

STATUTORY APPROVALS AND THE CONCEPT OF TITLE

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According to Godfrey JA in *Spark Rich (China) Ltd v Valrose Ltd*,¹ “a prudent vendor should always consider, before attempting to sell his property, whether his title to the property may be affected by some unauthorised building work. If so, he should refrain from entering into any contract for the sale of the property which does not contain (1) a full disclosure of the problem; and (2) an agreement on the part of the purchaser not to raise any requisition or take any objection to the title based upon the unauthorised work. Cases in which a purchaser of property may safely be advised that he can be sure he can safely disregard unauthorised building work are likely to be rare.” Problems caused by unauthorised building work will be familiar to most conveyancers, but the suggestion that unauthorised work may affect the title to the property is something that has not been much explored in courts in the United Kingdom. The suggestion echoes the argument put forward by Professor Potter in a series of articles in the *Conveyancer and Property Lawyer*² and in the *Journal of Planning Law*,³ as to the effect of the Town and Country Planning Act 1947. “Whether”, he wrote, “failure to disclose [unauthorised] development would enable a purchaser to avoid the contract we must leave for fuller consideration to another article, but we think that it might. Failure to disclose in the conveyance might be a breach of the covenants for title.”⁴ Again, “today, the land, when conveyed, can only serve the “existing use” because uses for any other purpose can be stopped. Hence, the vendor only has “title” to convey “the existing use” and, consequently, all matters concerned with user are matters of title.”⁵

Professor Potter’s argument was described in 1962 as the most well-known argument town planning had produced. At the same time it was said to have been accepted by hardly any practitioners.⁶ Not long afterwards, one practitioner described it as well-known but now ignored.⁷ Fifty years on, the issues discussed in the articles regarding the impact of the planning legislation on conveyancing law and practice remain largely unexamined by courts in the UK. Whether or not the thesis that the Town and Country Planning Act 1947 effected the radical change in the nature of ownership of land which Professor Potter thought, is right, some of the practical questions raised in the articles require answers. If Professor Potter’s argument was

¹ [1999] HKCA 105.

² (1947) 11 *Conv* (NS) 147; (1948) 13 *Conv* (NS) 36, 85, 110, 159.

³ [1948] *JPL* 48, 104, 188, 353, 426, 547; [1949] *JPL* 49, 91, 186, 458; [1950] *JPL* 80, 247, 331, 747, 801, 879.

⁴ Potter, “Dealings with land under the Planning Acts” [1948] *JPL* 48, p 51.

⁵ *Ibid*, 91, p 111. For another consideration of the question see Cobby, “Is the permitted use a matter of title?” (1949) 13 *Conv* (NS) 329.

⁶ Mellows, “The use and title” (1962) 26 *Conv* (NS) 269. See also (1951) 15 *Conv* (NS) 209.

⁷ Russell, “The principal covenants for title” (1970) 34 *Conv* (NS) 178, n 93.

considered by most members of the profession to be too academic,⁸ the question put by Professor Mellows is certainly not. “Suppose”, he said, “that X contracts to sell to Y a building which X has used as a factory and which Y also wishes to use as a factory. Suppose also that three years previously X had changed the use to that of a factory from that of a warehouse without permission. After contracts are exchanged Y discovers the true position and refuses to complete: will X succeed if he sues on the contract?”⁹ Similar questions can arise also in the context of other regulatory controls imposed by Parliament over a landowner’s right to carry out building work on his land or to put the land to a particular use. The need to obtain local authority approval under the Building Regulations is one example: if the purchaser discovers after entering the contract that the property has been built without approval under the Regulations, what is his position? In other instances the use of property for a particular purpose may require a licence or certificate from one authority or another, fire certificates and entertainments licences being examples.¹⁰ The issue for consideration in this article is the effect of the absence of such approvals on a purchaser of the property. In wider terms, the question is what are the rights and obligations of the parties to a contract for the sale of land where the property lacks the approvals which should have been obtained, and in narrower terms, does the absence of such approvals constitute a defect in the title to the property?

TITLE AND QUALITY

The distinction between the *title* to property and the *quality* of the property in question lies at the root of the law as to contracts for the sale of land. The principle *caveat emptor* is the basis of the latter. It is up to the purchaser to satisfy himself as to the quality of the property he is buying. On the other hand, it is the responsibility of the vendor to deduce a good title to that property. Matters of quality exist for example where the property will require unforeseen repair, or where it floods in the winter, or where it is not capable of supporting loads likely to exist in the purchaser’s use of the property.¹¹ In such cases the physical characteristics of the property are in some way defective. Defects in title exist where the ownership of the property is affected. The obvious case is where some third party has a right in the property, such as a covenant affecting the use of the property, or a right of way through the property, or there is a charge on the property subjecting the owner to a monetary liability. Here the physical characteristics of the property may be precisely those which the purchaser

⁸ See Garner, [1953] *JPL* 460.

⁹ Mellows, *op cit* p 284.

¹⁰ For the requirement of planning permission and approval of the building authority see Planning (NI) Order 1991 and Building Regulations (NI) Order 1979. For fire certificates see Fire Services (NI) Order 1984. For the requirement of a licence or approval for particular uses see *eg* Local Government (Miscellaneous Provisions) (NI) Order 1985; Betting, Gaming Lotteries and Amusements (NI) Order 1985; Food Safety (NI) Order 1991; Licensing (NI) Order 1996.

¹¹ *Milne v Delta Foods Ltd* (1996) 61 ACWS (3d) 587. See also *Playboy Hairstyling Ltd v King & Tse Enterprises Ltd* (1995) 57 ACWS (3d) 495 (lessee incurring expenditure to comply with by-law applicable to property as a result of lessee’s intended user).

thought he was acquiring, but the problem is that the enjoyment of the property is affected by the rights of a third party.

In some cases the question whether the problem which has arisen for the purchaser is one concerning the quality of the property or one going to the title of the property is not as straightforward to answer.¹² Cases where the vendor has carried out building operations on the land, or has changed the use of the property, without the approvals he should have obtained, fall into this category. If the property in sale lacks the appropriate approvals, is this a matter of title, or merely a matter of quality? And in any case, what difference does it make? The danger of course for the purchaser is that the absence of the appropriate approval may result in the authority whose approval should have been obtained taking enforcement action. In such circumstances the purchaser is likely at best to be involved in remedial work or expenditure, and at worst to find that he cannot use the property he has purchased. In such circumstances one might expect the law to provide redress. This note is intended to examine whether the lack of consent or the risk that enforcement action may be taken by the relevant authority is a matter affecting the purchaser's title to the land, so as to put the purchaser in the same position as he would have been in had he discovered for example that the property was affected by an easement or restrictive covenant of which the purchaser was unaware. There is an obvious analogy between the situation under discussion and that where property is affected by a restrictive covenant and consent of the covenantee has not been obtained. Covenants preventing building work or restricting user of the property are common and restrict a purchaser's enjoyment of the property in the same way as does the requirement of planning permission. There are of course differences in the consequences of failure to comply with the restrictions, but initially the owner of the position of the purchaser of property is much the same position whether his enjoyment is restricted by a covenant or by the need for planning permission. The existence of a covenant restricting user to that of a private dwelling house has been held to be a defect in title,¹³ as has a statutory provision restricting the purchaser's right to build on the property,¹⁴ and where the purchaser discovers a breach of a covenant restricting user of the property there is a defect in the title.¹⁵ It could therefore be argued that the need for planning permission for building work and user of property without planning permission or whatever other statutory approvals are needed should be seen in the same way. The similarity is apparent also where the property is affected by a notice served by the relevant authority as a result of the absence of consent, such as an enforcement notice or a notice requiring remedial work to comply with building regulations. Notices served by landlords as a result of a breach of covenant are matters of title, and therefore

¹² According to Young J in *Pemberton Australia Pty Ltd v CPS Services Pty Ltd* 1990 NSW LEXIS 10619 there is a "fine line" between defects in title and defects in quality. Seven years later the distinction had become "very fine": see *Eighth SRJ Pty Ltd v Merity* 1997 NSW LEXIS 317.

¹³ *Re Stone and Saville's Contract* [1963] 1 All ER 353.

¹⁴ *In re Ponsford and Newport District School Board* [1894] 1 Ch 454.

