

HONG KONG / JUDGMENT

MULTI ELITE LTD v. LI YAN PING AND ANOTHER

[2020] HKCFI 2689**COURT**

Court of First Instance

DECIDED

22 October 2020

CASE / FILE NUMBER

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[2020] HKCFI 2689 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE HIGH COURT ACTION NO 1486 OF 2014 LI YAN PING Plaintiff and MULTI ELITE LIMITED FUNG SING MARKETING LIMITED (formerly known as FLOURISH PROPERTY AGENCY LIMITED) (by original action) 1st Defendant 2nd Defendant AND BETWEEN MULTI ELITE LIMITED Plaintiff and LI YAN PING FUNG SING MARKETING LIMITED (formerly known as FLOURISH PROPERTY AGENCY LIMITED) (by counterclaim) 1st Defendant 2nd Defendant

Before : Hon Marlene Ng J in Court Dates of Hearing : 4-10 July 2018 Date of Handing Down Judgment : 22 October 2020

JUDGMENT

I. INTRODUCTION Max Rainbow Enterprise Limited (Max Rainbow) was the former registered owner and the 1st defendant Multi Elite Limited () is the current registered owner of ALL THOSE 55/30167th parts or shares of and in ALL THOSE pieces or parcels of ground registered in the Land Registry as the TSUEN WAN TOWN LOT NO 236 AND THE EXTENSION THERETO at Tsuen Wan in the New Territories of Hong Kong (collectively,) and of and in the messuages erections and buildings thereon known as Shop No 4 (Shop 4) and Yard adjacent thereto (Shop 4 Yard) (collectively, Shop/Yard 4) on Ground Floor () and Store No 4 (Store 4) on Cockloft Floor () of Phase Phase 2) of the Commercial Development (Development) of Allway Gardens (Buildings), Nos 187-195 Tsuen King Circuit and Nos 2-22 On Yat Street, Tsuen Wan, New Territories, Hong

Kong (collectively, Property). Max Rainbow was the registered owner of the Property from 2 January 2008 until D1 became the registered owner thereof on 31 May 2013. The present action arose from a sub-sale and sub-purchase transaction in respect of the Property in 2012-2013 whereby D1 as purchaser purchased the Head Property referred to in paragraph 3 below (including the Property and the Other Property referred to in paragraph 6 below) and as confirmor/vendor re-sold the Property to the plaintiff () as sub-purchaser with completion to take place on 31 May 2013. The 2nd defendant () was a realty estate agent who acted for both P and D1 in respect of such sub-sale and sub-purchase, and its handling employee was Mr Eric Tong Chun Lung (Tong), who was himself a licensed estate agent. For convenience, D1 and D2 are collectively referred to as below. By a provisional agreement for sale and purchase (PASP) dated 9 November 2012, Max Rainbow as vendor agreed to sell and Ho Chi Yung () or his nominee as purchaser agreed to purchase ALL THOSE 2030/30167th parts or shares of and in the Lot And of and in the Buildings together with the sole and exclusive right and privilege to hold use occupy and enjoy ALL THOSE PORTIONS of the Development of the Buildings comprising PORTION ON LOWER GROUND FLOOR OF PHASE 1, GROUND FLOOR OF PHASE 1, SECOND FLOOR OF PHASE 1, GROUND FLOOR OF PHASE 2, and COCKLOFT FLOOR OF PHASE 2 (collectively, Head Property) subject to existing lettings/tenancies (if any) for a consideration of \$350,000,000 with completion to take place on or before 31 May 2013 (Head PASP). The relevant terms of the Head PASP are set out in Schedule 1 to this Judgment, and I adopt the abbreviations therein. On 27 November 2012, the Head PASP was registered at the Land Registry under memorial no 12112700840065 dated 21 November 2013 that was prepared by D1 s former solicitors Wilkinson & Grist (). The Head Property comprised inter alia a large number of shops/units at a shopping mall at Phase 1 and shops/units at Phase 2 of the Development of the Buildings. D1 intended to purchase and sub-divide the Head Property into individual shops/units, and to sub-sell such shops/units to different sub-purchasers with a view to make profit gain. By a Nomination dated 22 November 2012, Ho inter alia nominated D1 as his nominee for entering into the formal agreement for sale and purchase (FASP) in respect of the Head Property free from any trust whatsoever to the intent that D1 shall take up the assignment of the Head Property as the absolute and legal owner thereof, which nomination was also confirmed by D1 (Head Nomination). On 28 December 2012, the Head Nomination was registered at the Land Registry under memorial no 12122802390014 dated 28 December 2012 that was prepared by W&G. By a PASP dated 22 November 2012 in the printed standard form of D1 s estate agent Midland Realty (Shops) Ltd (Midland Realty), D1 as confirmor/vendor agreed to sub-sell and P as purchaser agreed to sub-purchase Shop No 6 (Shop 6) and Yard adjacent thereto (Shop 6 Yard) (collectively, Shop/Yard 6) on G/F and Store No 6 (Store 6) on C/F of Phase 2 of the Development of the Buildings (collectively, Other Property) subject to lettings/tenancies (if any) for a consideration of \$11,523,960 with completion to take place on/before 2:00 pm on 31 May 2013 (Shop 6 PASP). The relevant terms of the Shop 6 PASP are set out in Schedule 2 to this Judgment, and I adopt the abbreviations therein. P paid \$500,000 to D1 as initial deposit under Clause 2(a) of the Shop 6 PASP. By a PASP dated 28 November 2012 in D2 s printed standard form, D1 as confirmor/vendor agreed to sub-sell and P as purchaser agreed to sub-purchase the Property subject to lettings/tenancies (if any) for a consideration of \$15,247,980 with completion to take

