Tort* (9th ed.), at pp. 236–7:
1. if there is deceit, one cannot exclude liability by a disclaimer.
2. the duty of honesty, if different from the duty to abstain from deceit, will not be excluded by a disclaimer save in the unlikely event that the defendant has expressly stated that he does not propose to give an honest answer.
3. Words of exclusion should, following the normal practice, be interpreted contra proferentum.
4. The disclaimer must have been made before or at the time that the defendant supplies the information or advice. Once a responsibility has been accepted it cannot be avoided save by agreement between the parties – this seems to be suggested by Lord Devlin in *Hedley Byrne's* case, and would accord with general principle.

60 In America it is notorious that doctors will not render assistance to people injured in road accidents for fear of being sued for negligence.

61 *Horsley v. MacLaren* [1970] 2 O.R. 487, at p. 499, *per* Jessup J.A.; *Gautret* v. *Egerton* (1867) L.R. 2 C.P. 371.

62 [1941] A.C. 74.

63 [1970] 2 O.R. 487 (C.A.), reversing 1969 2 O.R. 137.

64 *Ibid.*, at p. 500.

65 A preferable approach might be one pioneered in the United States. Over thirty American jurisdictions have enacted legislation relieving doctors and nurses and, on some occasions, ordinary citizens from tort liability for their conduct at the scene of an accident, except if they are guilty of gross negligence.

Besides the possibility of being mulcted in damages where his effort was bungled, years ago, a rescuer may be denied tort remedy if he was injured in a rescue attempt on the ground that they had voluntarily assumed that risk of injury or on the ground that the defendant was not the cause of their loss,[66] and the common law did not go out of its way to reward such chivalrous and gallant conduct, *e.g.*, in *Cutler* v. *United Dairies,*[68] Slesser L.J. said that although the act was "heroic and laudable", it cannot be said that it was "in the legal sense the cause of the accident."

The matter was finally settled by the great American judge, Justice Cardozo, who stated the principle in *Wagner* v. *International Railway Co.*, that the wrongdoer, who had imperilled the life of the victim, is liable to the rescuer, where a rescue would be reasonably foreseeable.[69]

In 1938, the English courts finally followed the Canadian and American lead and granted recovery to the rescuer. In *Haynes* v. *Harwood,*[70] Greer L.J. in the Court of Appeal justified the decision as follows: "It would be a little surprising if a rational system of law .... denied any remedy to a brave man."[71] Maugham L.J. pointed out that it is necessary to balance the interests which are sought to be protected and the other interests involved. In other words, one must take into account the degree of danger and the probable response of the rescuer.

In *Videan* v. *British Transport Commission*, the duty to the rescuer was extended to cover a rescue of an "unforeseeable" trespasser. In the words of Denning L.J.: "Whoever comes to the rescue, the law should see that he does not suffer for it."[72] Similarly, someone who suffered anxiety neurosis after he helped in a rescue operation after a train wreck was permitted to recover tort damages in circumstances where they probably would have been denied an ordinary bystander.[73]

A person is not only liable to those injured while rescuing third persons that he places in danger, but, if he gets himself into trouble, he owes a duty to someone who comes to his aid.[74]

The common law does not protect every single rescuer no matter how foolish his attempt may be; there must be some reasonably perceived danger to a person or goods,[75] and the conduct of the rescuer must be reasonable in the circumstances.[76] In fact, there is authority to the effect that contributorily negligent rescuers cannot recover at all.[77]

Now, however, legislation permits the splitting of responsibility under section 21(1) Law Amendment and Reform (Consolidation) Ordinance, Cap. 23, in Hong Kong.[78] There is, therefore, no reason why a reduced award cannot be granted to the rescuer which would give him something for his heroism without ignoring the fact that he was less than careful.

Where, however, there is lack of foresight and absence of duty, the court may still deny compensation altogether.

In conclusion, the courts are beginning to use tort law to encourage rescuers and Good Samaritans. New duties to act are being created. The standard of care demanded of rescuers is being diminished. Injured rescuers are being compensated, even where they are partially to blame for their loss. Perhaps greater care and more gratuitous acts of chivalry will be fostered by this rule. In any event, there are fewer rescue situations today where the

66 *Anderson* v. *Northern Railway of Canada* (1876) 25 U.C.C.P. 301 – the Court of Appeal while expressing admiration for P's "gallant self-sacrific", held that the injury was "self-sought" and "self-caused". Also see *Kimball* v. *Butler Brothers* (1910) 15 O.W.R. 221 (C.A.) – the court there refused to impose liability on the defendant because the rescuer was acting "solely as a volunteer" and with a "full comprehension of danger".

67 [1933] 2 K.B. 297 (C.A.).

68 In *Brandon* v. *Osborne Garrett Co.* [1924] 1 K.B. 548, the problem was avoided when Swift J. Described as "instinctive" the rescue act of a wife who tried to pull her husband away from glass falling from a sky-light.

69 232 N.Y. 176, 133 N.E. 437 (1921).

70 [1934] 2 K.B. 240; affirmed [1935] 1 K.B. 146 – a police constable tried to push a woman out of the way of a runaway horse and was injured in the attempt.

71 *Ibid.*, at p. 152.

72 [1933] 2 All E.R. 860, at p. 868.

73 *Chadwick* v. *British Transport Commission* [1967] 2 All E.R. 445.

74 *Baker* v. *Hopkins* [1958] 3 All E.R. 147.

75 *Ould* v. *Butler's Wharf* [1953] 2 Lloyd's Rep. 44.

76 *Baker* v. *Hopkins*, supra, footnote 74, at p. 153; *Seymour* v. *Winnipeg Electric* (1910) 13 W.L.R. 571.

77 In *Brandon* v. *Osborne Garrett Co., supra*, footnote 68, the court indicated that if a rescuer "did something a reasonable person ought not to have done", he will be denied recovery.

78 The corresponding English Act – The Law Reform (Contributory Negligence) Act 1945.

law is out of step with current notions of morality, which is something to be welcomed.

D. Reforms

As far as liability is concerned, we have seen that the law is apparently working towards satisfactory results, which is to be commended.

The facet of the law relating to gratuitous undertakings which is most in need of reappraisal is that in relation to the enforcement of a gratuitous promise.

We have seen from section B.2. of this dissertation, that although consideration has had a useful role to play in the early development of the English law of contract, at the present it only serves to frustrate the legitimate wishes of the contracting parties, and has placed a great obstruction in the administration of justice, in that the courts, in order to arrive at a just result, would have to go round the doctrine of consideration.

English lawyers felt somehow attached to a doctrine which, for all its defects, has been at the basis of the English law of contract for several centuries. But if a concept does not give satisfaction, and it is generally admitted that consideration does not, one is entitled to ask whether there is not a need to attempt a fresh approach to it.

If the need to re-examine consideration is obvious on rational grounds, recent developments have made it an urgent necessity, for since the United Kingdom had successfully entered into the European Economic Community, one of the most important topics in the programme of the English Law Commission is the revision and codification of the law of contract,[79] to promulgate "a code which, as far as possible, will facilitate a closer association between the United Kingdom and the Continent of Europe."

In particular, with regard to consideration, the practical problem that will arise is that, whereas under English law the absence of consideration is fatal to a contract, in continental law a mutual exchange of declarations may be binding even though performance may be contemplated by one side to a contract only. It is not difficult to imagine instances in which an English business man may plead absence of consideration and avoid a contract in circumstances in which his German counterpart would be bound.

The essence of reform would be to adopt the most rational solution which responds to the dual objectives of the Law Commission, namely, the improvement of English law , and its approximation with European law.

Such reform, if adopted, would undoubtedly have great repercussions affecting the law as to gratuitous promises.

1. *Early Attempts at Reform*

After Lord Mansfield's attack on consideration as early as 1756,[80] came the *Report of the Law Revision Committee of 1937,* suggesting piece-meal reform of the law in its recommendations.[81] The failure of the Report is a double one. It failed to satisfy those who were in favour of consideration and it did not gain the acceptance of those who wished to see it abolished. In effect, the Report spelt the abolition of the doctrine through the backdoor, for, as most contracts are made by correspondence, writing would have provided a substitute for consideration. The approval of a moral obligation as good consideration would have covered oral agreements. The rest would have been modified by the Committee's other proposals, *e.g.*, the proposal to abolish the rule that past consideration is no consideration. Had these proposals been put into effect, they would have resulted in the virtual abolition of the doctrine of consideration although in theory English law would have still been governed by that doctrine.