¹⁵ See *Re Martin* (1912) 106 LT 381; *In re Taunton and West of England Perpetual Benefit Building Society and Roberts' Contract* [1912] 2 Ch 381; *Becker v Partridge* [1966] 2 All ER 266; also *McAleer v Desjardine* [1948] OR 557.

must be disclosed.¹⁶ The analogy between restrictive covenants and statutory approvals is not however perfect. Unlike the case of a restrictive covenant, the requirement of planning permission and the other approvals under consideration is imposed not by an instrument between private individuals but by a statute of general application.¹⁷ Moreover, while a restrictive covenant creates an equitable interest in the land, the statutory provisions in question do not create in favour of the relevant authority any estate or interest, legal or equitable in the property,¹⁸ so that the vendor remains able, notwithstanding the statutory obligations, to transfer legal and equitable ownership of the property.¹⁹ The most significant difference for present purposes however may be the consequences which follow from breach of covenant and breach of the requirement of statutory approval. In the case of failure to obtain the consent of the lessor to building work or user which is prohibited by a covenant in the lease, the lessee may run the risk of forfeiture of his estate in the property. Where no possibility of forfeiture exists, it has been held in Ireland that a notice served by a lessor threatening action a result of a breach of a repairing covenant by the lessee is not a matter of title, Kingsmill Moore J saying that “[a] liability to ejectment for forfeiture, crystallised by service of a repairing notice by the landlord, is clearly a defect in title to which the vendor must call attention. Mere disrepair which may involve an action for breach of covenant, but which, in the absence of a proviso for re-entry, cannot be a ground of forfeiture, is not a defect of title, but is a defect in subject-matter.”²⁰ In the case of failure to obtain planning permission or other approval for building works or use of the property, enforcement action is likely to take the form of orders requiring demolition or cessation of user, but the owner’s estate in the property will remain intact. That may suggest the problem of activity for which statutory approval is not obtained is not one of title. The danger of forfeiture cannot however be the only criterion which makes the something a matter of title, as otherwise restrictive covenants and charges would not be matters of title.²¹

The consequences of the problem being identified as a matter of title are considered below. Before that however, two points may be made. First, the absence of statutory approvals will not render the contract invalid.²² Discussion of the possibility that the agreement could be void for illegality

¹⁶ *Beyfus v Lodge* [1925] Ch 350.

¹⁷ *Dell v Beasley* [1959] NZLR 89, relying on *Manukau Beach Estates Ltd v Wathe* [1932] NZLR 146. See also *Re Mullin and Knowles* (1965) 53 DLR (2d) 680; *Royal Sidney Golf Club v Federal Commissioner of Taxation* (1955) 91 CLR 610 (“There is all the difference between a public law affecting the enjoyment of land and a restriction of title.”) Note however *Moss v Perpetual Trustees Estate and Agency Co of New Zealand Ltd* [1923] NZLR 264 and *Schollum v Francis* [1930] NZLR 504 where the fact that a restriction was created by a statute did not prevent the court holding the purchaser entitled to rescind.

¹⁸ *Lunahome Ltd v London Yard Management Co Ltd* (1989) unrep; *Township of Trafalgar v Hamilton* [1954] OR 81; *Re Mullins and Knowles* (1965) 53 DLR (2d) 680; *Tabata v McWilliams* (1981) 33 OR (2d) 32.

¹⁹ *Harris v Weaver* [1980] 2 NZLR 437; *Sullivan v Dan* 1996 NSW LEXIS 3672; *Doolan v Murphy* (1993) unrep (RoI).

²⁰ *In re Flynn & Newman’s Contract* [1948] IR 104.

²¹ See further below p 112.

²² *EJH Holdings Ltd v Bougie* (1977) 7 AR 213.

has invariably taken place in the context of leases where the lessee has entered a covenant to use the property only for a particular purpose, and planning permission for such use has not been granted. The view of the courts is that unless the lease requires the use of the property without the necessary consent, or the lessor intended that the property would be used without consent, the lease is valid,²³ and mere absence of the relevant consent does not of itself vitiate the contract the parties have made.²⁴

The second point is that the absence of statutory approvals or certificates for property bought by a purchaser may give rise to a number of causes of action which do not require consideration whether the problem involves a matter of title or not. Thus the purchaser may have remedies in contract or in tort if the vendor has made a fraudulent statement that such approvals exist. Equally, he may have remedies for negligent misstatement arising from a statement to that effect which is not fraudulent but is nonetheless wrong. The vendor may likewise be liable in negligence if his failure to point out the absence of such approvals or that there are restrictions on enjoyment of the property amounts to a breach of the duty of care he owes.²⁵ More interesting questions arise where the vendor has not made any statement that the property has the benefit of the relevant approvals, but the property in sale has been described in such a way that there is a representation that such approvals exist, or that enjoyment of the property is not subject to any restrictions.²⁶ More interesting still is the suggestion that the mere fact of a

²³ *Edler v Auerbach* [1949] 2 All ER 692; *Holidaywise Koala Pty Ltd v Queenslodge Pty Ltd* [1977] VR 164; *Bawofi Pty Ltd v Comrealty Ltd* 1992 NSW LEXIS 6795.

²⁴ *Best v Glenville* [1960] 3 All ER 478; *Laurence v Lexcourt Holdings Ltd* [1978] 2 All ER 810.

²⁵ For the possibility that a vendor owes a duty of care to the purchaser see *Esso Petroleum Co Ltd v Mardon* [1976] 2 All ER 3. See also *Greyhill Property Co Ltd v Whitechap Inn Ltd* (1993) unrep (RoI) (receiver of vendor company held to owe duty of care to purchaser). In *Doolan v Murray* (1993) unrep (RoI) Keane J considered that had the vendors been aware of a condition in a planning permission restricting the purchaser's ability to develop the land in sale they might have owed a duty of care to the purchaser since they might reasonably have assumed that the purchaser would rely on the vendors' silence as indicating there would be no problems in carrying out the work intended.

²⁶ See *Laurence v Lexcourt Holdings Ltd* [1978] 2 All ER 810 (lessee of premises let as offices able to rescind agreement where premises lacked planning permission for such use for more than two years of fifteen year tenancy); *Atlantic Estates plc v Ezekiel* [1991] 35 EG 118 (purchaser of premises described as wine-bar entitled to rescind where licence to sell alcohol had been forfeited); *Re Deighan* (1897) 31 ILTR 44 (misdescription where property described as "licensed premises" sold by vendor not having full licence); *Thompson v Vincent* [2001] 3 NZLR 355 (purchaser of building containing 24 motel units later discovering planning permission existed for only 12 units successful in action based on misrepresentation, the representation being that the property could be used as 24 units, and not merely that there were physically 24 units in the building). See also *Registered Holdings Ltd v Kadri* (1972) 222 EG 621 (misdescription where property said to include "accommodation" found to be subject to closing order, as description implied purchaser was entitled to occupy property without consent of third party); also *London Investment and Mortgage Co Ltd v Ember Estates Ltd* (1950) 1 P & CR 188; *Pierse v Allen and ors* (1993) unrep (RoI); *Barry Plant Real Estate (Regional) Pty Ltd v Canazi* 1994 VIC LEXIS 858; *Lash and Moneta Builders and Construction Co v Miller* (1956) 5 DLR (2d) 469. There may also be

landlord's showing premises to a tenant is in itself an implied representation by conduct that the premises in their physical configuration and construction were lawful.²⁷ The one argument that seems certain to fail however is that the vendor impliedly warrants that the property can be put to the use intended by the purchaser. No warranty is implied that the property is physically fit for the purpose intended by the purchaser, and the same applies where the property cannot be used in the way intended by the purchaser because such user would involve a breach of covenant.²⁸ By further extension, it seems that the same will be true where the restriction on user is statutory.²⁹

Apart from remedies on the contract or in deceit or negligence, the possibility that the vendor's actions in building or using the property without the relevant approvals may afford the purchaser an action for breach of statutory duty needs to be considered. In *Watkin v Wilson*³⁰ Henry J thought the wilful construction of a building or part of a building without a permit and in breach of the standards required should found a cause of action at the instance of an owner of the building. In *Willis v Castelein*³¹ however Williams J rejected such a possibility relying on a dictum of Cooke J in *Askin v Knox*³² that "[n]egligence liability has itself been a difficult and in some respects controversial development in the building control field. . . A claim of liability without proof of negligence goes too far and must be rejected." Breach of planning controls confers no right of action on members of the public³³ and a purchaser is unlikely to be in any better position.