place on/before 2:00 pm on 31 May 2013 (Shop 4 PASP). The relevant terms of the Shop 4 PASP are set out in Schedule 3 to this Judgment, and I adopt the abbreviations therein. P paid \$300,000 to D1 as initial deposit under Clause 2(a) of the Shop 4 PASP. Under Clauses 6 and 17 of each of the Shop 6 and Shop 4 PASPs, (a) D1 as vendor sold as confirmor and not as registered owner of the Other Property and the Property, and (b) D2 was the estate agent for both D1 and P in the sub-sales and sub-purchases of these properties. On the day before the Shop 4 PASP was signed (ie 27 November 2012), D2 faxed Henry Chiu & Partners () to confirm that P s then solicitors were HCP and D1 s then solicitors were W&G. On 4 December 2012, HCP wrote to W&G (a) enclosing copy Shop 4 PASP, (b) asking for the draft FASP for the sub-sale and sub- purchase of the Property for their approval together with certified true copies of the Head PASP and the Head Nomination, and (c) asking for all title deeds and documents of the Property (Title Deeds) for their perusal on usual undertakings. On 12 December 2012, W&G sent to HCP copy Head PASP. On 4 January 2013, W&G wrote to HCP (a) stating they were taking D1 s instructions on the terms of the draft FASP for the sub-sale and sub-purchase of the Property, which draft would be provided to HCP for approval as soon as possible, and (b) asking for payment of the further deposit in favour of W&G pursuant to the Shop 4 PASP. HCP delivered the Shop 4 PASP to the Land Registry under memorial no 13010801340066 dated 7 January 2013, and such documents were received by the Land Registry on 8 January 2013. On 8 January 2013, HCP wrote to W&G stating they still had not received the draft FASP, but enclosing a cashier order for \$1,224,798 in favour of W&G in payment of the further deposit. By such letter, HCP also asked W&G about the undivided share of the Property which information was necessary for registration of the Shop 4 PASP at the Land Registry, and warned W&G that D1 would be liable for P s loss/damages, if any, due to inability to register the Shop 4 PASP at the Land Registry upon D1 s failure to advise the undivided share of the Property. Thus, P had paid to D1 a total sum of \$1,524,798.00 as initial/ further deposits under Clause 2(a)-(b) of the Shop 4 PASP (collectively, Deposits). In the end, D1 and P did not enter into and/or sign any FASP for the sub-sale and sub-purchase of the Property. On 4 February 2013, the Land Registry informed HCP that memorial no 13010801340066 for the Shop 4 PASP and memorial no 13010801340070 for the Shop 6 PASP were withheld from registration, and such memorials/instruments were returned to HCP for amendment and clarification on matters raised in the scrutineer s notes as follows: Please complete, amend or add as indicated below:-

- (1) Please specify the Property Reference Number(s) [PRN(s)] of the affected premises in the memorial in accordance with Reg (6)(1)(eb) of the Land Registration Regulations.
- (2) Please specify the undivided share of the premises affected in the memorial. By a Nomination dated 20 February 2013, P nominated Yan Yau Investment Limited (Yan Yau) as her nominee to be the purchaser and to take up the assignment of and in the Other Property to the intent that all of her estate right title benefit and interest of and in such property under the Shop 6 PASP be vested in Yan Yau, and P as the nominator and also on behalf of Yan Yau signed to confirm the nomination (Shop 6 Nomination). On 13 March 2012, the Shop 6 Nomination was registered at the Land Registry under memorial no 13031301560165 dated 7 March 2013 that was prepared by HCP. By a Nomination dated 20 February 2013, P nominated Win Yan Investment Limited (Win Yan) as her nominee to be the purchaser and

to take up the assignment of and in the Property to the intent that all of her estate right title benefit and interest of and in such property under the Shop 4 PASP be vested in Win Yan, and P as the nominator and also on behalf of Win Yan signed to confirm the nomination (Shop 4 Nomination). On 13 March 2012, the Shop 4 Nomination was registered at the Land Registry under memorial no 13031301560190 dated 7 March 2013 that was prepared by HCP. On 25 February 2013, the Land Registry by its letter to HCP noted (a) the Shop 4 and Shop 6 PASPs and their memorials had not been re-delivered to the Land Registry, and (b) urged HCP to re-deliver the duly amended and/or clarified instruments/memorials as soon as possible together with the additional registration fees. On 28 February 2013, HCP replied by enclosing the Shop 4 and Shop 6 PASPs with cheques for payment of the additional registration fees. HCP went on to explain that the vendor (ie D1) had not yet advised the undivided shares of the Other Property and the Property, so they were unable to specify the undivided shares and/or the PRNs for the corresponding memorials. HCP therefore asked the Land Registry to stop again [their] registration and return the documents to [them] for [their] further action and to withhold any further disincentive fee therefor . On 1 March 2013, HCP wrote to tell W&G they had delivered the Shop 4 PASP to the Land Registry for registration so as to secure P s interests, but were unable to fill out details required for the corresponding memorial due to D1 s failure to advise the undivided share of the Property despite their earlier requests for the same, so the Land Registry withheld registration of the Shop 4 PASP and P had to pay a disincentive fee / additional registration fee of \$200. By such letter, HCP held D1 liable for such (and any further) disincentive fee / additional registration fee, and urged W&G to advise the undivided share of the Property as soon as possible. On 20 March 2013, W&G wrote to HCP saying the Title Deeds were available, and asking for settlement of their fee note in the sum of \$4,179 for preparing certified copies of various title deeds and documents. On 28 March 2013, W&G wrote to HCP enclosing (a) the draft FASP for the sub-sale and sub-purchase of the Property for approval, and (b) the copy tenancy agreements of the Property dated 21 March and 5 November 2012 for reference. W&G (i) stated that if HCP approved the draft FASP they could treat it as engrossment for P s signature and return the signed FASP to W&G for D1 s signature, but (ii) reminded that W&G were still taking D1 s instructions on the terms of the draft FASP, so there might be further revisions and D1 s rights to make such revisions were expressly reserved. On 9 April 2013, HCP replied to W&G s letter dated 20 March 2013 by noting P was not obliged under clause 8 of the Chinese supplemental agreement for sale and purchase dated 28 November 2012 to pay any fees for the Title Deeds, and urging W&G to let them have all the Title Deeds for their perusal. On 3 May 2013, W&G replied saying that even though the purchaser should pay for preparation of the certified copies of the Title Deeds, they had conveyed P s objections to D1 and were awaiting D1 s instructions. But on without prejudice basis W&G loaned and forwarded the copy Title Deeds to HCP against their undertakings (a) to hold them to W&G s order, (b) to forthwith return them on demand, and (c) not to make any certified copy unless with W&G s express written consent. Thus, despite Ds non-admission in their pleadings, it appeared W&G did lend the Title Deeds (or at least copies thereof) to HCP for their perusal. On 3 May 2013, HCP wrote to W&G putting on record that (a)