2. *The Abolition of the Doctrine of Consideration?*

It had already been suggested in this dissertation that the doctrine of consideration adds nothing substantial to the certainty of English law. It can be assumed

---

79 The Law Commission, *First Annual Report* 1965-66 (*Cmnd.* 84152) s. 31.

80 He refused to recognise it as the vital criterion of a contract, and treated it merely as evidence of the parties' intention to be bound. If such an intention could be ascertained by other means, such as the presence of writing consideration was unnecessary.

81 See Treitel, *The Law of Contract* (3rd ed.) at pp. 118-9.

that if the doctrine of consideration is abolished, the general principles of the English law of contract are sufficient to validate agreements. Continental countries have managed quite well without this doctrine, why can common law countries not do the same?

It has been argued, however, that to talk of abolition of the doctrine of consideration is nonsensical.[82] Nobody can seriously propose that all promises should become enforceable. To abolish the doctrine of consideration, therefore, is simply to require the courts to begin all over again the task of deciding what promises are to be enforceable.

On the other hand, something can be said for beginning this task again, using a new technique, since changes in social and commercial conditions, and changes in the moral value of the community, mean that the courts will not always find the same reasons for the enforcement of promises to be good today as their forbears did, *e.g.*, the fact of reliance has now been held a good reason for enforcing gratuitous promises.

An obvious device that lies to hand to meet this task may be the requirement of an "intent to create legal relations," which has already been used by the courts today. Formal requirements of the seal, or the continental practice of certification by notaries of the documents,[83] may serve as evidence of an intention to create legal relations, and thus acting also as safeguards against rash promises, but these should not become a technical requirement.

Besides leading to a closer link between common law countries and continental countries, there is also less likelihood of the "intent to create legal relations" formula ossifying into a rigid "doctrine" as the doctrine of consideration did; though there is the converse danger that its application may create uncertainty as to what promises will be enforceable.

To provide certainty in this area of the law, it seems desirable to provide clear and precise legislation. The first need, therefore, is to declare valid all agreements that are seriously meant. It should be added that no form is needed unless it is specialy required by law.[84]

A promise which the promisor knows, or reasonably should know, will be relied upon by the promisee and is acted upon by him to his detriment should be binding. In this connection, perhaps, the law should strike a compromise between the views that such promises are either fully binding or not binding at all. This could be done by laying down that the promisee should not necessarily be able to enforce the actual promise, but that he should recover damages to the extent to which he has been prejudiced as a result of his reliance on the promise.[85]

Justice for the promisee must be balanced by justice for the promisor, thus, it would be wise to provide for a much wider defence of frustration and mistake in the case of gratuitous promises.

E. Conclusion

Undoubtedly, most would agree that the law should foster undertakings of kindness as far as possible while not causing hardship to the promisor – an almost impossible task likely to confuse the Utopian legislator. A choice between English, Continental, or American law would not prove entirely sufficient, for each system has its own advantages and set-backs.

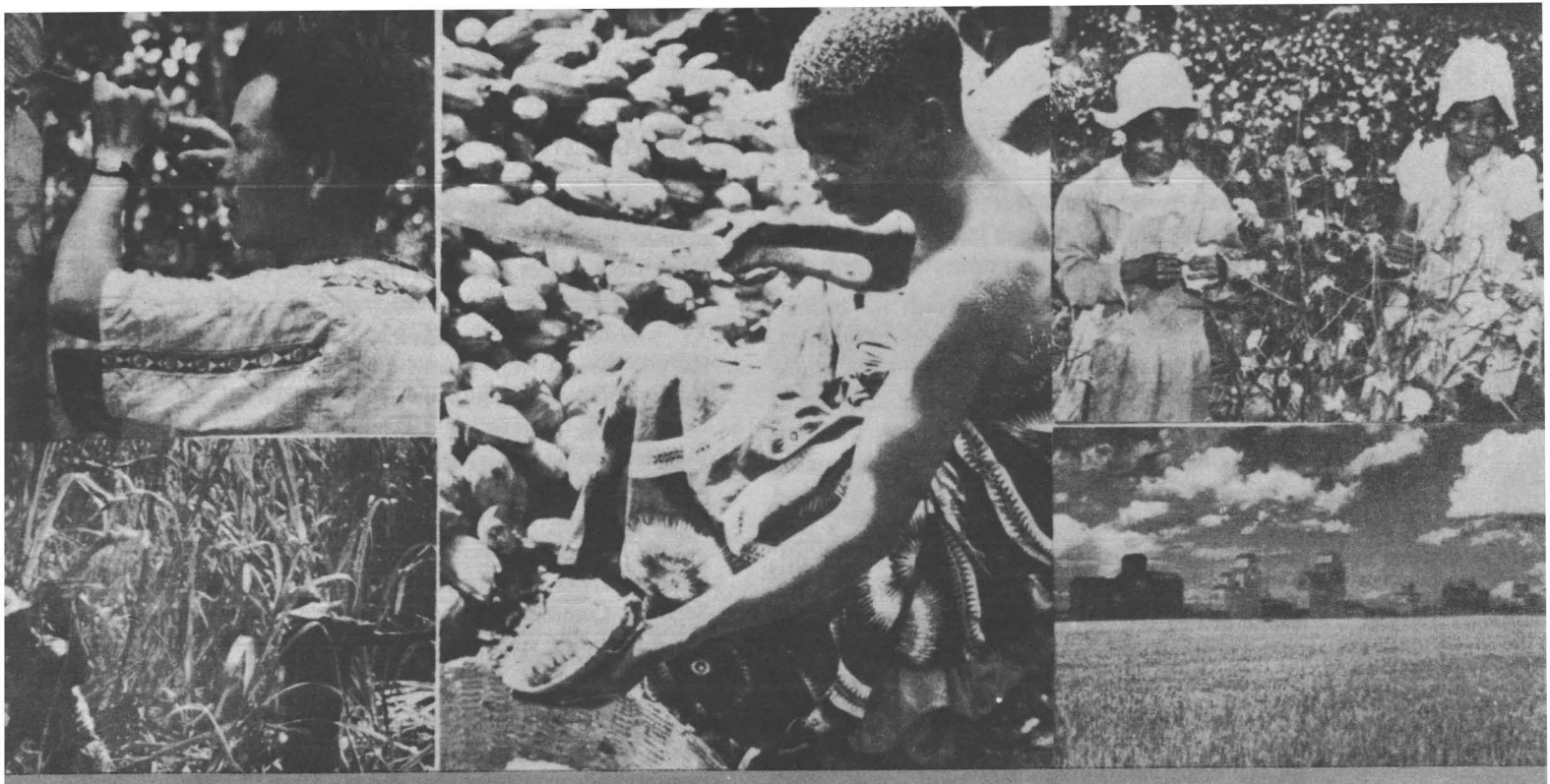
The restatement of the law which the actual decisions compels us to adopt differs from the conventional approach, in recognising the importance of untypical and marginal cases. It is not, however, merely a question of recognising that there are exceptions to the ordinary rules to which adequate attention has not been paid. It will require in particular that lawyers should think in terms of reasons for enforcing a promise or allowing recovery for injury resulting therefrom. It will require lawyers to recognise that the presence of factors like benefit, detriment, and bargain are taken into account because they are often very material factors in determining whether it is just or desirable to enforce a promise or allow for recovery; and this necessarily involves recognition that these are not the only facts to which attention must be, and is in practice, paid by the courts, for other cirurcumstances also contribute to make each individual case distinct from each other, and thus requiring different considerations.

82 Atiyah, *Consideration in Contracts*.

83 The intervention of a neutral official fulfils several objects: it facilitates the proof of the transaction, serves as a check of the capacity of the parties and ensures that the donor acts only after due deliberation and thereby also serves as a protection of his family.

84 For some proposed reforms by legislation – see A.G. Chloros, *The Doctrine of Consideration and the Reform of the Law of Contract*, at pp. 162-4.