Even however if the purchaser fails in an action against the vendor, it should not be forgotten that the vendor may yet be unsuccessful in an action from specific performance, this being an equitable remedy and accordingly lying in the discretion of the court, which may refuse the remedy if the vendor's conduct is such that the court thinks the remedy would be unfair to the purchaser. It has been suggested on several occasions that the absence of statutory approvals would result in the refusal of specific performance at the suit of the vendor.³⁴ Nor should the possibility of an action against the purchaser's solicitor be overlooked. The cases in the UK courts in which the absence of necessary approvals has been the issue have involved actions by

an offence committed under the Property Misdescriptions Act 1991 if property is advertised for sale without the requisite consents: see *Enfield LBC v Castle Estate Agents Ltd* [1996] 36 EG 145, where however the prosecution was unsuccessful.

²⁷ See *Nip Wun Lan v Chan Oi Ling* [1985] 2 HKC 105, where however the court was doubtful of the proposition.

²⁸ *Hill v Harris* [1965] 2 All ER 358. See also *Stokes v Mixconcrete (Holdings) Ltd* (1978) 38 P & CR 488; *Molton Builders Ltd v City of Westminster LBC* (1975) 30 P & CR 182.

²⁹ *Edler v Auerbach* [1949] 2 All ER 692; *Belcain Guest House Ltd v Weir* [1963] NZLR 301.

³⁰ [1985] 1 NZLR 666.

³¹ [1993] 3 NZLR 103.

³² [1989] 1 NZLR 248.

³³ See *Mahon v Sharma* [1990] 2 NIJB 76 (market holder not entitled to maintain action to restrain user without planning permission by competitor).

³⁴ *Dell v Beasley* [1959] NZLR 89; *Fletcher v Manton* (1940) 64 CLR 37; *Yammouni v Conditorio* [1959] VR 479. See also *Huang Ching Hwee v Heng Kay Pay* [1993] 1 SLR 100; *Tabata v McWilliams* (1981) 33 OR (2d) 32; *Pottinger v George* (1967) 116 CLR 328.

purchasers against their solicitors.³⁵ It may be that that is the easiest course for the purchaser to adopt, obviating the need to determine whether the matter is one of title or not. The question may be relevant however should the solicitor seek to avoid liability. In a number of cases in the UK and elsewhere defendant solicitors have sought to avoid liability to their clients on the basis that by the time the solicitors had been instructed, the clients had already committed themselves to purchasing the property, and that the absence of the relevant approval was a matter within the principle *caveat emptor*.³⁶

A MATTER OF TITLE?

It is clear then that a purchaser who discovers that the property he has agreed to buy does not have the approvals for its construction or use which should have been obtained may not be without remedy. The burden of this article is however to examine whether, apart from the various causes of action which have already been noted, the absence of appropriate statutory approvals or certificates is a matter affecting the title of the property. The question is not one peculiar to the UK and Ireland. Courts in various common law jurisdictions have had to consider the issue. In Canada restrictions on use imposed by a zoning by-law do not, in the absence of an express provision of the contract,³⁷ constitute defects in title,³⁸ and the same is true for breaches of building control.³⁹ In Australia,⁴⁰ New Zealand⁴¹ and Singapore⁴² the position

³⁵ *Lake v Bushby* [1949] 2 All ER 964; *Cottingham v Attey Bower & Jones* *The Times* 19th April 2000; *Babicki v Rowlands* [2001] EWCA Civ 1720. See also *Ford v White & Co* [1964] 2 All ER 775; *Raintree v Holmes & Hills* (1984) 134 *NLJ* 522. In Ireland the purchase of licensed premises has given rise to similar problems: see *Taylor v Ryan & Jones* (1983) unrep; *Kelly v Crowley* [1985] IR 212; *Flannery v Houlihan* (1987) unrep; *Pierse v Allen & ors* (1993) unrep.

³⁶ *Lake v Bushby* [1949] 2 All ER 964; *Tabata v McWilliams* (1981) 33 OR (2d) 32. See also *Kolan v Solicitor* (1969) 7 DLR (3d) 481; *Sullivan v Dan* 1996 NSW LEXIS 3672.

³⁷ See *Tabata v McWilliams* (1981) 33 OR (2d) 32; *Palen v Millson* (1987) 65 OR (2d) 89; *Cinram Ltd v Armadale Enterprises Ltd* (1996) 31 OR (3d) 257. According to Lerner J in *Tabata v McWilliams*, “[t]he parties can, by contract, make a matter which is normally not one affecting title become one which does affect title. If the contract is silent, by-laws do not affect title. If the contract expressly so states, by-laws can affect title.” What seems to be meant is that the remedies available to the purchaser where a vendor fails to deduce good title are available where there is a breach of planning control. Thus where a clause was held to have the effect of making breaches of planning by-laws a matter of title, the court considered the purchaser would have been entitled to avoid the contract where the vendor had failed to disclose breaches.

³⁸ See *Jackson v Nicholson* [1979] 3 ACWS 52; *Palen v Millson* (1987) 63 OR (2d) 89; *Gelakis v Giouroukos* (1991) 26 ACWS (3d) 1046.

³⁹ *Cinram Ltd v Armadale Enterprises Ltd* (1996) 31 OR (3d) 257.

⁴⁰ *McInnes v Edwards* [1986] VR 161; *Delbridge v Low* [1990] 2 Qd R 317; *Carpenter v McGrath* (1996) 40 NSWLR 39; *Falcone v Mentyn* [2003] TASSC 79. There are earlier authorities taking the view that the absence of approval under the building regulations amounts to a defect in title: see *Vukelic v Sadil-Quinlan* (1976) 13 ACTR 3; *Maxwell v Pinheiro* (1979) 46 LGRA 310; *Borthwick v Walsh* (1980) 41 LGRA 144. For an extensive review of the authorities see *Carpenter v McGrath*.

appears to be the same. In contrast, courts in Hong Kong have held that the absence of appropriate approvals can constitute a defect in title.⁴³ The reasons for the differing views are considered hereafter. To begin with we will look at the implications of the question. It has been pointed out that “title” may have different meanings according to the context in which the term is used.⁴⁴ It is therefore best perhaps to proceed by considering various possible consequences which may follow from saying that the absence of statutory approvals is a matter of title.

If the absence of planning permission or other statutory approvals is a matter of title, various consequences seem to follow.⁴⁵ (1) The vendor is said to be under a duty to disclose latent defects in title, so that failure to make the purchaser aware that there is no planning permission or other approval for the building on the land, or for the use of the property, will afford the remedies open as a consequence of non-disclosure. (2) Any approvals which should have been obtained are documents of title which should be abstracted to the purchaser to prove title. (3) If the matter is a matter of title, the vendor will fail to discharge his obligation to show a good title to the property if the property does not have the necessary approvals. (4) The purchaser may also have the right to repudiate the contract as soon as he discovers the absence of the relevant consent, on the basis that the purchaser has a right to repudiate the contract once he discovers that the vendor’s title is defective. (5) If the absence of statutory approvals is a matter of title, it is something which can be raised by the purchaser in requisitions on title. Further, if the matter is not merely a matter of title, but something which goes to the root of the title,

⁴¹ *Dell v Beasley* [1959] NZLR 89; *Harris v Weaver* [1980] 2 NZLR 437. See however *Watkin v Wilson* [1985] 1 NZLR 666 where the purchaser of property which had been built without the necessary building approval was successful in an action for damages to compensate for the cost of demolishing the structure in question on the ground *inter alia* that there was a latent defect in the title to the property on account of the possibility that the building authority could require demolition of the property. In *Willis v Castelein* [1993] 3 NZLR 103 the court distinguished *Watkin v Wilson* on the basis that in the earlier case a demolition order was in existence. In the most recent case, *Lawrence v Power* [1997] 3 NZLR 503, the court refused the vendor’s application to strike out the purchaser’s action on the ground that the claim was untenable in the light of the authorities, the court holding that the law was not sufficiently clearly against the action as to warrant such a course.