notwithstanding their letters dated 8 January and 1 March 2013 W&G still had not advised the mode of allocation of undivided share of the Property, which information was necessary for them to approve the draft FASP, and (b) P's interests in the Property were prejudiced because P could not register the Shop 4 PASP at the Land Registry. By such letter, HCP pressed D1 to provide without further delay documentary evidence to show the mode of allocation of undivided share of the Property, and all P's rights were reserved in the meantime. On 8 May 2013, HCP wrote to W&G raising a series of requisitions on title after perusal of the Title Deeds, including the following: (a) [since] [D1] has partitioned the [G/F] and [C/F] into numerous smaller units, please let [HCP] have documentary evidence to show that the partitioning has not breached clause 4 of Section IV of the Deed of Mutual Covenant No TW358241 [as] mentioned in [HCP's] letters dated 8th January 2013, 1st March 2013 and 3rd May 2013, [HCP has] not received from [W&G] any documentation to show the mode of allocation of undivided share of the Property up to the present. Please let [HCP] have certified copy of the said document without further unnecessary delay. On the same day, HCP wrote to W&G saying they still had not received W&G's written reply to the requisitions raised, and [since] completion is imminent and [D1] as vendor is obliged to prove good title of the property at his own expenses, [HCP] are pleased if [W&G] would let [HCP] have [W&G's] satisfactory reply to [HCP's] requisitions without further delay or the completion will not be taken place in time and further [W&G's] attention is drawn to the judgment of *Yeung Sau Chuen v Chung Chun Ting* and another [MP No.4080 of 1992]. On 10 May 2013, W&G enclosed copy draft Sub-Sub-Deed of Mutual Covenant (Sub-Sub-DMC) as approved by LACO, Lands Department (which showed that Shop/Yard 4 and Store 4 of C/F at Phase 2 of the Development of the Buildings were allocated 31 and 24 undivided shares respectively) for HCP's perusal, and further enclosed a proforma assignment for HCP's reference. By such letter, W&G asked for HCP's draft assignment as early as possible for approval by HCP and by Max Rainbow's solicitors. On the same day, W&G sent copy assignment floor plan of the Property for HCP's perusal. On 15 May 2013, W&G sent (subject to usual undertakings) certified copy of the approval letter dated 9 May 2013 for the Sub-Sub-DMC issued by the Lands Department. On 23 May 2013, W&G replied to the requisitions raised by HCP's letter dated 8 May 2013 stating inter alia as follows: (a) [please] be informed that the sub-division of the [Property] is in accordance with the approved building plans. [W&G] would also like to draw [HCP's] attention to [the Waiver Clause] of the Appendix to the [Shop 4 PASP] [Shop 4 Appendix] made between [D1 and P]. In view thereof, [HCP's] requisition will not be further entertained copy draft Sub-Sub-DMC had been sent to HCP earlier, and W&G were prepared to give HCP their undertaking (to be included in HCP's completion letter) to send HCP certified copy of the duly registered Sub-Sub-DMC within 14 working days after HCP's receipt of the same from the Land Registry. But as seen in further detail below, P complained that W&G's aforesaid reply to HCP's requisitions failed to disclose the Alleged UBWs (referred to in paragraph 37 below). On 24 May 2013, HCP wrote to W&G asking them to confirm/advise in writing the undivided share allocated to the Property, and to clarify why the proforma assignment did not include Store 4. On 27 May 2013, W&G replied that in accordance with the draft Sub-Sub-DMC approved by the Lands Department, the number of

undivided shares allocated to the Property were 55/30167th shares (see paragraph 30 above), and went on to remind that it was for HCP acting for the sub-purchaser to prepare an assignment that duly set out the full particulars of the Property for W&G's approval, but W&G gave a full description of the Property in such letter to assist HCP. In May 2013, P commissioned a survey report of the Property by RHL Surveyors Limited (). RHL carried out site inspection on 24 May 2013, and rendered its report dated 27 May 2013 on the condition of the Property (RHL Report) as follows:

- i. According to the building plans (B.O.O. ref. No. 2/9086/75II(P)59) approved by the Buildings Department [] on 8 June 1978 and the site inspection on 24 May 2013, we confirm that the existing layout of the [Property] is different from the approved building plans. There were two sub-divided units at the G/F; namely a hardware store on the left hand side (west side) [Unit 4(A)] and a real estate agency on the right hand side (east side) [Unit 4(B)] when viewed from Tsuen King Circuit. Entry to the real estate agency office was denied for our site inspection. However from the cockloft [ie Store 4] and hardware store we noticed some Unauthorized Building Works [UBWs] as shown below:-
 - a) Steel security cage for windows type air conditioners on the cockloft windows at rear
 - b) Canopies at hardware store on G/F at rear yard ii. The subject building is a 35 years old 25-storey tenant building constructed with reinforced concrete frame, floor slabs and roof. We consider that the premises was generally constructed and maintained in a fair condition. iii. According to the land registry records on the subject property searched on 27 May 2013, there are no other subsisting orders registered against the title of the premises. (Appendix C) Caveats Any parts of the building which are covered, unexposed or inaccessible, could not be inspected and it is therefore not possible to report such parts are free from defects. On the same day, RHL issued invoice no 11203 to P for the RHL Report in the sum of \$7,000 (RHL Invoice). So P claimed (but Ds denied) that on/about 27 May 2013 (ie 4 days before the date scheduled for completion of the sub-sale and sub- purchase of the Property pursuant to the Shop 4 PASP) she discovered from the RHL Report there were UBWs at the Property that (according to P but denied by Ds) D1 was at all material times aware of but failed to disclose despite earlier requisitions raised by HCP (Alleged UBWs): (a) steel security cage for widow-type air-conditioners on the rear windows of Store 4 on C/F (Cage UBW the presence of canopies at the rear yard of the hardware store at Unit 4(A) (ie the Shop 4 Yard) on G/F (Canopy UBW On 30 May 2013, HCP replied to W&G's letter dated 23 May 2013 inter alia by (a) asking W&G to enlighten how the Waiver Clause in the Shop 4 Appendix could be an answer to their requisitions when such clause related exclusively to the Property but HCP's requisitions related to the sub-division of G/F of Phase 2 of the Development of the Buildings, (b) reiterating their requisitions, and (c) pointing out it would be a breach of clause 4 of section IV of the DMC if there was no document to evidence approval of the sub-division of the Property. Further, HCP enclosed with such letter a copy of the RHL Report stating that some UBWs were found at the Property, and asked W&G to enlighten [HCP] what step [D1] is going to take to reinstate the defect condition in order to ensure the Property