85 Cf. *the Tentative Draft of Restatement, Contracts*, 2d. s.90, which concludes that "the remedy may be limited as justice requires". This *Draft* also omits the requirement of "substantial" reliance.



COMMODITIES: PROTECTION OF SPECULATORS IN HONG KONG

Cheung King Poon

Introduction

The purpose of this essay is to consider the laws controlling speculations on commodities in Hong Kong from the point of view of protection of investors. Here, although the interests of investors are protected to the extent that establishment of unregulated commodity exchanges is prohibited, investors are not protected when speculating in the overseas exchanges because the brokers through which they speculate are not subject to statutory control.

In the subsequent paragraphs, we shall examine how, on the one hand, unregulated commodity exchanges are prohibited by the *Commodity Exchange (Prohibition) Ordinance*[1] and, on the other hand, how investors are subject to the malpractices of brokers, the way these malpractices are checked, whether these checks are sufficient and what reforms are needed in this respect.

Method of Trading in Commodities

Basically, a commodity exchange is a place where consumers of commodities buy from the producers.[2] In the exchange, goods may be sold on the spot[3] or for delivery in future. The period of future delivery may range from one to six months. Thus, rice which is still in the padi might already have been sold in the exchange.

The price for any commodities fluctuates, and such fluctuation may be substantial even

1 Ord. No. 54/73.

2 A 'commodity exchange' is defined in the *Commodity Exchange (Prohibition) Ordinance* as 'a market or exchange at or through which persons regularly offer commodities for sale or exchange'. This is a rather wide definition and covers even retail markets for foodstuffs and wholesale markets for vegetables and fisheries. This essay, however, is not concerned with the dealings in this type of markets. What it is concerned with are large-scale commodity exchanges with millions of dollars as turnover per day. Any later reference to 'commodity exchange' will be to this type of commodity exchanges.

3 This means sales for delivery in the immediate future.

within a day's time. This feature caters for speculation and speculative trades are usually bigger in volume than consumptive trades.

A speculator transacts through his broker. If he anticipates a rise in the commodity price, he buys; otherwise he sells short.[4] Since speculators are not interested in the delivery of the goods, they will usually offset the outstanding trades before the delivery date by means of a converse order.[5] Thus the person who had sold short before will now have to effect a purchase order in settlement and vice versa. The difference in price represents the gain or loss to the speculator as the case may be. A commission will be charged by the broker for every sale or purchase. Also, before accepting any orders placed by a customer, whether it be buying or selling short, the broker will demand a payment of margin.[6] This varies but normally ranges from 5% to 15% of the contract value. A broker who is not given credit by the exchange has to pay over to the exchange the margins received from the customers. Otherwise he pays over only that part of the margin which is in excess of the amount of credit allowed to him. The margins will be returned to the customer after he has settled the outstanding trades.

Since trading is on a margin basis, a small fluctuation in price will bring about a relatively large gain or loss. For example, where the margin payable is 6%, a variation of price for 6% will cause the speculator to lose all his money if the change in price is in the opposite direction to that which is expected.[7]

The Commodity Exchange (Prohibition) Ordinance[8] and its Spirit

There had been attempts to set up commodity exchanges in Hong Kong. But such attempts had been frustrated by the above Ordinance. The facts are that during the ten months or so preceding this Ordinance, the Hong Kong stock prices had risen from a level of about 600 points in the Hang Seng Index to a peak of 1774.96 in 9th March, 1973 and then back catastrophically to the 600 point level. Whereas the big speculators had profited, the majority of the losers were the average citizens. Subsequent to the happening of this, the government was alarmed and realized that the speculative fervour must be calmed down and the investors protected. Drastic measures were introduced: daily trading period shortened, stamp duty increased, a Security Commissioner appointed and, above all, the number of stock exchanges was restricted to four.[9]

It was at this stage that attempts were made by four commercial concerns to open up commodity exchanges in Hong Kong.[10] Unfortunately for them, this was in direct conflict with the government's policy to minimize speculations. The Government's policy could be seen by reference to a speech by the Financial Secretary in the Legislative Council meeting on 20th June, 1973.[11] He said:

> "Operations on a commodity exchange are in many ways more risky even than on a stock exchange and the small man who risks his capital in this way can very easily lose it.
>
> ..... the establishment of a number of unregulated exchanges could well produce a dangerous speculative situation.
>
> ..... given the technical and complex nature of commodity markets and their highly speculative and volatile characteristics such exchanges should not be permitted to operate before adequate regulations so vital

4 Selling goods that one does not possess in the hope of buying back later on.

5 It has been held by the House of Lords in *Universal Stock Exchange Ltd.* v. *Strachan* (1896) A.C. 166 that where both parties to contracts for the sale and purchase of stocks *intend* that no stock shall be delivered and that differences only shall be accounted for, the contract is a wagering one and is void under the Gaming Act, 1843, which says: 'All contracts or agreements .... by way of gaming or wagering shall be null and void; and .... no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager.' By virtue of this, a broker cannot sue his customer for any money lost by him and vice versa. This case in on stocks, but there seems to be no reason for not extending this principle to commodities.

This Act, however, has no application to Hong Kong. Thus, wagering contracts are valid in Hong Kong under the Common Law and the customer may be sued for his loss if it is in excess of the margins paid.

6 The amount deposited by a client with his broker to protect the broker against losses on contracts being carried or to be carried by the broker.

7 For greater details refer to *'How to Buy and Sell Commodities'* issued by Merrill Lynch, Pierce, Fenner & Smith Inc.

8 *Supra.*

9 S.4 of the Stock Exchange Control Ordinance, 20/73 S.11 of Stamp (Amendment) Ordinance 41/73.

10 *Hong Kong Hansard* 1972/93.

11 Order No. 54/73.

to the proper running of a reputable international market have been worked out."

It could be seen from the above that the objective of the Government was to protect the 'small man' against losing his capital. In an attempt to achieve this objective, the Commodity Exchange (Prohibition) Ordinance was passed. The material part of which states:

s.4 (1) No person shall –
a) establish or operate a commodity exchange to which this Ordinance applies; or
b) Knowingly assist in the operation of any such commodity exchange.

(2) Any person who contravenes subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine of $500,000 and, in the case of a continuing offence, to a fine of $50,000 for each day during which the offence continues.

Four exceptions are given, of which the relevant one is given in

s.3 (*d*) a commodity exchange which was in operation on 20th June, 1973.

By virtue of this, the Chinese Gold & Silver Exchange is unaffected.

The list of prohibited commodities is made up of 20 items: Barley, Cocoa, Coffee, Copper, Cotton, Gold, Lead, Maize, Oats, Platinum, Rice, Rubber, Silver, Oil seeds and Vegetable oils, Sugar, Timber, Tin, Wheat, Wool, Zinc. To this list were subsequently added 4 other items: Jute, Frozen meat, Poultry, Fish.[12]

The Effectiveness of the Ordinance

Does the Ordinance effectively achieve its objective in protecting the 'small man' against losing his capital? It is effective only to the extent that it successfully insures the speculators against one of the two types of risks inherent to the commodity trade. The risks are, firstly, that of an unregulated exchange and, secondly, that of uncontrolled brokers.

Commodity speculators here are not protected in respect of the conduct of the brokers. who deal in the overseas markets. Their operation is not within the above Ordinance, hence they are not banned. Yet for reason that their conducts are not controlled, investors are liable to be defrauded by them.

Possibility of Fraud in the Operation of the Commodity Brokers Dealing in the Overseas Markets.

These brokers were established in Hong Kong only as late as about 5 years ago. At present there are about twenty of them dealing respectively in the U.S., London but mainly the Japanese markets. They receive orders from the local people and trade in the overseas exchanges on their behalf. Everyday, prices are intermittently transmitted to Hong Kong by telex. According to these prices, people may speculate.

As we shall see presently, brokers operating in their country of origin are subject to effective disciplinary controls imposed either by the Exchange or by the Government. Yet those brokers who receive orders from the local people and trade in the foreign markets are not specifically controlled. This loophole exists in Hong Kong and apparently also in England. In the U.S., there are some controls on this latter type of brokers but their effectiveness is doubtful.