⁴² *Huang Ching Hwee v Heng Kay Pay* [1993] 1 SLR 100.

⁴³ *Giant River Ltd v Asie Marketing Ltd* [1990] 1 HKLR 297.

⁴⁴ Mellows, “The use and title” (1962) 26 *Conv* (NS) 269; Rudden, “The terminology of title” (1964) 80 *LQR* 62. See also Cobby, “Is the permitted use a matter of title?” (1949) 13 *Conv* (NS) 329.

⁴⁵ What follows are the consequences where the contract is an open contract. It is of course possible for the parties to regulate their obligations expressly. In the Republic for example, the Law Society’s General Conditions of Sale (2001 edn) contain a warranty on the part of the vendor that planning permission and building bye-law approvals have been obtained for any work carried out (condition 36). In Hong Kong, where the presence of unauthorised structures seems to have caused particular problems, clauses limiting the vendor’s liability are common. Provided they give the purchaser sufficient indication of the risk he is taking the courts will uphold such clauses: see *Jumbo King Ltd v Faithful Properties Ltd* [1999] 4 HKC 707.

then the purchaser will be able to raise the issue of lack of approvals notwithstanding that the time for raising requisitions has passed. (6) If the purchaser brings an action as a result of the breach of contract, then if the absence of statutory approvals is a matter of title, the purchaser's damages will be limited by the rule in *Bain v Fothergill*. (7) If the purchaser raises a requisition concerning the absence of approvals, the court may resolve the matter on an application to it under the Vendor and Purchaser Act 1874 made by either party. (8) If the absence of statutory approvals does not come to light until after completion, the purchaser may have remedies under the covenants for title implied by section 7 of the Conveyancing Act 1881.

It will be convenient to deal with these questions chronologically, as concerning matters which arise before contract, or while the parties rights are governed by the contract, or lastly, as matters which depend on the rights of the parties after completion of the contract has taken place.

Before Contract

In contracts for the sale of land the vendor is under a duty of disclosure to the purchaser. Traditionally this duty has been said to be limited to disclosure of latent defects in title.⁴⁶ Unless the absence of statutory approvals is a latent defect in title, it would seem to follow that the vendor need not say anything about the absence of planning permission or other approvals. That is one reason why the discussion whether such matters are matters of title is necessary. Unfortunately the matter is complicated by two factors. First, it appears from some of the cases that failure by the vendor to state that such approvals are lacking may amount to a misrepresentation.⁴⁷ If the failure to point out to the purchaser that the property lacks the necessary approvals can amount to a misrepresentation, it might be argued that it matters not whether what is not disclosed is a matter of title or not. A problem may however arise if other elements required to ground an action for misrepresentation are not present, *eg.* that the misrepresentation did not induce the contract. It is therefore necessary still to distinguish between misrepresentation and non-disclosure, and accordingly to ask whether the absence planning permission or other approvals amounts to a matter of title so as to fall within the vendor's duty of disclosure. The need to determine whether something constitutes a matter of title or is simply a representation was noted also in *Aslan v Berkeley House Properties Ltd*⁴⁸ where Fox LJ said that he considered the purchaser's case "an attempt to introduce into the field of title matters which, if they are to be material at all, more properly belong to the field of representation. Mr Meehan knew that he was buying a risky title. If he wanted to assess further the chances of the trustees threatening to operate

⁴⁶ *Emmet and Farrand on Title* para 4.027; Farrand, *Contract and Conveyance* (4th edn, 1983) p 63; Megarry & Wade, *The Law of Real Property* (6th edn, 2000) para 12-068; Barnsley, *Conveyancing Law and Practice* (4th edn, 1996) p 153. For a full discussion of the vendor's duty of disclosure see Harpum, "Selling without title: a vendor's duty of disclosure?" (1992) 108 *LQR* 280.

⁴⁷ See *Dell v Beasley* [1959] NZLR 89; *Gosling v Anderson* (1972) 223 EG 1743; *Sinclair-Hill v Sothcott* (1973) 26 P & CR 490; *Thomas v Vincent* [2001] 3 NZLR 355; *Doolan v Murray* (1993) unrep (RoI); *Goldstein v Davison* (1994) 47 ACWS (3d) 1105.

⁴⁸ [1990] 37 EG 81.

the break clauses and thus forcing a surrender of the leases, he could have asked [the vendor] what his information was. If [the vendor] gave a misleading reply, [the purchaser] would then have had a remedy. What actually happened was that [the vendor] contracted to sell the very title that he owned. There was no defect latent or patent in that title.”

The other factor complicating the issue whether the absence of statutory approvals is a matter of title is that in some cases⁴⁹ courts have stated the duty of the vendor in relation to disclosure in a manner which is more extensive than the traditional formulation that the duty is to disclose latent defects in title, so that non-disclosure of planning or other matters has been found to be a breach of the duty, in consequence of which the question whether the matters in question are matters of title or not is likewise avoided.⁵⁰

Bearing such factors in mind, there is a clear statement that “the absence of planning permission is *not*⁵¹ in itself a matter which affects the title in the land, nor is it in the absence of special circumstances a latent defect in the property as to which there is a duty on the vendor to speak” in the judgment of Graham J in *Gosling v Anderson*.⁵² While the decision was reversed on appeal,⁵³ it appears that Lord Denning MR agreed with the view that there was no duty to disclose the absence of planning permission, though he went on to hold that failure to do so could amount to a misrepresentation. Relevant also to the need for disclosure is *Geryani v O’Callaghan*,⁵⁴ in which the purchaser of property used as a café discovered after the contract was made that the property was not registered with the health authority as required by the Food Hygiene Regulations, but was only provisionally registered, and could not be fully registered unless a number of conditions involving significant expense were complied with. Failure to comply with the conditions would result in continued operation of the café becoming illegal some three months later. The purchaser purported to rescind the contract pursuant to a clause in the contract providing that the purchaser would not be required to accept property differing substantially from the property agreed to be sold. Holding the purchaser justified in her action, Costello J said that the purchaser could reasonably assume that the property was one in which the business could lawfully be carried on, and that he had impliedly rejected the argument advanced for the vendor, based on the

⁴⁹ *Sidney v Buddery* (1949) 1 P & CR 34; *Sakkas v Donford Ltd* (1982) 46 P & CR 290.

⁵⁰ See *Carlsh v Salt* [1906] 1 Ch 335, Joyce J considering that the vendor of real estate is required to disclose to the purchaser material defects in the title, or in the subject of the sale, which are in the vendor’s exclusive knowledge and which the purchaser cannot be expected to discover with the care ordinarily used in such transactions. For criticism see *In re Flynn and Newman’s Contract* [1948] IR 104. In *Citytowns Ltd v Bohemian Properties Ltd* [1986] 1 EGLR 258 failure to disclose a dangerous structure notice, the condition of the roof and a dispute with the tenant of the property in sale were considered to be matters of title, as the property was an investment and these would affect the purchaser’s rights as landlord against the tenant.

⁵¹ Emphasis added.

⁵² (1971) 220 EG 1117.

⁵³ (1972) 223 EG 1743.

⁵⁴ (1995) unrep (RoI).

doctrine of *caveat emptor*, that there was no duty on the vendor to disclose the fact that the premises were only provisionally registered, and that the purchaser could have ascertained the position by pre-contract enquiries. After stating the rule to be that a vendor was required only to disclose latent defects in title, Costello J went on to say that the clause in the contract upon which the purchaser relied meant that “if a vendor has knowledge of facts where non-disclosure might confer contractual rescission rights . . . prudence would suggest either pre-contract disclosure or that they be made the subject of special contractual conditions.”