would be sold free from encumbrance . HCP also reserved the right to raise further requisitions, and to put on record that [W&G] have not provided good title of the Property up to the present. [P] is not obliged to proceed with the completion of purchase of the Property unless and until good title of the Property had been proved . On 30 May 2013, W&G replied inter alia as follows: (a) The sub-division (of G/F of Phase 2 of the Development of the Buildings see paragraph 35 above) was in accordance with the approved building plans from the BD (copy enclosed), and the then 10 commercial units on G/F of Phase 2 and the then 7 units on C/F were in existence before the DMC, so there was no further sub-division of shops/units. Further, the assignment plan (to be certified by an Authorised Person and attached to the Assignment in respect of the Property) corresponded with the approved building plans. As regards the internal layout of the Property, the Waiver Clause of the Shop 4 Appendix was applicable. But without prejudice to D1 s rights under such clause, even if there was any unauthorised alteration/structure (which W&G denied and put P to strict proof), there were cases that held the existence of minor/trivial unauthorised structure would not pose real risk to the title and would not enable the purchaser to rescind. As regards the [UBWs] in the [RHL Report], [W&G] reiterate that the [Waiver Clause] applies and [W&G] repeat [their] view stated in [(a)-(b)] above. [P] has accepted the present condition and [D1] has no obligation to take any reinstatement action. In such letter, W&G asserted (i) D1 had properly satisfied all HCP s requisitions and had proved good title to the Property, and (ii) D1 was ready, willing and able to complete the sub-sale of the Property on the following day in accordance with the Shop 4 PASP. The completion of the sub-sale and sub-purchase of the Other Property took place on 31 May 2013. By an Assignment of such date among Max Rainbow as head vendor, D1 as confirmor/vendor and Yan Yau as sub-purchaser, and in consideration of \$11,523,960 paid by Yan Yau to D1, Max Rainbow as beneficial owner and D1 as confirmor assigned and confirmed to Yan Yau the Other Property subject to and with the benefit of inter alia (a) the DMC, the Sub-DMC and the Sub-Sub-DMC of the Buildings insofar as they related to or affected the Other Property, and (b) the existing lettings/tenancies of the Other Property (if any) (Shop 6 Assignment). On 26 June 2013, the Shop 6 Assignment was registered at the Land Registry under memorial no 13062601140107 dated 20 June 2013 that was prepared by HCP. On 31 May 2013, the sub-sale and sub-purchase of the Property between D1 as confirmor/vendor and P as sub-purchaser fell through, but the sale and purchase of the Property between Max Rainbow as head vendor and D1 as purchaser were completed. By an Assignment of such date, and in consideration of \$9,329,212.52 (being the apportioned consideration for the Property) paid by D1, Max Rainbow as beneficial owner assigned to D1 as purchaser the Property subject to and with the benefit of inter alia (a) the DMC, the Sub-DMC and the Sub-Sub-DMC of the Buildings insofar as they related to or affected the Property, and (b) the existing lettings/tenancies of the Property (if any) (Shop 4 Assignment). A floor plan signed by an Authorised Person showing the layout of G/F and C/F of Phase 2 of the Development of the Buildings was annexed to the Shop 4 Assignment (Assignment Plan On 27 June 2013, the Shop 4 Assignment together with the Assignment Plan were registered at the Land Registry under memorial no 13062701440106 dated 26 June 2013 that was prepared by W&G. As evident

from the land search records of the Other Property and the Property, the Sub-Sub-DMC was signed/sealed on 31 May 2013 and was registered with the Land Registry on 25 June 2013. On 7 June 2013, W&G wrote to HCP stating P had failed (a) to pay the balance of the purchase price of \$13,273,182 and (b) to complete the sub-purchase of the Property before 2:00pm on 31 May 2013 in accordance with the Shop 4 PASP, and W&G had not received the balance of the purchase price from P even up to the time of such letter. W&G went on to say in such letter that because of P's breach D1 as purchaser had to make last-minute legal/financial arrangements to take up the Property from Max Rainbow as head vendor by way of the Shop 4 Assignment, and as a result extra costs/expenses were incurred. Such letter then stated as follows: [W&G] are instructed by [D1] to hereby give [P] notice through [HCP] that, unless [P] shall pay the balance of purchase price and complete the purchase of the [Property] within 21 days from the date of this notice (of which time shall be of essence), [D1] will enforce its rights under the [Shop 4 PASP] to determine the [Shop 4 PASP], and to forfeit the sums paid by [P] to [D1] under Clause 2(a) and (b) of the [Shop 4 PASP] by way of deposit. Upon determination of the [Shop 4 PASP], [D1] may proceed to resell the [Property] and recover from [P] any deficiency in the resale price and all expenses incurred in connection with such resale. All [D1's] rights under the [Shop 4 PASP], at common law, in equity or otherwise are expressly reserved. On 13 June 2013, P's new solicitors Chak & Associates () wrote to W&G (a) saying that as at the date for completion of the sub-purchase of the Property (ie 31 May 2013) and thereafter, D1 was in breach of the Shop 4 PASP by failing to prove good title of the Property, so P would not proceed with the completion of the sub-purchase of the Property, and (b) demanding D1 to return the Deposits P had paid for the sub-purchase of the Property within 7 days, failing which C&A had standing instructions to sue D1. On 28 June 2013, W&G replied that they had answered all requisitions raised by HCP, and that HCP had not raised further requisitions after receipt of W&G's letter dated 30 May 2013. W&G went on to say it was on 31 May 2013 (ie the scheduled date for completion) that C&A sent a letter stating they had replaced HCP as P's solicitors but without raising other requisitions, and nothing was heard further until C&A's letter dated 13 June 2013. W&G went on to say as follows: [W&G] would also like to point out that [P] was also the purchaser of Shop No 6 on the [G/F] of Phase 2 of the above estate (Shop 6), who before completion nominated [Yan Yau] to take up the Assignment thereof. From [W&G's] company search, [W&G] note that [P] is the sole director of Yan Yau. [HCP] representing Yan Yau, had raised similar requisitions as those in respect of the [Property] to which [W&G] sent the same replies as those of the [Property]. Yan Yau had accepted title to Shop 6 and completed the purchase thereof on 31/5/2013. [W&G] reiterate [D1's] instructions as set out in [their] letter to [C&A] dated 7 June 2013. [W&G] also reiterate that all [D1's] rights under the [Shop 4 PASP] in respect of the [Property] made between [W&G's and C&A's] respective clients dated 28/11/2013, including the right to claim damages against [P] for breach of contract, are hereby expressly reserved. Should [P] choose to institute legal proceedings against [D1] for the refund of the deposit despite of [P's] breach, [W&G] have instructions to accept service. In any event, [D1] shall have no hesitation to claim all legal costs incurred in respect of [P's] preposterous claim. On 3 July 2013, W&G wrote to C&A referring to their letter dated 7 June 2013, and noting P had