Malpractices Open to a Commodity Broker

In the absence of control, malpractices are open to a commodity broker. We shall examine what these malpractices are, how they are checked, and what more needs to be done to prevent them:

a) There is a grave suspicion that instead of executing the orders placed by a customer, the broker may keep the order and absorb the profit or loss himself. This practice is made possible because, unlike transactions in security, the transaction in commodity does not involve a negotiable instrument to be surrendered to a buyer. On placing an order and paying the necessary margin, the speculator is only given in return a

12 Legal Notice No. 163 – *Commodity Exchange (Prohibition) Ordinance (Amendment of Schedule)* Notice 1973.

margin receipt and a confirmation from the broker that the order has been executed. But whether the order has actually been executed the customer could never know. Also, in view of the fact that inexperienced speculators tend to lose rather than to gain, there is a strong incentive for the brokers so to behave. In fact there is mutual accusation among the broker firms that the others are behaving in this manner.

This practice, if proved, will constitute the offence of obtaining property by deception as stated in the Theft Ordinance[13]

> s.17 (1) Any person who by any deception (whether or not such deception was the sole or main inducement) dishonestly obtains property belonging to another, with the intention of permantly depriving the other of it, shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for ten years.

This can be prevented in the case of a broker trading in the homeland. In America, for example, this practice is prevented by the Commodity Exchange Act [14]:

> s.6 (g) Reporting and record keeping requirements of futures commodities merchants and floor brokers.
>
> "Every person registered hereunder as futures commodity merchant or floor broker shall make such reports as are required by the Secretary of Agriculture regarding the transactions and position of such person and the transactions and position of the customer thereof, in commodities for future delivery on any board of trade in the U.S. or elsewhere."

By requiring the brokers to keep full records, the government can, when necessary, check with the exchange whether an order has been executed in fact.

Yet it is doubtful whether the brokers trading "elsewhere" can be affected. A broker of this category will normally telex the orders of the customers to an agent in the country of the exchange. On the face of the broker's records, there will thus be no malpractice. Cross checking with the exchange is difficult since it is situated overseas. For the same reason, it is difficult to obtain evidence to prove the crime of deception. In order to be effective, this statutory provision has to be complemented by an additional measure to be discussed in the next section.

Nevertheless, this malpractice as such would normally cause no pecuniary detriment to the customers. Whether the order is executed or not, the customer will nevertheless win or lose the same amount of money. Yet it gives rise to a problem to be discussed in the next section.

b) The second risk accruing to the investors is a consequence of the above malpractice. It is that if the broker does not actually execute the orders, he will be left with a free hand to use the customers' money for his own purposes instead of paying it over to the exchange. Also, there is the possibility that if the winnings of the customers should be so much as is beyond the means of the broker, they will be left without a claim. Could this be prevented?

In America, by the joint effect of three sections of the Commodity Exchange Act,[15] control is imposed on the brokers dealing in the local and overseas exchanges:

> s.6 (d) Future commission merchants, dealing by unregistered merchants prohibited; moneys and securities of customers' care and use.
>
> "It shall be unlawful for any person to engage as a future commission merchant in soliciting orders or accepting orders for the purchase or sale of any commodity for future delivery, or involving any contracts of sale of any commodity for future delivery, on or subject to the rules of any contract market unless—
>
> 2) such person shall .... treat and deal with all money, securities and property received by such person to margin, guarantee, or secure the trades or contracts of any customer of such person, or accruing to such customer as the result of such trades or contracts, as belonging to such customer. Such money, securities and property shall be separately accounted for and shall not be commingled with the

13 Cap. 210.

14 & 15 Sept. 21, 1922, Ch. 369 ss 1, 42 Stat 998.

funds of such commission merchant or be used to margin or guarantee the trades or contracts, or to secure or extend the credit of any customer or person other than the one for whom the same are held: Provided however, that such ..... share thereof as in the normal course of business shall be necessary to margin, guarantee, secure, transfer, adjust or settle the contract or trades of such customers, or resulting market positions with the clearing house organization of such contract market or with any member of such contract market, may be withdrawn and applied to such purposes, including the payment of commissions, brokerage, interest, taxes, storage and other charges, lawfully accruing in connection with such contracts and trades .....

s.6(*f*) Registration of commission merchants and brokers; financial requirements of futures commission merchants.

(2) Notwithstanding any other provisions of this chapter, no person desiring to register as futures commission merchants shall be so registered unless he meets such minimun financial requirement as the Secretary of Agriculture may by regulation prescribe as necessary to insure his meeting his obligation as a registrant, and such person so registered shall at all times continue to meet such prescribed minimum financial requirements."

s.6(*g*) Reporting and record keeping requirements of futures commodities merchants and floor brokers (as stipulated in section a) above.)

In other words, a broker is required to keep the moneys of a customer in a separate account, and only such amount as has to be paid over to the exchange as margins, or is in discharge of other expenses stated in the statute can be drawn out. Also, the broker has to keep records of all his customers orders. This has two results. Firstly, the problem of the brokers' not being able to pay off the winnings of the customer will not arise since the record keeping requirement binds the broker to execute all orders in the exchange. Secondly, the regulations prevent the brokers from using the money of the customers for his other commitments and thereby minimize the possibility of the customers' deposits being lost through the brokers' insolvency. Any violation of this may be detected by the system of constant supervision and record checking. An additional safeguard against insolvency is the requirement that the broker must at all times meet the minimum financial requirements.

Yet, when we apply these regulations to a broker trading in the overseas exchanges, it seems that we are again beset with the difficulty mentioned in the last section, *viz.*, there are no effective checks against this type of brokers' not executing the customers' orders. Thus those brokers who does not execute the orders in the exchanges may withdraw the money on the pretext that they are paying it over to the exchanges. As a result they may use the customers' money freely.

In England, control of the brokers dealing in the local commodity exchanges is undertaken by the Commodity Exchanges themselves. The provisions therein obviously do not affect brokers trading in overseas markets. And as there are no statutory provisions specifically or otherwise governing the conduct of these brokers, official supervision on them is presumably as negligible in England as in Hong Kong.

Could there be any substantially effective sanctions in this respect? The Commodity Exchange Act requires the commodity brokers to keep up a minimum financial requirement. This may reduce the chances of insolvency on the part of the brokers, but this does not prevent the brokers from not executing the orders.

Another illustration of a negative sanction of a kind is to be found in the case of the Chinese Gold & Silver Exchange in Hong Kong. Formerly, there are no sanctions there other than determination of membership.[16] Thus there had formerly been cases of bankruptcy of brokers incurring loss to customers. Today the sanction is the result of a special feature. This is that the licence of a member is currently worth as much as $220,000. Thus, a fraudulent member is liable without more to lose the above sum. The money realized from the sale of the licence will be used to indemnify the customers. But in the case of the brokers dealing in the foreign markets, there is

16 Regulations of The Chinese Gold & Silver Exchange.

no such sanction. Also, this sanction is again not absolute.

On reviewing this section as well as section a), we find that the existing preventive measures are not sufficiently effective to prevent this type of brokers from not executing the orders. Unless there are more effective checks, investers in this business are inevitably under a risk.

These preventive checks can become effective, it is submitted, with the aid of the cooperation among the commodity exchanges in the different countries as follows: Any local commodity broker trading in a foreign exchange must submit the name of the agent through whom he executes the orders. Both the broker and the agent are to keep record of the transactions between them and each is to submit the records to the respective governments. The records kept by the broker here may be checked against the bank statement of the broker to make sure that all the customers' orders are recorded. The record kept by the agent will be verified by the foreign government to the effect that all the customers' orders recorded have been executed in the exchange. In this way the possibility of the brokers' not placing the orders and therefore of appropriating the money will be ruled out. It is submitted that it is with this additional measure that the control in America could become effective; and it is in this manner that the control should be adopted in Hong Kong. It seems that of all the relevant controls on the conduct of the brokers in our case, the requirement that all orders be executed is most crucial.

c) The third risk accruing to the speculators in our case is absconding. The difficulty in this case is that as long as money is in the hand of the broker, there is the danger of his making off with it.