Even however if the absence of planning permission or other approval were to be considered a matter of title, that would not be enough to require the vendor to disclose the fact. The vendor is required only to disclose *latent* defects in title. A defect will be latent where its existence is not apparent to the eye or is a necessary implication from something visible to the eye.⁵⁵ In *Billion Profit Enterprises Ltd v Rise Path Investments Ltd*⁵⁶ user of property as a karaoke bar where the occupation permit allowed use for offices was considered not to be a latent defect, the actual user being obvious for all to see, but the court held that in any event there had been sufficient disclosure in the terms of the agreement. It is not clear from the cases how buildings constructed without permission should be considered. On the one hand their existence is plain to see: the fact that they lack the appropriate consent however is not.⁵⁷ Assuming that the vendor is required or decides to disclose unlawful structures, according to *Billion Profit Enterprises* it is not the case that the vendor has to pinpoint precisely every illegal structure, as this would lead to dispute as to how far the vendor needs to disclose the precise nature of the illegal structure, its exact size, and in what ways the structure could create a risk or doubt on the title: where doctrines of equity were called on, said the court, it should be borne in mind that the purchaser can and should inspect the property before entering the contract, and if the contract contains clauses extinguishing or limiting the vendor’s duty as to user and unauthorised structures, the purchaser cannot be heard to complain of non-disclosure.⁵⁸

⁵⁵ *Yandle & Sons v Sutton* [1922] 2 Ch 199.

⁵⁶ [1999] HKCFI 858.

⁵⁷ See *Century Legend Ltd v Chu Chung Shing Development Co Ltd* [1999] HKCFI 853: “Knowledge of the existence of alterations was not to be equated with knowledge of the legal consequences of alterations.” In *Brain Future Ltd v Century Crown Ltd* [1999] 589 HKCU 1 the court considered that the presence of unauthorised structures could not be considered a latent defect. See also *Kensel Ltd v Charmfast Investment Ltd* [2001] HKCFI 1006. Note also however *But Chung Yin v Billion Extension Development Ltd* [1997] 1 HKC 531 in which a purchaser who was aware of the existence of unauthorised structures was not precluded from raising requisitions as he was not aware that enforcement action had been taken by the building authority.

⁵⁸ See also *Profit Rich Enterprises Ltd v Sky Talent Properties Ltd* [2003] HKCFI 536.

Between Contract and Completion

Deduction of Title

One reason why it is necessary to determine whether the absence of statutory approvals is a matter of title or not is because of the vendor's obligation to show good title to the purchaser. It is not enough that the vendor has a good title: he must show that that is the case.⁵⁹ Professor Potter considered that the vendor would be required to abstract the history of the use of the property in the same way as he would have to abstract the history of ownership and dealings with the property.⁶⁰ If that is right, then grants of planning permission and presumably other statutory approvals are documents of title in the same way as conveyances, mortgages and other assurances of the property. There is authority in Hong Kong that such is the case: in *Lui Kwok Wai v Chan Yiu Hing*⁶¹ the court held that an occupation permit was a necessary document to prove the vendor's title to the property.

Obligation to Show Good Title

The vendor must show good title to the property.⁶² A good title means a title free from all incumbrances except those which are patent or are known to the purchaser at the time of contracting.⁶³ That the vendor's obligation comprises two elements, (1) that the vendor can show he is owner of the property he has agreed to sell, and (2) that he can transfer that property free from incumbrances, was pointed out in *Ng King Wai Terence v Qing Yuan Enterprises Ltd*.⁶⁴ The absence of statutory approvals does not affect ownership of the property, so unless the absence of the relevant permission means the property is subject to an incumbrance, such absence does not prevent the vendor from fulfilling his obligation.⁶⁵

"Incumbrances" covers all subsisting third party rights and includes statutory liabilities, if they are not merely potential or imposed on property generally.⁶⁶ In *Re Allen & Driscoll's Contract*⁶⁷ the court rejected the argument that an inchoate incumbrance existed where a notice requiring work had been served by a local authority, holding that any charge arose only when the works were completed. Closer to the situation under discussion is *Re Forsey and Hollebrone's Contract*⁶⁸ where the court held that no incumbrance had been created where a resolution by a planning authority to prepare a town

⁵⁹ See *Active Keen Industries Ltd v Fok Chi Keung* [1994] 2 HKC 67 (described by counsel in *Summit Link Ltd v Sunlink Group (Hong Kong) Co Ltd* [1999] HKCFI 1448 as "the Bible for conveyancing lawyers").

⁶⁰ Potter, "Caveat emptor" 13 *Conv* (NS) 36, 42.

⁶¹ [1995] 1 HKC 197.

⁶² *Re Ossemley's Estates Ltd* [1937] 3 All ER 774; *Timmins v Moreland Street Properties Ltd* [1957] 3 All ER 265; *Leominster Properties Ltd v Broadway Finance Ltd* (1981) 42 P & CR 372.

⁶³ Megarry & Wade, *op cit*, para 12-080.

⁶⁴ [1998] 2213 HKCU 1. See also *Jumbo King Ltd v Faithful Properties Ltd* [1999] 4 HKC 707.

⁶⁵ See further *Summit Link Ltd v Sunlink Group (Hong Kong) Co Ltd* [1999] HKCFI 1448.

⁶⁶ Megarry & Wade, *op cit*, para 12-080.

⁶⁷ [1904] 2 Ch 226. See also *In re Farrer and Gilbert's Contract* [1914] 1 Ch 125.

⁶⁸ [1927] 2 Ch 379.

planning scheme existed at the time of the contract, Eve J, whose views were endorsed on appeal, saying that until approval for the scheme had been given by the Minister there was no scheme in existence which could affect the property: there was a potential interference with the enjoyment of the property, but until that potentiality had ripened into an actual interference, the property was not affected in the sense that there was no incumbrance imposed by the mere passing of the resolution.⁶⁹ Where property has been built or used without the necessary approvals, there is a risk that enforcement action will be taken by the relevant authority. The question is whether this risk means that an incumbrance exists.⁷⁰ In Hong Kong the view is that it can: whether or not it does is a question of degree.⁷¹ In *Ng King Wai Terence v Qing Yuan Enterprises Ltd*⁷² the court held that the risk of enforcement action for breach of the building regulations would mean that the vendor was unable to transfer the property free from incumbrances. Likewise, in *Wah Ying Properties Ltd v Sound Cash Ltd*⁷³ the court held that there was an incumbrance where remedial work had been carried out by the building authority and the potential risk existed that an order would be made requiring the repayment of the cost of such work by the owner, although the order was not made until after the purchaser acquired the property. In Australia however the risk of enforcement action has been held not to constitute an incumbrance.⁷⁴

Requisitions and Objections

If the absence of planning permission or other statutory approvals is a matter of title, it would seem to follow that the purchaser is able to raise any problems in requisitions on title. Unless it *is* a matter of title, the vendor will be able to refuse to answer any questions.⁷⁵ Two decisions of the Irish courts are relevant to the question whether questions arising in connection with planning controls are matters of title. In *Meagher v Blount*⁷⁶ the purchaser had entered a contract containing a warranty by the vendor as to compliance with planning controls. The purchaser raised a requisition on title as to planning matters and the question was whether he was entitled to do so or had to rely merely on the warranty contained in the contract. The court held that the purchaser's requisition was valid. In *Doolan v Murray*⁷⁷ however Keane J considered that requisitions as to planning matters, though common, were not in the strict sense requisitions on title. As noted, courts in Hong Kong have considered the absence of approvals to be a matter of title: in

⁶⁹ See also *A-G v Barnes Corp* [1939] Ch 110.

⁷⁰ Where enforcement action has already begun, it seems to be accepted that the vendor is unable to show good title: *But Chung Yiu v Bullion Extension Development Ltd* [1997] 1 HKC 531; *McInnes v Edwards* [1986] VR 161; *Huang Ching Hwee v Heng Kay Pay* [1993] 1 SLR 100.

⁷¹ *Jumbo King Ltd v Faithful Properties Ltd* [1999] 4 HKC 707 (Littton PJ). See below, p 114.

⁷² [1998] 2213 HKCU 1.

⁷³ [1994] 1 HKC 786.

⁷⁴ *McInnes v Edwards* [1986] VR 161. See further below p 112.

⁷⁵ See Farrand, *op cit*, p 118; *Ridley v Oster* [1939] 1 All ER 618.

⁷⁶ [1984] ILRM 671.

⁷⁷ (1993) unrep (RoI).