not made good her default. W&G stated that P's breach (in failing to pay the balance of the purchase price and/or to complete the sub-purchase of the Property within 21 days from the date of W&G's letter dated 7 June 2013, which time was of the essence) amounted to repudiation of the Shop 4 PASP, which repudiation was accepted by D1 as vendor. W&G on D1's instructions gave notice to P through C&A under common law (i) to determine the [Shop 4 PASP] forthwith; and (ii) to forfeit absolutely the [Deposits] already paid by [P] under the [Shop 4 PASP]. The [Shop 4 PASP] is thus determined and the [Deposits are] forfeited accordingly. W&G therefore claimed D1 was entitled to re-sell the Property without further notice to C&A and/or P, and in the event of a resale of the Property, any deficiency in price and all expenses incurred in connection with such re-sale shall be recoverable from P by D1 as and for liquidated damages. On 5 July 2013, D1 registered W&G's letters dated 7 June and 3 July 2013 to C&A with the Land Registry under memorial no13070601160121 dated 4 July 2013 that was prepared by W&G. D2 claimed neither D1 nor P paid to D2 any commission as provided in the Shop 4 PASP. On 14 March 2014, C&A wrote to D2 in relation to D2's invoice dated 30 November 2012 stating that due to the misrepresentation (fraudulent, negligent or otherwise) and/or material non-disclosure of defects in the [Property] on [D2's] part (in respect of unauthorized structures, etc), [D2's] request for payment in the sum of HK\$56,300.00 is hereby declined. In fact, [P] is considering taking legal proceedings against the Vendor and, if the circumstances require, will join [D2] as a co-defendant or a third party (as the case may be). In the meantime, all [P's] rights and remedies against [D2] are hereby reserved. On 19 May 2014, C&A wrote to D2 referring to their letter dated 14 March 2014, and stating they were instructed to put on record that before the Shop 4 PASP was signed (a) there was never inspection of the interior condition of the Property, and (b) D2's estate agent represented to P the as is basis in the Shop 4 PASP referred to the external and not the internal condition of the Property. If [D2] deem otherwise, please kindly revert within seven (7) days from the date of this letter. In the meantime, all [P's] rights and remedies are hereby reserved.

II. PARTIES RESPECTIVE CASE

As between P and D1, P claimed she was unwilling to complete the sub-sale and sub-purchase of the Property due to (a) the existence of the Alleged UBWs at the Property, and (b) W&G's allegedly unsatisfactory answers to HCP's requisitions in relation to the Alleged UBWs. D1 denied liability, putting P to proof of (a) above but denying (b) above. D1 further alleged P was precluded by the Waiver Clause in the Shop 4 Appendix from complaining about the Alleged UBWs and from refusing to complete the sub-purchase of the Property on such basis. As between P and D2, D2 claimed that since May 2011 P had engaged D2 to be her estate agent for purchase(s) and re-sale(s) of various commercial/industrial units. P claimed that by an oral agreement with Tong on behalf of D2 in/about October or November 2012, P engaged D2's services as estate agent to seek vendor(s) willing and able to sell commercial unit(s) to her for commission payable by her at approximately 1% of the purchase price in the event D2 introduced such vendor(s) to her (Agency Agreement). P's claim against D2 was based on (a) D2's alleged breach of contract,