An effective check, it is submitted, will be to require the broker to place with the Government a substantial sum as guarantee. This will guard against their becoming bankrupt, or not able to pay off the customers' profits or absconding.

d) A fourth malpractice open to such a broker is that in order to earn more commissions, the broker will supply the customer with false information or unrealistic forecasts so as to ask him to trade or to settle rapidly as the case may be. In case the broker keeps the order instead of executing it, there is even more incentive for giving advice which will cause the customer to lose money. Does the law give any recourse to the customer?

Civil liability

Where some false information is given to secure an order from the customer, say, for example, the world consumption of sugar is decreasing when in fact it is rising, he may be liable for deceit in tort or for fraudulent or negligent misrepresentation in contract. The ingredients for deceit have been summarised by Lord Maugham in *Bradford Building Society* v. *Borders:*[17]

1. There must be a representation of fact made by word or conduct.
2. The representation must be made with the intention that it should be acted upon by the plaintiff or by a class of persons which includes the plaintiff, in the manner which resulted in damage to him.
3. It must be proved that the plaintiff suffered damage by so doing.
4. It must be proved that the plaintiff has acted upon the false statement.
5. The representation must be made with knowledge that it is false. It must be wilfully false, or at least made in the absence of any genuine belief that it is true.

Applying this to our case, it may be said that the broker has wilfully made a false representation of fact with the intention that it shall be acted upon by the customer and has in fact been acted upon by him to his detriment. The broker will thus be liable.

He may also be sued for misrepresentation, since he has made to the customer a misrepresentation of fact which has induced him to enter into the contract. If he is sued for fraudulent misrepresentation, he will be liable if the plaintiff can also prove fraud in the sense that the statement is made either knowlingly or without belief in its truth or recklessly, careless whether it is true or not.[18] The easier course for the plaintiff, however, is to sue under negligent misrepresentation in which case the broker will be liable unless he can prove that he had 'reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true'.[19]

17 (1941) 2 All E.R. 205.

18 *Derry* v. *Peek* (1889) 14 App. Cas. 337.

19 Misrepresentation Ordinance.

Where, however, an opinion instead of information is given, say, for example, an advice is given to sell sugar when in fact one should buy, liability can only be founded on the authority of *Hedley Byrne & Co., Ltd.* v. *Heller.*[20] In that case, it was held that if someone possessed of a special skill undertakes to apply that skill for the assistance of another person who relies upon such a skill, a duty will arise. The effect of this case is moderated by the later case of *Mutual Life and Citizen Assurance Co., Ltd.* v. *Evatt.*[21] This case decides that there can be liability for misstatement only where the defendent is in the business of supplying information or advice or that he has let it be known that he claims to possess the necessary skill to do so and is prepared to exercise due diligence to give reliable advice. Nevertheless, the broker in our case is not helped by *Evatt's* case because it could safely be said that he holds himself out as a professional and is therefore within the rule of *Evatt's* case.

In additional to the above heads of liability, the Protection of Investors Ordinance[22] will provide yet another source of liability. It provides:

s.8(1) Where any person alleges that he has, as a result of any false, misleading or deceptive statement, forecast or promise .....

a) enter into an agreement –

(i) for the acquisition, disposal, or underwriting of, or subscribing for securities

(ii) the purpose or pretended purpose of which was to secure to him a profit from the yield of securities or by reference to the fluctuation in the value of securities or property other than securities; or

b) take part in any investment arrangements in respect of property other than securities and that he has, by reason of his reliance on the statement, forecast, or promise, suffered pecuniary loss, he may institute civil proceedings against any person who is alleged to have made the statement, forecast, or promise or to have caused or authorised it to be made.

(2) Where civil proceedings are instituted under subsection (1) the court shall order the defendent to pay such sum by way of damages as it considers just and equitable if it is satisfied on the evidence that –

a) the plaintiff did any of the acts referred to in paragraphs a) and b) in subsection (1) as a result of a statement, forecast, or promise which was made by the defendent, or which the defendent caused or authorised to be made;

b) the statement, forecast or promise was false, misleading or deceptive; and

c) the plaintiff suffered pecuniary loss by reason of his reliance on the statement, forecast or promise.

unless the defendent proves that he had reasonable cause to believe and did believe that the statement was true or that the forecast or promise was justified.

It seems that the task of the plaintiff is much easier under this Ordinance. In the first place, the plaintiff does not have to establish a duty of care situation; no special relationship nor assumption of responsibility by the defendent need be proved. All that is needed is causation between the statement and the consequential loss. Secondly, the burden is on the defendent to show that there is reasonable ground for the statement.

Criminal Liabilities

The same Ordinance also gives rise to criminal liability. The Ordinance says:

s.3(1) Any person who, by any fraudulent or reckless misrepresentation, induces another person –

a) to enter into or offer to enter into any agreement –

(ii) the purpose or effect, or pretended purpose or effect,

20 (1964) A.C. 465.

21 (1971) 2 W.L.R. 23.

22 13/1974.

of which is to secure to any of the parties to the agreement a profit from the yield of securities or by reference to fluctuations in the value of securities or properties other than securities ..... shall be guilty of an offence

(2) For the purpose of subsection (1) "fraudulent or reckless representation means – .....

d) the reckless making (whether dishonestly or otherwise) of any statement or forecast which is false, misleading or deceptive.

In view of the above heads of liability for untrue statements, it seems that the investor is sufficiently protected in this respect.

Other Controls

In the interest of the investors, a few other controls will be appropriate:

i) S.4 of the Protection of Investors Ordinance has made it an offence for the brokers to put up advertisements inviting members of the public to deal in commodities with him.

ii) By virtue of s.344 of the Companies Ordinance,[23] 'It shall not be lawful for any person to go from house to house offering shares for subscription or purchase to the public or members of the public'. It is difficult to see why the same shall not be extended to commodities.

iii) An additional safeguard against misconduct is to license all commodities brokers as in America or in the case of Securities dealers in England.[24]

iv) There have been talks among the brokers here of their forming a society to control their own conduct. This seems a good idea. Yet nothing has been done so far, probably because the brokers are too greedy to assent to any measures of self-control.

Conclusion

Commodity speculation in Hong Kong is of recent development and control is lacking. We have seen in this essay that the Government has rightly stepped in to prohibit the establishment of commodity exchanges. But control is unforthcoming as regards the business conduct of the brokers dealing in the overseas exchanges. Formerly, due to the scarcity of brokers of this type operating here, specific attention on the part of the Government seems undeserving. But, now that there are as many as thirty such companies, such governmental controls as listed above becomes appropriate. In fact such companies are opening fast recently.

The situation now is that the recently passed Protection of Investors Ordinance has kept under control inducement by unreasonable, fraudulent and reckless statements and advertisements. As regards advertisements, one finds that at this moment there are still advertisements on newspapers issued by commodity brokers inviting people to deal in commodities. It seems that more attention and response on the part of the Government would be desirable. The 'small man's capital' must be diligently protected.

More legislation in this respect are needed other than the above. As stated above, the first and foremost control would be the two-fold requirement of requiring that the moneys of the customers to be separately accounted for and not to be withdrawn unless in a manner authorised by the statute, and of assuring that full records are kept by the brokers and their agents. This provision, must, however, be backed by cooperation on the part of the foreign governments to verify that all orders received by the brokers' agents are executed. The compined effect of these measures will positively prevent pecuniary loss to accrue to customers from the brokers' agents are executed. The combined be prevented only by requiring the brokers to deposit a substantial sum with the Government as guarantee.