*Empire Trend Enterprises Ltd v Double Mind Co Ltd*⁷⁸ the court considered there was “no doubt” that the presence of unauthorised structures would prevent the vendor from showing good title. It follows from such a view that the purchaser should be entitled to raise requisitions on the matter. It appears from the decisions in Hong Kong that not only will the purchaser be able to raise requisitions, but in some cases the absence of approvals may be a matter which goes to the root of the title, so that the purchaser may be able to raise the problem notwithstanding that the time for raising requisitions has gone by.⁷⁹

Purchaser’s Right to Repudiate

Although the presence of unauthorised buildings has been held in Hong Kong to mean that there is a defect in title, the courts have held also that the purchaser does not have the right to repudiate the contract prior to completion, as where a purchaser discovers the vendor’s title is bad.⁸⁰ In *Ip Cho Sau v Leung Kai Cheong*⁸¹ the court held that although the presence of unauthorised structures went to the root of the title, and consequently that the time limits for raising requisitions did not apply, the purchaser’s action in repudiating the contract before completion had denied the vendor an opportunity of rectifying the position in order that good title could be shown on completion. The court considered the situation to be very different from cases where such a right of repudiation existed. One means of the vendor being able to rectifying the position would of course be to obtain approval from the building authority for the structures. The courts have however held that the vendor will show good title if he demolishes the unlawful structures before completion, so long as the purchaser will thereafter be getting substantially what he contracted for.⁸² This doctrine of substantial completion was relied on by the vendor in *Link Harvest Ltd v Wayhang Development Ltd*⁸³ who argued that it was the purchaser’s intention to redevelop the property so that any risk of enforcement action by the building authority would not adversely affect the purchaser. The court said it was prepared to accept that there would be substantial completion of the contract, and the purchaser would be wrong in failing to complete, if the purchaser’s

⁷⁸ [2001] 1 HKC 302.

⁷⁹ *Giant River Ltd v Asia Marketing Ltd* [1990] 1 HKLR 297; see also *Ip Cho Sau v Leung Kai Cheong* [2000] HKCFI 118; *Brain Future Ltd v Century Crown Ltd* [1999] 589 HKCU 1; *Large Land Investments Ltd v Cheung Siu Kwai Pansy* [2002] HKCFI 63. It seems however that the absence of approvals will not necessarily be a matter going to the root of the title: see *Mexon Holdings Ltd v Silver Bay International Ltd* [1999] HKCA 333. An appeal from that decision was dismissed ([2000] 2 HKC 1), though the court expressed doubt as to whether there was a blot on the title in any case. See also *Big Foundation Development Ltd v Wong Shu Kei* [1998] 772 HKCU 1; *Woo Wai Man v Tang Ying Ming* [1999] HKCU 1.

⁸⁰ Emery, “A purchaser’s right of repudiation” (1977) 41 *Conv* (NS) 18.

⁸¹ [2000] HKCFI 118. See also *Great Billion Enterprises Ltd v Chan Lin Ying* [2003] HKCFI 123.

⁸² *Goldful Way Development Ltd v Wellstable Development Ltd* [1998] 4 HKC 679; *Wide Link Ltd v Tam Sing Cheong* [2000] HKCA 29.

⁸³ [2001] 391 HKCU 1. See also *Perfect Manner Ltd v Bermuda Far East Properties Ltd* [2000] 690 HKCU 1; *Empire Trend Ltd v Double Mind Co Ltd* [2001] 1 HKC 302.

purpose in acquiring the property was immediate redevelopment. On the facts this was not the case, so that the vendor's argument failed.⁸⁴

Vendor and Purchaser Summons

Section 9 of the Vendor and Purchaser Act 1874 provides a summary procedure allowing either party to a contract for the sale of land to seek the court's determination "in respect of any requisitions or objections . . . or any other question arising out of or connected with the contract". The summary procedure cannot be invoked however to determine questions as to the existence or validity of the contract. The effect of the provision is to put the parties in the same position as if an action for specific performance had been brought and a reference directed as to title.⁸⁵ Two decisions of the courts in Canada involving comparable legislative provisions exist to the effect that the summary procedure is not available to determine questions concerning planning matters, as these are not matters of title. In *Re Pongratz and Zubyk*⁸⁶ a purchaser of property used for industrial purposes raised a requisition that the property should be rezoned to allow such activity, it being discovered that the property was zoned for residential purposes. The vendor applied for a declaration that the purchaser's objection had been satisfactorily answered. The court held the application was not properly brought under the equivalent Canadian statutory provision for the reason *inter alia*, that the requisition did not deal with a requisition or objection to title, but only with an instrument (the zoning by-law) affecting the land. The same view was taken, albeit by a majority, in *Re Mullin and Knowles*,⁸⁷ Shroeder JA distinguishing between a restrictive covenant and a municipal zoning by-law on the ground that in the former there was a clear question affecting the title to land, whereas in the latter, the land was affected but the title was not, and saying that the subject-matter of the requisition upon which the court was asked to rule, not being a matter of title, did not come within the purview of the statutory provision.

The Rule In Bain v Fothergill

The rule in *Bain v Fothergill*⁸⁸ limits the amount of damages which a purchaser will receive where the vendor is in breach of contract and the cause of the breach is a defect in his title. If the absence of planning permission or other approvals is a matter of title, then the rule would seem applicable.⁸⁹ The question was raised but unanswered in *Homyip Investment Ltd v Chu Kang Ming Trade Development Co Ltd*,⁹⁰ but in *EJH Holdings Ltd v Bougie*⁹¹ the court considered that the rule would not be applicable where

⁸⁴ See also *Max Smart Ltd v First Super Investment Ltd* [1998] HKCFI 691; *Summit Link Ltd v Sunlink Group (Hong Kong) Co Ltd* [2000] HKCA 305; *Grandco (Holdings) Ltd v Harbour Wealth Co Ltd* [2000] HKCFI 452.

⁸⁵ *Re Burroughs, Lynn & Sexton* (1877) 5 Ch D 601.

⁸⁶ [1955] 1 DLR 143.

⁸⁷ (1965) 53 DLR (2d) 680.

⁸⁸ (1874) LR 7 HL 158.

⁸⁹ The point is raised in Wylie, *Irish Conveyancing Law* (2nd edn, 1996) para 16.75.

⁹⁰ [1995] HKCFI 204. It has since been held that the rule is not applicable in Hong Kong: see *Grand Trade Development Ltd v Bonance International Ltd* [2001] HKCA 263.

⁹¹ (1977) 7 AR 213.

the court was awarding damages in lieu of specific performance, as the vendor had failed to take steps to obtain planning permission. That view is in keeping with other decisions on the rule,⁹² so that even if the absence of approvals is one of title, it is unlikely the courts will allow a vendor who has carried out work without seeking the relevant approval to rely on the rule.

After Completion

If the purchaser does not discover the problem until after completion the question will be whether he has a cause of action for breach of the covenants for title implied under section 7 of the Conveyancing Act 1881. Put in that way however the issue is misleading. Although section 7 speaks of a covenant, the section imports into conveyances by grantors who convey and are expressed to convey as beneficial owners more than one obligation. Contravention of planning controls has been considered to fall within the covenant by the vendor that the property will be enjoyed free from incumbrances, which includes “claims and demands.”⁹³ Action by the planning or other authority in the absence of any contravention may not however result in liability, as the vendor is responsible only for acts and omissions of himself and certain other persons mentioned in section 7.

Decisions involving breaches of planning controls and the implied covenants for title are in short supply. Two may be mentioned. In *Doolan v Murray*⁹⁴ the property assured to the purchaser was affected by a condition in a planning permission requiring part of the property to be kept undeveloped in order to serve as a fire escape route for property nearby. On the refusal of the planning authority to grant permission for the purchaser to build over the area in question the purchaser sought damages from the vendor under the implied covenants. Keane J dismissed the claim saying there was no breach of the covenant that the vendors had full power to convey, the property having been vested in the purchaser in accordance with the contract. Nor was there any breach of the covenant for quiet enjoyment, the purchaser’s situation not having been brought about by any act or omission of the vendors. The other is *Wah Ying Properties Ltd v Sound Cash Ltd*,⁹⁵ in which the purchaser was successful in recovering on the covenant that the property was free from incumbrances, where at the date of the assurance to the purchaser remedial work had been carried out by the Building Authority on failure of the vendor to comply with a notice requiring such work. The court held that the potential for a charge to be imposed to recover the cost of the work was an incumbrance, Cheung J saying: “As of 30 June 1992 [the date of the assurance], there was a risk that repayment of the cost of the remedial work might be demanded from the plaintiff. It was for the defendant to show a good title to the property free from that risk and without the possibility of litigation to the plaintiff. In my view, it had failed to do so.”