- (b) D2's alleged breach of duty of care, (c) D2's alleged breach of fiduciary duties, and (d) Tong's alleged misrepresentation (for which D2 was allegedly vicariously liable) as to the existence of UBWs at the Property and the meaning/effect of the Waiver Clause in the Shop 4 Appendix (see the 1st and 2nd Representations in paragraph 75 below). D2 denied (i) Tong ever made such alleged representations to P, (ii) D2 knew or ought to have known the Property had illegal structures and/or UBWs, and/or (iii) D2 had been reckless as alleged or at all.
- (a) Site inspections P claimed that several days before 28 November 2012, D2's Tong accompanied her to view the exterior of the shops/units at inter alia G/F and C/F of Phase 2 of the Development of the Buildings, so P viewed the exterior of the Property (of which Shop/Yard 4 was then occupied by tenants see paragraph below), but she was unable to gain access to and/or to inspect the interior of the Property. P further claimed D2/Tong did not make arrangements with such tenants for her to access/inspect the interior of the Property before she signed the Shop 4 PASP, so she could/did not know there were alterations in such shops/units. On the other hand, D2 averred that: (a) In/about mid-November 2012, D1 engaged D2 to be its estate agent for seeking confirmor sub-sales of the shops/units at inter alia G/F and C/F of Phase 2 of the Development of the Buildings, which was part of the Head Property that D1 purchased from Max Rainbow under the Head PASP with completion of such purchase to take place on 31 May 2013. In/about mid-November 2012, D2 through its senior account manager Tong asked P whether she would be interested to purchase from the confirmor/vendor shop(s)/unit(s) at inter alia G/F and C/F of Phase 2 of the Development of the Buildings, and P replied in the affirmative. On/about 20 November 2012, Tong accompanied P to inspect various shops/units at inter alia G/F and C/F of Phase 2 of the Development of the Buildings. During such inspection on 20 November 2012, Tong provided P with the following documents supplied by D1 to D2: (i) copy floor plans of the shops/units at Phases 1 and 2 of the Development of the Buildings (C/971-978, Floor Plans and (ii) copy price list of those shops/units which also set out the particulars of the then known existing lettings/tenancies (C/986, Price List I pause to note it was common ground that P countersigned the Phase 2 Floor Plans. As most of the shops/units on G/F and C/F of Phase 2 of the Development of the Buildings were tenanted, the inspection on 20 November 2012 took place outside those shops/units, but P did not ask Tong to arrange any inspection of the interior of those shops/units. P knew or ought to have known from such inspection on 20 November 2012 and also from the Floor Plans and the Price List that there had been alterations to the shops/units (or to some of them) at G/F and C/F of Phase 2 of the Development of the Buildings, including internal partitioning and alterations in the locations of the staircases leading from [G/F] to the shop(s)/unit(s) on [C/F]. After such inspection on 20 November 2012, P informed Tong she was interested to purchase Shop No 5 on G/F (Shop 5) and Store No 5 on C/F (Store 5) of Phase 2 of the Development of the Buildings, which were subject to tenancy, but Tong later found out from D1 that Shop 5 and Store 5 had already been sub-sold, so he informed P accordingly. On/about 21 November 2012, P informed Tong she was interested to purchase the Other Property (of which Shop/Yard 6 was subject to tenancy) for the price of \$11,523,960 with completion on/before 2:00

pm on 31 May 2013, so Tong prepared the Shop 6 PASP that included an appendix (Shop 6 Appendix At a meeting between Tong and P on/about 21 November 2012, Tong explained to P and went through with her the terms of the Shop 6 PASP including the terms in the Shop 6 Appendix (that were identical to those in the Shop 4 Appendix). Tong informed P that (i) D1 drafted the terms in the Shop 6 Appendix for incorporation as an appendix to each PASP in respect of its confirmor sub-sales of the shops/units on inter alia G/F and C/F of Phase 2 of the Development of the Buildings so as to conform with the terms of the Head PASP, and (ii) D1 would not sign any such PASP without such terms/appendix, so Tong asked P whether she needed to seek advice/assistance from independent professional(s) referred to in the Waiver Clause of the Shop 6 Appendix. P did not require advice/assistance from independent professional(s), so she signed the Shop 6 PASP (including the Shop 6 Appendix), and delivered to Tong her cheque for \$500,000 drawn in favour of D1 for payment of the initial deposit for her sub-purchase of the Other Property. Tong for and on behalf of D2 signed the Shop 6 PASP, which was subsequently signed by D1 and dated 22 November 2012. On/about 28 November 2012, Tong asked P whether she was also interested to purchase the Property, and P replied in the affirmative. On/about 28 November 2012, Tong prepared the Shop 4 PASP (including the Shop 4 Appendix), and informed P the standard terms of the Shop 4 PASP (including those of the Shop 4 Appendix) were the same as those of the Shop 6 PASP (including the Shop 6 Appendix). Indeed, the Waiver Clause of the Shop 4 Appendix was identical to the Waiver Clause of the Shop 6 Appendix. P signed the Shop 4 PASP (including the Shop 4 Appendix) after reading the same herself, and she delivered to Tong her cheque for the sum of \$300,000 drawn in favour of D1 in payment of the initial deposit for the sub-purchase of the Property. Tong for and on behalf of D2 signed the Shop 4 PASP, which was subsequently signed by D1 and dated 28 November 2012. P averred (but Ds did not admit) that at/about the end of December 2012 D1 arranged site inspection for P who gained access to Store 4 but not Shop/Yard 4 (which was then occupied by tenants). P further averred (but Ds did not admit) that at RHL s site inspection on 24 May 2013, RHL s surveyor only gained access to Unit 4(A) (which was occupied by a hardware store) and Store 4 (see paragraph 36 above), but not Unit 4(B) (which was occupied by Midland Leasing (xx) Ltd (Midland Leasing).

- (b) Sub-sale and sub-purchase of the Property P claimed (but Ds did not admit) it was an implied term of the Shop 4 PASP that D1 shall (a) give good title to the Property in accordance with section 13A of the Conveyancing and Property Ordinance Cap 219 () and (b) prove and show good title to the Property in accordance with section 13 of the CPO at its own expense, and D1 shall at like expense make and furnish to P such certified/attested copies of any deeds or documents of title, wills and matters of public record as might be necessary to complete such title. P averred the Partition Clause of the Shop 4 Appendix disclosed the presence of an unauthorised internal partition wall that divided Shop 4 into Unit 4(A) and Unit 4(B), but the Shop 4 PASP did not disclose the Alleged UBWs, so P claimed D1 was in breach of (a) the implied covenant to give good title and (b) Clause 4 of the Shop 4 PASP by failing to disclose all defects in title in respect of the Property of which it was aware.