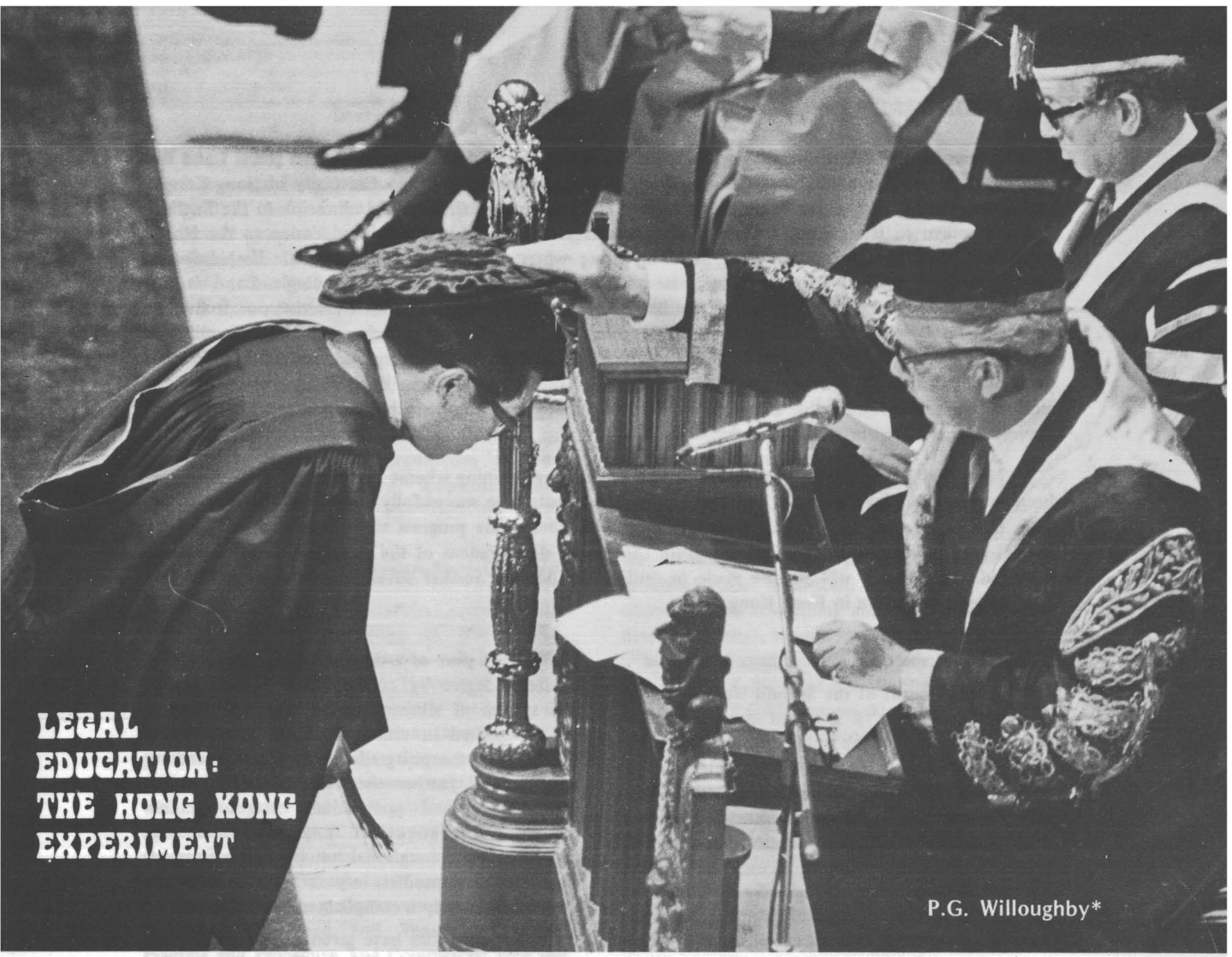
If, for any reason, the Government should deem the above proposals to be undesirable, then, in the absence of effective disciplinary control, it is better to ban the operation of these brokers altogether rather than leaving the investors unprotected.

If the Government should deem the controls effective, then it is in the interest of the investors that action should be taken now rather than after injuries have resulted as in the case of the stock market.

---

23 Cap. 32.

24 The Protection of Depositors Act.



LEGAL EDUCATION: THE HONG KONG EXPERIMENT

P.G. Willoughby*

By courtesy of S.C.M.P.

Introductory

Since 1969, the University of Hong Kong has been offering courses for its own bachelor or laws degree and since 1972 graduates from the University have been able to complete a further year of vocational legal education leading to the award of a Postgraduate Certificate in Laws. This formal legal education is then followed by a period of twelve months pupillage or two years articles for those who wish to qualify respectively as either barristers or solicitors. In the case of the latter it is also necessary to sit the English Law Society's examination in Accounts. Thus after either five or six years of legal education and training in Hong Kong a student can expect to be admitted as either a barrister or solicitor.

* LL. B.; LL. M.; Solicitor; Senior Lecturer in Law and present Acting Head in the Department of Law, University of Hong Kong.

It remains possible to qualify as a barrister by sitting the English Bar examinations (Parts I and II) in England [1], or by obtaining a law degree from an English University or the University of Hong Kong [2] and sitting Part II of the Bar examinations only. The student can then obtain admission to the English Bar and return to Hong Kong before or after pupillage in England and obtain admission to the Hong Kong Bar after completing pupillage in Hong Kong where necessary. In the case of the solicitors' profession there remain two avenues into the profession. A student can proceed to England and sit the English Law Society's examinations. If he has a law degree from an English Univeristy, or from the University of Hong Kong, he can obtain exemption from Part I of the Solicitors' Qualifying Examination. Articles can, subject to finding a principal be completed in England, and then, following admission in England, a newly qualified solicitor can obtain admission in Hong Kong. Alternatively a student can register with the Law Society of Hong Kong and complete his articles and English Law Society examinations in Hong Kong [3].

Now that Hong Kong's own academic and professional training scheme for the legal profession has been in operation for five years and two groups of students have successfully completed the courses for both the LL.B. and the P.C.LL., it is appropriate to review the progress so far achieved and also to indicate the modifications required to ensure the proper development of the system of legal education provided. An attempt will also be made to outline the possible further developments envisaged in the field of legal education in Hong Kong.

The Present Structure

In the Report of the Second Working party on Legal Education [4] it is stated in paragraph 13 that "Clearly it is in the public interest to ensure that all practitioners are sufficiently trained to deal with the varied problems on which they may be consulted". As far as formal education, as opposed to pupillage or articles, is concerned it was decided that this requirement could best be met by requiring prospective entrants to the profession to have proved their proficiency in a wide range of subjects some of which were to be undertaken at the degree stage and others at the postgraduate stage. At the same time it was envisaged that the postgraduate course would include some 'practical' or 'vocational' training of the kind recommended in the Ormrod Report [5]. No clear distinction between the degree and postgraduate stage of the scheme was, however, drawn with the result that in its first two years of operation the P.C.LL. course has resembled the fourth year of a degree course or perhaps a master's degree by course work. Unfortunately the system of allowing certain optional subjects to be studied in either the third year of the LL.B. or at the postgraduate stage has tended to obscure still further the different objectives of the degree and postgraduate stages of the scheme. Moreover it has rendered the introduction of vocational training in the form of simulated case studies very difficult to organise in what is already a complicated timetable.

Examinations have given rise to difficulties arising from the fact that candidates have so far been permitted to offer certain undergraduate subjects in the examination for the Postgraduate Certificate. The different approach of examiners setting and marking papers for the two courses has been exacerbated by the fact that the results in degree subjects are classified in the case of undergraduates but merely have to be recorded as a pass at lower second standard or fail in the case of P.C.LL. candidates.

---

1 This possibility is unlikely to remain for very much longer. The last intake for non-graduate students at the Inns of Court School of Law will be in 1975 and the last intake of non-law graduates of U.K. Universities will be in 1976 Application to an Inn must have been made by 31/3/75 or 31/3/76 respectively in order to gain admission to these courses.

2 It is quite likely that by 1978 the English Bar will insist upon a law degree obtained from a U.K. University as the basic qualification for admission to a course for a new Bar final vocational course. It is, however, hoped that the Hong Kong University's LL.B. will continue to be recognised for this purpose. Tuition for Part II of the present Bar Examination is expected to cease by 1980.

3 After practising as an admitted solicitor in Hong Kong for three years it is possible to be admitted to the roll of solicitors in England, without further articles or examinations under the terms of the Overseas Solicitors (Admission) Order 1964.

4 See Legal Education in Hong Kong pp. 31–48.

5 Cmnd. 4595.

For these, and other reasons, it has been decided to separate the Postgraduate Certificate course from that for the LL.B. It must, however, be stressed that this is not a 'divorce' following 'an irretrievable breakdown' but merely a recognition of the fact that the two courses differ in approach as well as content. The LL.B. courses tend to be more theoretical and are perhaps analogous to the pre-clinical training of a medical student. The P.C.LL. course, on the other hand, is more akin to the clinical training of a medical student. Thus the LL.B. and P.C.LL. courses will continue to represent a continuum and will compliment each other, hopefully more effectively than before.