⁹² *Cp Day v Singleton* [1899] 2 Ch 320; *Sharnesford Supplies Ltd v Edge* [1987] 1 All ER 588.

⁹³ Farrand, *op cit*, 266; Russell, *op cit*, 190.

⁹⁴ (1993) unrep (RoI).

⁹⁵ [1994] 1 HKC 786.

BASES FOR THE DECISIONS

In considering whether or not the fact that property has been constructed or used without statutory approval constitutes a defect in title, a number of matters may be identified in the authorities.

Comparison With Restrictive Covenants

In some of the decisions the differences between the situation where carrying out building on land or the use to which land is put is controlled by a covenant and that where it is controlled by the statutory provisions under consideration have been emphasised. As noted earlier, a number of matters have been identified in the authorities as distinguishing the two situations: in the case of the approvals under consideration the restrictions arise under statutory provisions rather than private instruments; those provisions are of general applicability rather than being concerned only with the particular property of the vendor; they do not create any legal or equitable interest in the property in favour of the authority charged with enforcement; and accordingly the vendor remains able to transfer the estate he has contracted to sell.⁹⁶

Passing of Risk

Some of the cases have relied on the rule that risk passes to the purchaser at the date of the contract for the view that the absence of statutory approvals is not a matter of title. *McInnes v Edwards*⁹⁷ is the decision upon which courts in Australia and elsewhere⁹⁸ have later relied for the view that the absence of statutory approvals does not amount to a defect in title. In it Kaye J held that “the material time for the purpose of conveyance for determination whether a defect in title exists is at the time when the parties entered into their contractual relationship. The existence of an order made or direction given in the exercise of a statutory power imposing a burden or charge on land or the improvements thereon constitutes a latent defect in title. However the mere existence of circumstances which create the possibility or probability or risk that the property will at a future date be subject to a statutory charge or burden does not constitute a latent defect in title.” Kaye J went on to say that in the case before him “at the time of making the contract, alterations to the house had been made without the Council’s approval. That state of affairs per se did not and does not create an incumbrance, charge or burden upon the property. It gives rise merely to a potential situation out of which a statutory liability might be created or imposed by the Council exercising its powers. . . . But those powers, not having been exercised by the Council, there is not a latent defect in the title to the property agreed to be sold.”

The views expressed in *McInnes v Edwards* were considered to be correct in *Carpenter v McGrath*,⁹⁹ albeit that Sheller JA pointed out that “in a sense there is a circularity in using the passing of risk at the date of contract which is dependent upon the subsequent making of good title, to justify a view that

⁹⁶ Above, notes 18 and 19.

⁹⁷ [1986] VR 161.

⁹⁸ See *Huang Ching Hwee v Heng Kay Pay* [1993] 1 SLR 100.

⁹⁹ (1996) 40 NSWLR 39.

the existence of the potentiality of adverse affectation between contract and completion negates the characterisation of that potentiality as a defect of title.” Nonetheless, he continued, “it is the title which the vendor has contracted to convey which is established by the contract and thus it must be determined at the date of the contract. At that time a property may have the potentiality to be subjected to orders or charges pursuant to a number of local government, rating and other statutes, which potentiality may or may not in the future be realised. The passing of risk at the date of contract passes the risk of that potentiality. Thus, as it seems to me, it is correct in concept to hold that mere potentiality of affectation does not constitute a defect in title.”¹⁰⁰ The obvious objection to determining the question on the basis that the risk passes to the purchaser on entering the contract is that the vendor may well be aware of the potential for such action whereas the purchaser may not. The same however applies where the vendor knows the propensity of the property to flood in bad weather, so that the vendor’s knowledge cannot be a sufficient reason to refuse to base the decision on the rule as to risk. It is however possible to argue that the vendor should be under an obligation to disclose what he knows to the purchaser.¹⁰¹ The view that the vendor should be under a duty to disclose this requires either that the duty be formulated in a way that is not limited to disclosure of matters concerning title, or that the potential for enforcement action by statutory authorities is a matter of title.

Not only have the courts rejected the vendor’s knowledge that the property lacks statutory approvals as relevant, they have also dismissed the illegality of the vendor’s actions as relevant to distinguishing the position from the general risk that property will become affected by some action on the part of a statutory authority. In *Delbridge v Low*¹⁰² Derrington J said, “It is difficult to accept the proposition advanced for the plaintiffs that there is some relevant distinction in the case of a potential liability of the land to such a burden where on the one side it arises out of illegal conduct and on the other where it is simply the result of an action by an authority so empowered. There is a distinction certainly, but its relevance has never been acknowledged by the many authorities that have touched this and related topics.” That view was endorsed by Sheller JA in *Carpenter v McGrath*.¹⁰³

¹⁰⁰ See also *Huang Ching Hwee v Heng Kay Pay* [1993] 1 SLR 100, the court considering that “it would give rise to great uncertainty and unnecessary disputes in conveyancing practice if the mere potential of enforcement action by the authorities were to be treated as something going to title.”

¹⁰¹ See *Chi Kit Co Ltd v Lucky Health International Enterprise Ltd* [2000] 521 HKCU 1 (“The maxim [caveat emptor] should not be applied so that it leaves a purchaser exposed to a serious detriment the risk of which is solely within the knowledge or the means of knowledge of the vendor.”) See also *Fletcher v Manton* [1940] 64 CLR 37, Dixon J suggesting that had the vendor known that the making of a demolition order was contemplated by the relevant authority and had failed to disclose this to the purchaser, the contract might have been voidable. That dictum was relied on by the trial judge in *Huang Ching Hwee v Heng Kay Pay* [1990] 1 SLR 1220 in deciding that the vendor should have disclosed unlawful alterations carried out by him. On appeal however [1993] 1 SLR 100 knowledge was seen as irrelevant to the vendor’s liability.

¹⁰² [1990] 2 Qd R 317.

¹⁰³ (1996) 40 NSWLR 39.

Yet the distinction is surely important: the illegality involved in carrying out building works or using the property without the relevant approvals gives rise to the potential for action to be taken to undo what has been done unlawfully, and such action can be taken whether or not the person whose act has given rise to the action remains the owner of the property. To that extent a purchaser of the property in effect suffers a sanction for the wrongdoing of the vendor. That is unlike the case where an authority carries out street works and imposes a charge on the property, or where an authority makes a demolition order because the property is dilapidated or where it decides to acquire the property. There is in such cases no wrongdoing by the vendor for which the purchaser incurs a sanction. The action taken by the authority has nothing to do with illegality, but arises because of the physical state of the property or because of some decision taken by the authority. That is simply a matter attributable to the purchaser's misfortune rather than the vendor's misconduct. If the distinction is therefore relevant, by holding the carrying out of the activity in question to be a matter of title the purchaser is given the opportunity of avoiding such loss through the unlawful acts of his predecessor.¹⁰⁴

Quality of Title and Incumbrances

Risk of enforcement action has been dealt with differently by the courts in Hong Kong, leading to the opposite view, *viz.*, that a defect in title exists. There appear to be two aspects to this: one is that the risk means that the title shown fails to reach the standard required for a good title; the other is that the risk means that there is an incumbrance so that the vendor is unable to convey the property free from incumbrances.

As to the first, some of the cases¹⁰⁵ proceed on the basis of authorities determining the standard which a title has to meet before it will be forced on an unwilling purchaser in an action brought by the vendor for specific performance.¹⁰⁶ The question for the court has therefore concerned the threshold for determining whether there is a sufficient risk of action being taken by the building authority for non-compliance with the building regulations so as to amount to a defect in title.¹⁰⁷ Unless it is clear beyond reasonable doubt that the purchaser's title will be secure from the danger of third parties asserting a claim successfully, the title does not meet that

¹⁰⁴ Note also the comments of Li Deputy J in *Summit Link Ltd v Sunlink Group (Hong Kong) Co Ltd* [1999] HKCFI 1448 that "[t]here are laws prohibiting illegal and unauthorised structures. Courts may be undermining laws passed by our legislature by giving recognition to illegal and unauthorised structures. . . . Perhaps, if the courts consistently hold that illegal structures (large or small and of whatever nature) are blots on title, owners would remove such structures before more funding can be found to re-double the sorely needed enforcement efforts by the Building Authority."