P further averred D1 was not entitled to rely on the Waiver Clause in the Shop 4 Appendix to avoid answering HCP's requisitions raised by letters dated 8 and 30 May 2013 (see paragraphs 28-29 and 38-39 above), but W&G by their replies dated 23 and 30 May 2013 failed to disclose the Alleged UBWs and wrongfully relied on the Waiver Clause with respect to the presence of the Alleged UBWs (see paragraphs 33 and 40 above). P therefore claimed that: (a) notwithstanding repeated requests, D1 failed to answer P's requisitions concerning the presence of any UBWs (including the Alleged UBWs) satisfactorily or at all; by virtue of the presence of the Alleged UBWs which at all material times D1 was aware but repeatedly failed to disclose to P, D1 was not entitled to and was precluded from relying on the Waiver Clause in the Shop 4 Appendix to prevent P from objecting to the title; further or alternative to (b) above, D1's duty to give good title was independent of such Waiver Clause; further or alternative to (c) above, pursuant to the Shop 4 PASP, P had not waived her right to raise requisitions concerning any UBWs; further or alternative to (d) above, the language of such Waiver Clause was not sufficient to preclude P from objecting to title; further or alternative to (e) above, such Waiver Clause being inconsistent with Clause 4 of the Shop 4 PASP had no effect or was not binding; since D1 failed to show good title to P, P was entitled not to complete the sub-purchase of the Property pursuant to the Shop 4 PASP. Further/ alternatively, P averred (a) the Waiver Clause of the Shop 4 Appendix (which should be construed contra proferentum) was inconsistent with the implied term of the Shop 4 PASP that good title had to be shown and proved, so P was not debarred from raising requisitions in respect of Alleged UBWs, and (b) D1 wrongfully refused to answer requisitions on title in relation to such matters, which requisitions remained outstanding as at the date for completion of the sub-sale and sub-purchase of the Property. On the other hand, D1 denied P's case: (a) D1 did not admit the Property had illegal structures not authorised by the Building Authority (), but if and insofar as necessary, D1 averred (i) the trivial or minor Alleged UBWs would not give rise to any real risk of enforcement and/or would not enable P to rescind the Shop 4 PASP, but (ii) even if the presence of the Alleged UBWs had the effect of causing any defect in title (which D1 denied), such effect was de minimus. D1 claimed P's requisitions in relation to the Alleged UBWs did not go to the root of its title to the Property, and reiterated (i) it did not have knowledge and/or it was not aware there was any illegal structure at the Property, and (ii) the Waiver Clause of the Shop 4 Appendix was included in the Shop 4 PASP to provide for the possibility that there was. D1 claimed P should have discovered the Alleged UBWs much earlier because (i) P had inspected the Property under the arrangement and in the company of D2's Tong before she signed the Shop 4 PASP, (ii) the Alleged UBWs were patent upon any inspection of the Property, and (iii) P had an opportunity to seek professional advice in respect of the Property before she signed the Shop 4 PASP. Further, if and insofar as necessary, D1 would rely on (i) Clause 6 of the Shop 4 PASP that provided D1 was selling as confirmor and that the Shop 4 PASP was subject to the terms of the Head PASP dated 9 December 2012 made between D1 and Max Rainbow in respect of the Head Property (including the Property), (ii) the Head Nomination by which Ho nominated D1 to be the assignee of the Head Property under the Head PASP, and (iii) Clause 27 of the Head PASP that provided [Ho or his nominee] has accepted the physical condition

of the [Head Property] even if any unauthorized or illegal structure or alteration exists in the [Head Property] and/or any part or parts thereof; and [Ho or his nominee] shall have no right to rescind the agreement for the aforesaid reason Further, D1 disagreed it failed to answer or satisfactorily answer P's purported requisitions on title in respect of the Alleged UBWs, and claimed it was not obliged to deal with such requisitions by virtue of the Waiver Clause in the Shop 4 Appendix, so P could not refuse to complete the sub-purchase of the Property under the Shop 4 PASP: (a) D1 claimed such Waiver Clause was an express, clear and unequivocal provision that excluded liability (NUO) (NUO) (NUO) (NUO) was inconsistent with the Partition Clause in the Shop 4 Appendix (ie a specific clause in relation to the internal partition wall at Shop 4), and claimed that the specific Partition Clause by its nature would not qualify the general Waiver Clause. Further, D1 claimed such Waiver Clause expressly addressed the possible legal consequences of any presence of UBWs at the Property, ie the possibility that the BD or other Government authorities might take enforcement actions that might lead to defect in title. D1 averred (i) such Waiver Clause was written in easily understood Chinese which P was and/or was expected to be familiar, (ii) P and D1 were of equal bargaining power, (iii) clauses such as the Waiver Clause that excluded the purchaser's right to complain about UBWs were commonplace in Hong Kong, (iv) P was experienced in property transactions regarding similar properties, and (v) P had completed the sub-purchase of the Other Property (located near to the Property) from D1 pursuant to the Shop 6 PASP (that contained a term identical to the Waiver Clause of the Shop 4 Appendix) at the price of \$11,523,960. D1 therefore claimed P entered into the Shop 4 PASP with full knowledge not only of the possibility of there being, as a matter of fact, UBWs at the Property in addition to that stated in the Partition Clause of the Shop 4 Appendix, but also the possible legal consequences and particularly the implications on title of the Property caused by the existence of any such UBWs at the Property. D1 also (i) claimed it had already discharged its duty to make full and frank disclosure about the Property insofar as it had any knowledge, (ii) denied any knowledge of the existence of the Alleged UBWs, (iii) averred Clause 6 of the Shop 4 PASP stipulated D1 was to sell the Property as confirmor and D1 was not aware of any illegal structure in the Property, so (iv) such Waiver Clause was included in the Shop 4 PASP to provide for the eventuality that there was any illegal structure at the Property. D1 therefore asserted (i) such Waiver Clause in the Shop 4 Appendix gave rise to a waiver in relation to any possible title defect that might be caused by the Alleged UBWs, which were in any event trivial and would not give rise to any real risk of enforcement, and (ii) by virtue of such Waiver Clause P had waived all requisitions on any/all illegal structures at the Property with full knowledge of the legal consequences of such waiver. On such basis, D1 claimed P was obliged to complete the sub-purchase of the Property pursuant to the Shop 4 PASP. D2 pleaded that the meaning/effect of the Waiver Clause in the Shop 4 Appendix was P acknowledged: (a) she should satisfy herself of the existing structural condition, physical condition and internal partition of the Property before she signed the Shop 4 PASP; she should seek advice/assistance from independent professional(s) before she signed the Shop 4 PASP; if the Property had any unauthorised alterations/additions, the BD or other Government authorities would be entitled to take action(s) on the same, which would

constitute defect in title in respect of the Property; she had accepted title in respect of the Property even if there were any such unauthorised alteration or addition, and had agreed not to raise any requisition/objection or to seek any compensation from D1 in respect thereof.