The Development of the Postgraduate Certificate Course

The formal separation of the P.C.LL. course from the LL.B. courses will commence with the session 1975/76. However, this will largely recognise what has become the evolutionary *de facto* position already. In the present session, 1974/75, there are no real options at the postgraduate stage for those wishing to enter the legal profession. With the agreement and support of the professional bodies there are currently four Postgraduate Certificate subjects all of which are required by the professions. These are Conveyancing (which now includes Landlord and Tenant), Taxation, Practice and Procedure, and Commercial Law and Practice. Graduates attending the P.C.LL. course must offer a fifth subject to obtain their Certificate but owing to the way in which the LL.B. options have been selected, the availability of courses and the requirments of the professional bodies, there are only two possibilities. These are Administration of Trusts and Estates, and Labour Law but there is no real choice available as the decision on which one of these subjects to select turns on the selection made at undergraduate level.

In 1975/76 the 'four' P.C.LL. subjects will in substance remain the same except that Conveyancing will include administration of estates and planning law and will be relabelled as "Property". It is proposed to set four papers in 1976 in these subjects and a fifth paper on Legal Drafting. There will be no separate course in drafting but already the existing teaching programme includes legal drafting as part of the courses in Conveyancing, Commercial Law and Practice, and Practice and Procedure and it is therefore felt, that this aspect of the course could best examined in a separate paper sat under 'open book' conditions in the Law Library. The other papers, being based mainly on substantive law, will it is hoped be sat under limited open book conditions, that is to say certain statutes will be provided.

The additional teaching time made available by the dropping of the formal requirement for a fifth subject will be used principally to increase the content of practical exercises based on simulated case situations. This aspect of the course is time consuming and will, as the course develops further, require more teaching time than is at present available. In the view of the writer this is one of the most important features of the Hong Kong P.C.LL. course containing as it does a strong emphasis on "learning by doing".

One important side effect of the administrative separation of the P.C.LL. course and the removal of optional subjects from the postgraduate stage is the reduction of real options in the third year of the LL.B. The University's regulations allow for a number of apparent options but the existence of real options depends very much on the availability of teaching staff with the specialised knowledge to teach them and also the understandable requirement of the professional bodies that the Hong Kong trained lawyer covers sufficient substantive law during the entire period of formal education at the University. It appeared at one time that prospective entrants to the solicitors' profession would have no real options at all in the third year of the LL.B. in view of the number of subjects made compulsory by the Hong Kong Law Society. However, after further discussion with the Society a prospective solicitor will in future have two real options in the third year of his LL.B. This situation has been achieved by removing Mercantile Law from the Law Society's list of required subjects and the Law Department's decision to include Trusts in

the Property II course and Wills and Administration of Estates in the compulsory "Property" course for the P.C.LL. Thus a prospective solicitor will be required to take Jurisprudence, Family Law and Business Associations, together with any two of the available optional subjects, in the third year of his degree[6].

In the case of a prospective Barrister a little more flexibility will be possible as Family Law is not compulsory with the result that three optional subjects may be chosen.

The Hong Kong and United Kingdom schemes contrasted

For someone who has lived all or most of his life in one place there are obvious advantages to be gained from education in a different environment with the exposure to another culture that that involves. However, for someone who wishes ultimately to practise the law in Hong Kong there is much to be said for not proceeding to England for a legal education. In the first place both academic and professional legal education in England is geared specifically for practice in England. Moreover, the courses offered for the professional examinations in England do not as yet contain the degree of vocational emphasis that is already present in the P.C.LL. course. It should be added that there is no dispute in England as to the desirability of a vocational year of legal education designed specifically to train law graduates for the legal profession but unfortunately there is a dispute over who is to undertake this task and more particularly who is to pay for it. Regretably the recommendations of the Ormrod Committee, have not so far been implemented. It was therefore perhaps fortunate that Hong Kong did not wait for the proposals of the Ormrod Committee to be announced [7] but planned ahead along what have turned out to be similar lines. In the result owing to the foresight and cooperation of the University of Hong Kong, the Law Society and the Bar Association, Hong Kong has already put into operation the kind of one year post-graduate course that was recommended for England but is now unlikely to be implemented there in the forseeable future.

In short the cultural advantages of travelling abroad in conjunction with legal education cannot be denied but for those who wish to qualify here the University of Hong Kong is now able to provide a comprehensive academic legal education which is comparable in standard to that obtainable at most English Universities and a professional training which is, in concept at least, in advance of that at present obtainable at the professional law schools in England [8].

The Demand For Lawyers

Reference has already been made to the fact that there are at present a number of traditional avenues open to the prospective legal practitioner and with the addition the Hong Kong University route the question of over-producing lawyers arises inevitably. To this there would appear to be a short and a long term view. In the short term it does appear that there may be a shortage of pupil masters and principals for, at any rate, the less distinguished applicants. To some extent a solution may be found by the suggestion of pupillage in the Attorney General's Chambers and articles with solicitors in the Government service. Looking further ahead it is to be hoped that the present rules laid down by the Law Society which prevent solicitors with less than five years practice in Hong Kong (and those who are not partners) from taking articled clerks, will be modified. It is thought that a solicitor who has held a practising certificate in Hong Kong for three years ought to be permitted to take an articled clerk subject if necessary to the approval of the Committee of the Law Society. The present rules, which also limit the number of articled clerks to two per principal, were conceived in the days when principals had the time to instruct their articled clerks and also at a time when the sort of legal education at present available was not provided.

In considering whether the total number of practising lawyers in Hong Kong is approaching saturation point it must be remembered that to serve a population of 4.5 million there is a practising legal profession of approximately 400, that is to say a ratio of roughly 1 to 10,000. In the United Kingdom the ratio is nearer 1 to 2,000 whereas in Singapore it is about 1 to 5,000.

6 He could if he wished take additional subjects either in his degree or perhaps after graduating in order to meet the requirements of the professional bodies.

7 The Committee's Report was presented to Parliament in March 1971.

8 The development of professional legal training in other parts of the Commonwealth, notably Nigeria, Uganda, the West Indies and at the Australian National University is also well in advance of anything comparable in England. The College of Law and Birmingham Law Society run excellent one week practical training courses but these are voluntary and do not as yet form part of a comprehensive scheme.

It should also be remembered that at present there is a communication gap between the bulk of population and the legal profession which tends to serve the wealthier section of the community. The training of competent commercial and property lawyers is of vital importance to Hong Kong but at the same time the gradual expansion of legal services to the community at large has already started. A number of legal advice centres exist and the Government's own Legal Aid Department is expanding steadily and providing a much needed 'National Legal Service'.[9] There remains much work to be done, however, in making legal services understood by and available to the population as a whole and development in this field can be expected possibly along the lines of the 'Neighbourhood Law Centres' which have been started in some cities in the United Kingdom. It is to be hoped that the Law Department of the University of Hong Kong will play its part in producing lawyers skilled not only in commerce but in poverty law also.

Overseas Recognition of the Hong Kong University LL.B. and Postgraduate Certificate

Mention has already been made of the recognition of the Hong Kong University legal qualifications. The LL.B. is recognised by the English Law Society and, at present, the Bar for the purposes of gaining complete exemption from Part I of the English Solicitors' Qualifying examination and partial exemption from Part I of the Bar examination. The Postgraduate Certificate followed by articles and three years admission as a solicitor is recognised by the English Law Society for the purposes of obtaining admission to the roll in England under the Overseas Solicitors (Admission) Order which has no real equivalent in the case of the Bar.

The Hong Kong University LL.B. has also been accepted by a number of English and Commonwealth Universities as a basis for further academic work.

However, it must be recognised that ultimately the question of admission to practice in England, elsewhere in the Commonwealth or possibly the United States must inevitably turn not on the quality of the Hong Kong based legal education but on the immigration requirements of the country in which it is intended to set up practice.