¹⁰⁵ See *Giant River Ltd v Asie Marketing Ltd* [1990] 1 HKLR 297; *Spark Rich (China) Ltd v Valrose Ltd* [1999] HKCA 105.

¹⁰⁶ See *MEPC Ltd v Christian-Edwards* [1979] 3 All ER 752.

¹⁰⁷ *Spark Rich (China) Ltd v Valrose Ltd* [1999] HKCA 105; *Nation Group Development Ltd v New Pacific Properties Ltd* [1999] 408 HKCU 1; *Jumbo Gold Investment Ltd v Warren Yuen Cheong Leung* [2000] 53 HKCU 1; *Queen Energy Ltd v Chan Shu Keung Raymond* [2000] HKCFI 543; *Great Billion Enterprises Ltd v Chan Lin Ying* [2003] HKCFI 123.

standard. The problem here however is that the courts have been concerned about the extent of the risk, not the nature of the claims by third parties. The decisions seem to proceed on the basis that any claim which affects enjoyment of the property is one affecting title.¹⁰⁸ In some of the cases the risk involved does mean the purchaser is in danger of losing his estate in the property.¹⁰⁹ In others it is not obvious whether the risk of enforcement action by the building authority is itself enough to result in a defect in title, or whether it is the possibility of forfeiture action on the part of the government as lessor which has this consequence.¹¹⁰ It is clear however from *Link Harvest Ltd v Wayhang Development Ltd*¹¹¹ that the risk of enforcement action on the part of the building authority is itself sufficient to result in a defect of title. In that case a purchaser raised requisitions concerning the construction of the building in sale, seeking proof that the government had approved the building pursuant to the provisions of an agreement for a grant of the land by the government. The building was also subject to the provisions of the Buildings Ordinance. The court distinguished between the risk of action by the government as grantor and by the building authority. So far as the former was concerned, any breach of the terms of the agreement for the grant had been waived, so that there was no risk of action and consequently no defect in title. There was however a risk that action could be taken by the building authority so that the purchaser's requisition in that regard was valid and the vendor had failed to show good title.

As we have seen,¹¹² other cases have proceeded on the basis that the vendor fails in his obligation to transfer the property free of incumbrances because the risk of enforcement action constitutes an incumbrance. That view is however contrary to Williams' statement of the law,¹¹³ based on authorities such as *Re Allen & Driscoll's Contract*¹¹⁴ noted earlier, that statutory burdens which have not attached as charges or become actual liabilities at the date for completion are not incumbrances, even though the event which will ultimately cause the charge or liability to arise happened before the sale. Nonetheless it seems more attractive than equating the risk of enforcement action by a statutory authority to the risk of challenges to the vendor's ownership, as exist in the cases where the question has been whether the

¹⁰⁸ See *Link Harvest Ltd v Wayhang Development Ltd* [2001] 391 HKCU 1, the court considering that although enforcement action by the Buildings Department would not affect the leasehold estate to be sold, "it may affect title of the property to be sold because it may, in most cases where the subject matter of the sale was a building or a part of a building, affect the purchaser's enjoyment of the building or that part of the building agreed to be sold to him."

¹⁰⁹ See *eg Giant River Ltd v Asie Marketing Ltd* [1990] 1 HKLR 297 where the unauthorised work meant that there was a risk of litigation from three sources: by the Crown, by the Building Authority, and by neighbouring owners. Only the first of these carried the risk of forfeiture of the vendor's estate in the property.

¹¹⁰ See *Big Foundation Development Ltd v Wong Shu Kei* [1998] 772 HKCU 1; *Chi Kit Co Ltd v Lucky Health International Enterprise Ltd* [2000] HKCU 1.

¹¹¹ [2001] 391 HKCU 1.

¹¹² Above, p 107.

¹¹³ Williams, *A Treatise on the Law of Vendor and Purchaser* (3rd edn, 1922) vol 1 p 167.

¹¹⁴ [1904] 2 Ch 226.

vendor has shown good title.¹¹⁵ Ironically, the point that in circumstances where that is the question, the litigation must relate to title, is made in a case from Hong Kong. In *Ng King Wai Terence v Qing Yuan Enterprises Ltd*¹¹⁶ it is said that “the “possibility of dispute or litigation” should not be taken out of context to mean any dispute or litigation. The litigation should be such as amounting to a challenge to title. If the title is defeasible at the challenge of another party, it is not good title. In this connection, it is important to note that “good” is used in contradistinction to “bad” or “doubtful” . . . An incumbrance, such as a restrictive covenant or a charge, does not render a title bad or doubtful; it is a burden on the property; hence the second limb of the common law duty or the contractual duty to convey property free from incumbrances.”

There is of course a significant difference in the position of the parties according to whether the position should be analysed by the rule that risk passes to the purchaser at the making of the contract, or according to the obligation of the vendor to transfer the property to the purchaser free from incumbrances. The relevant date for determining whether the vendor is able to convey the property to the purchaser free of incumbrances is the date of completion,¹¹⁷ so that if enforcement action is taken after the date of the contract but before completion is due, the result will be either that the purchaser must complete the contract (subject to any question of the court refusing specific performance in the exercise of its discretion) because the risk passed to him when the contract was made, or alternatively that the purchaser can be discharged from the contract because the vendor is unable to convey the property free from incumbrances at the date set for completion.

CHANGING TIMES?

If the prevalent view is that the absence of statutory approvals is not a matter of title, it may be asked whether it should be. In *Jackson v Nicholson*¹¹⁸ it was argued by the purchaser that modern real property law requires that a marketable title includes not only the traditional chain of ownership but also current compliance with the use and occupation requirements contained in statutory by-laws and regulations. The court examined the authorities cited for that proposition, finding they did not assist in the circumstances of the present case, but made no comment on the validity of the proposition itself. Some support for the proposition may come from cases on the question whether a contract for the sale of land can be frustrated. In *Lim Kim Som v Sheriffa Tabah Bte Abdul Rahman*¹¹⁹ the Court of Appeal in Singapore, relying on Lord Wilberforce’s view in *National Carriers Ltd v Panalpina*

¹¹⁵ See *Re Stirrup’s Contract* [1961] 1 All ER 805: “the purchaser is entitled to be satisfied that his vendor is seized of the estate he is purporting to sell . . . and that he is in the position, without the possibility of dispute or litigation, to pass [that estate] to the purchaser.”

¹¹⁶ [1998] 2213 HKCU 1.

¹¹⁷ *Kolan v Solicitor* (1969) 7 DLR (3d) 481: “it is trite law that any provision as to title being free from incumbrances speaks as of the date of closing.”

¹¹⁸ [1979] 3 ACWS 52.

¹¹⁹ [1994] 1 SLR 393. See however *Hillingdon Estates Co v Stonefield Estates Ltd* [1952] 1 All ER 853.

(Northern) Ltd,¹²⁰ that the conferring of an estate is a subsidiary means to an end rather than an aim in itself, held that the reality of a contract for the sale of property was that the purchaser bargained not only for the legal estate but for the use of the property, and that, where proceedings for compulsory acquisition were started after contract, he would be getting an estate which was unusable and unsaleable. The same reasoning can be applied where a purchaser enters a contract for the purchase of buildings or land which is being used for a particular purpose which the purchaser intends to continue. If the appropriate approvals for the existence of the buildings or the continuance of the use do not exist, the purchaser has bought something which may be of no use to him.¹²¹ True, that is the case where the property is physically defective, but the difference surely is that in the latter case the purchaser has the opportunity of ascertaining the position by physical inspection prior to the contract. The better analogy, it is suggested, is that the purchaser's position is the same as that which exists if he buys property which is affected by covenants against building or use.

¹²⁰ [1981] AC 875.

¹²¹ See further *Pemberton Australia Pty Ltd v CPS Services Pty Ltd* 1990 NSW LEXIS 10619 and *Mulwala & District Services Club Ltd v The Owners – Strata Plan 37724* [2000] NSWSC 1040, Young J suggesting in the former that there will be a defect in title where the purchaser is deprived of a significant and substantial feature of the property, and in the latter where there is a substantial interference with the use to which the property can be put.