Other Developments in Legal Education in Hong Kong

So far this survey has been concerned largely with the pre-qualification education of a Hong Kong lawyer but legal education does not stop with admission as a barrister or solicitor[10]. The Law Department of the University of Hong Kong is also gradually building up a scheme for continuing Legal Education as a service to the profession. So far this has been confined to arranging lectures by distinguished speakers and seminars which have been open to students and practitioners alike. In conjunction with the Hong Kong Law Journal and the Law Society a two-day course of refresher lectures was held in March 1974 which was attended by over one hundred practitioners. The experiment is to be repeated in January 1975. The next development in this area is likely to take the form of one day specialist courses for practitioners.

Expansion of the Law Department

During the present quadrennium the total student population of the Law Department is planned to increase from 145 to 188 and the number of teaching staff from 12 to 17. Provided that suitable staff can be recruited it is anticipated that further optional courses will be made available in the LL.B. In particular a course on the Law of the People's Republic of China will, it is hoped, be offered before the end of the present quadrennium. Some of the existing LL.B. subjects may undergo modification and the postgraduate course is to be modified as has been explained already. The prospects for the immediate future are then of expansion and systematic development in a number of areas. The next four years should prove as stimulating as they will be significant in the lives of all members of the Department of Law.

---

9 It should be added that graduates attending the Postgraduate Certificate course attend and assist at a Legal Advice Centre and also at the Legal Aid Department as part of their training. It is hoped that the link with the latter can be developed further to include regular weekly attendance as part of the curriculum.

10 Many would say that that is the point where education really begins!

The International Newsmagazine

You're not just *any* reader of *any* magazine.

You read Newsweek because you need to know not merely the news around the world, but its *significance* for you as well.

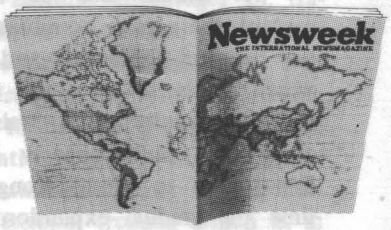
For example, a Japanese businessman doesn't simply *like* to know what's happening in the Common Market. He needs to know. Because he does business there.

And a diplomat in London *must* know more about what's going on in Washington or Bonn than he can get from diplomatic correspondence.

That's why Newsweek's brains are as international as its audience.

That's why Newsweek—and only Newsweek—judges every story by this crucial criterion: Will it be of compelling interest to our readers in Paris as well as Frankfurt, in Sydney as well as Singapore?

And that's why the real internationalists of the world read Newsweek. Week after week. Cover to cover.



The International Newsmagazine

Regular columns by Newsweek's contributing editors provide *on-the-spot* insight and analysis of major international events.

Newsweek's weekly *Interview* page is an international forum for world figures in politics, business, the sciences and the arts.

Asia is covered by a resident editor and three distinguished contributing editors reporting from Japan, Australia and Indonesia.

Newsweek's worldwide news is gathered by a network of 22 editorial bureaus around the world.

In Europe, Newsweek's coverage is enhanced with a resident editor in Paris and four contributing editors.

Our extensive business coverage includes such features as *New Products and Processes, International Marketplace,* and *Worldwide Stocks.*

ACKNOWLEDGEMENTS

The Editorial Board wishes to thank the following for their kind sponsorship of this review:

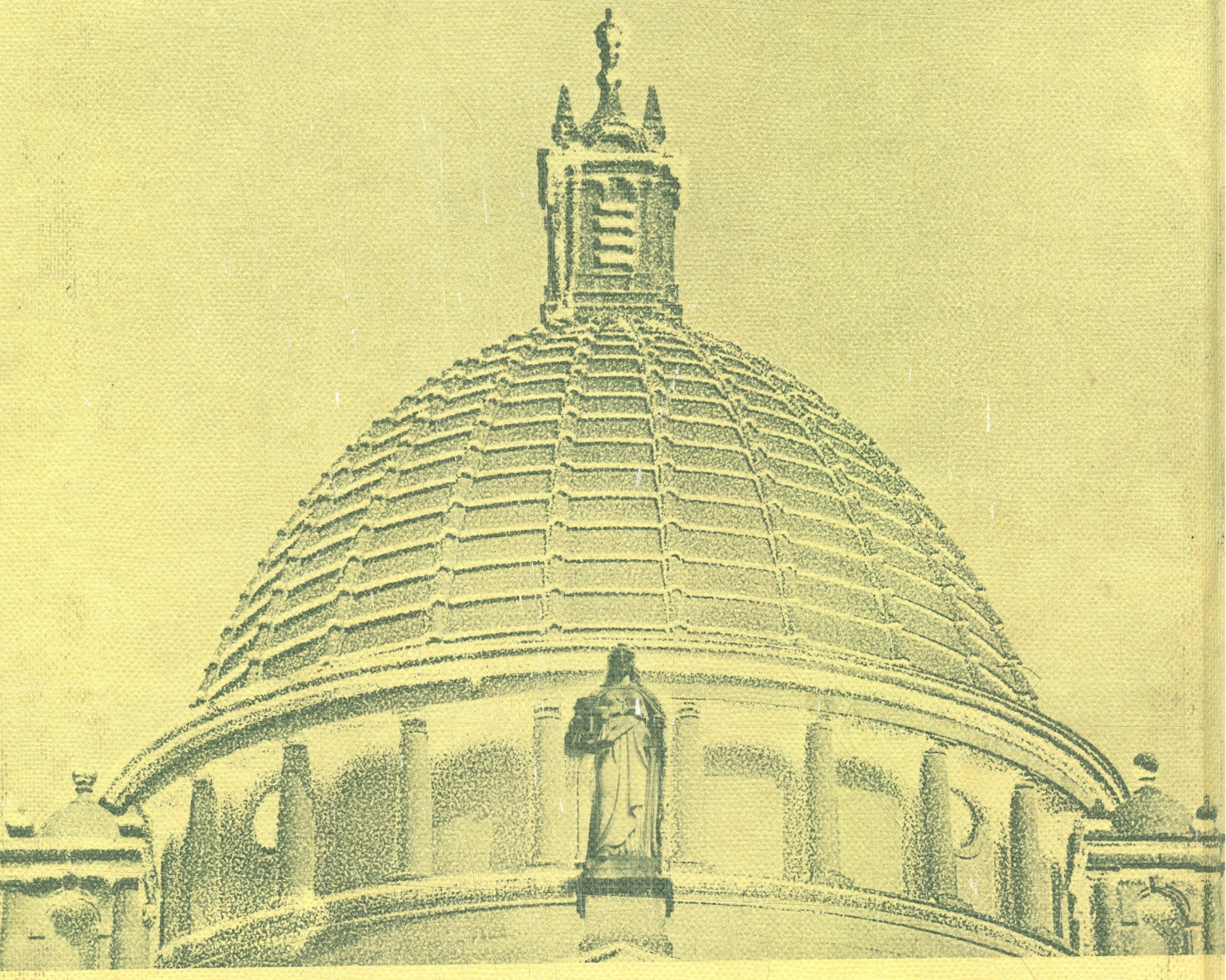
The Honourable Mr. Chief Justice G.G. Briggs
The Honourable Mr. Justice A.M. McMullin
Mr. G. O'Connor
Mr. F.W. Blackwell
Mr. F. de F. Stratton
Mr. Oswald Cheung, Q.C.
Mr. Martin C.M. Lee
Mr. Robert Wei
Mr. R. Mills-Owens
Mr. Wesley Wong
Mr. A.W. Sedgwick
Mr. John K.Y. Chau
Miss Maria Tam
Messrs. Johnson, Stokes and Master
Messrs. D.W. Ling & Co.
Messrs. H.A. Hoosenally & Co.
Messrs. Lo & Lo
Mr. Shum Chong Lau

Cover: The Supreme Court of Hong Kong by Mr. Chan Chi Hung
Some photographs in this review are reproduced by the kind permission of the Hong Kong Government Information Services and the South China Morning Post.

*The views expressed by our contributors do not necessarily represent those of the Editorial Board.

Publisher: QUALISELL INDUSTRIES
13-C EDWARD MANSION,
141, PRINCE EDWARD ROAD,
KOWLOON, HONGKONG
TEL: 3-800196 3-812585

JUSTITIA



HONG KONG UNIVERSITY
LAW ASSOCIATION REVIEW
1973-1974