- (c) P's claim against D1 P claimed that by reason of the matters in paragraphs 58-62 above, D1 was in breach or in anticipatory breach of the Shop 4 PASP in failing to (a) satisfactorily answer requisitions on title raised by HCP in respect of the Property, and (b) show/prove good title to the Property in accordance with the Shop 4 PASP, and by reason of the matters in paragraph 52 above, P was entitled to return of the Deposits paid under the Shop 4 PASP on the ground of total failure of consideration. P claimed that on 13 June 2013 she (through C&A) accepted D1's breach or anticipatory breach of the Shop 4 PASP and demanded refund of the Deposits (see paragraph 45 above), but on 3 July 2013 D1 (through W&G) wrongfully forfeited the Deposits (see paragraph 47 above). P averred that by reason of D1's breach or anticipatory breach of contract, she was entitled to refund of the Deposits in the sum of \$1,524,798, and to claim for loss/damages being wasted expenditure incurred in the course of investigating title to the Property (ie \$7,000 paid or payable in respect of the RHL Invoice). P did not plead any cause of action against D1 based on misrepresentation even though she claimed to have been misled by the Waiver Clause. Mr Lau, counsel for P, confirmed P's claim against D1 essentially rested on D1's failure to sufficiently answer P's requisitions, ie whilst D1 disclosed the existence of the partition wall at Shop 4, it did not disclose the existence of the Alleged UBWs, so it was said D1 could not rely on the Waiver Clause of the Shop 4 Appendix. On the other hand, D1 denied P's allegations, and claimed that (a) on 13 June 2013 P (through C&A) wrongfully demanded the refund of the Deposits that P had paid under the Shop 4 PASP and wrongfully repudiated the Shop 4 PASP, and (b) on 3 July 2013 D1 (through W&G) properly forfeited the Deposits. D1 averred it was P who was in breach of the Shop 4 PASP, and who wrongfully refused/failed to complete the sub-purchase of the Property on the basis of the requisitions which she raised concerning the Alleged UBWs but which in fact she was not entitled to raise.
- (d) P's claim against D2 P claimed that in order to give business efficacy and by virtue of the relationship between P and D2, it was an implied term of the Agency Agreement that (a) D2 would (i) comply with P's instructions and/or (ii) use all reasonable endeavours or all due care and skill to do so, and/or (b) D2 owed P duty of care and/or fiduciary duty to the same effect. D2 admitted it owed P duty of care that a reasonable estate agent would owe to his/her client. As for P's claim against D2 for breach of contract, P averred D2 wrongfully and in breach of the Agency Agreement: (a) failed to provide P at her express request information concerning the Alleged UBWs; failed to ensure its employee Tong provide at P's express request information concerning the Alleged UBWs; failed to arrange inspection of and accompany P to inspect the interior of the Property before P signed the Shop 4 PASP; failed to explain to P the terms of the Shop 4 PASP and to ensure P was made fully aware of her rights and obligations under such contract (particularly the effect of the Waiver Clause of the Shop 4 Appendix) when the Shop 4 PASP/Appendix were signed in the absence of legal

representatives acting for P; failed to ensure Tong be refrained from making misrepresentation concerning the existence/status of the Alleged UBWs (see the 1st Representation referred to in paragraph 75 below). As for P's claim against D2 for breach of duty of care, P further/alternatively averred D2 owed P a common law duty of care to act with reasonable care and skill expected of an estate agent (a) to provide services/opinions based on knowledge, training, qualifications and experience in the real estate business, (b) to provide services to P in the course of its business with honesty, fidelity and integrity, (c) to exercise due care and due diligence in fulfilling its duty as an agent of P, and (d) to ensure P was protected at all material times against fraud, misrepresentation or any other unethical practices in connection with the sub-sale and sub-purchase of the Property. P claimed D2 failed to exercise any or any reasonable care and skill expected of an estate agent, and instead it was negligent and in wrongful breach of the aforesaid duty of care (see paragraph 71 above and paragraphs 76-77 below). P also claimed that in breach of the duty of care and/or in breach of the Agency Agreement D2 failed to (a) use reasonable diligence and/or due care/skill to make suitable enquiries, (b) disclose the Alleged UBWs to her, and (c) stop her from entering into the Shop 4 PASP without deletion of the Waiver Clause of the Shop 4 Appendix (especially as the facts stated in such clause were false/untrue or alternatively inaccurate / misleading in that D2/Tong well knew P did not inspect the interior of the Property before she signed the Shop 4 PASP see paragraph 54 above). As for P's claim against D2 for breach of fiduciary duties, P further/alternatively averred that such fiduciary duties were implied by law by reason of the nature of the relationship between P and D2, and at all material times during the term of its agency D2 owed P (a) duties of fidelity, loyalty and good faith, and (b) other duties as referred to in paragraph 72(a)-(d) above, but D2 was wrongfully in breach of such fiduciary duties (see paragraph 71 above and paragraphs 76-77 above). P claimed that during inspection of the exterior of the Property before 28 November 2012 (see paragraph 54 above), she could not gain access to view the interior of the Property, so she specifically asked Tong whether there was any UBW in the Property to which he replied there was none (1st Representation). P also claimed that at the time when she signed the Shop 4 PASP (including the Shop 4 Appendix to which Tong appended his signature for and on behalf of D2), Tong explained to her (a) the provisions therein (including the Waiver Clause in the Shop 4 Appendix) were standard terms, and (b) P's right to demand D1 to prove/give good title in respect of the Property would not be circumscribed (2nd Representation). But P claimed at no time or at all did D2/Tong tell her that by agreeing to the Waiver Clause in the Shop 4 Appendix, she would risk waiving her right to raise objection to title in respect of the Property concerning UBWs, including the Alleged UBWs, even though D2 with its experience in relation to sale and purchase of commercial/other properties would or ought to have known that by enticing P to enter into and sign the Shop 4 PASP P could be compelled to purchase the Property with defective/imperfect title. P averred that: (a) it was incumbent upon D2/Tong as professional agents whom she engaged to act on her behalf to explain to her the full meaning/effect of such Waiver Clause before she entered into the Shop 4 PASP, especially when Tong knew or ought to have known she would rely on him and would be induced thereby to sign the Shop 4 PASP; Tong was in breach of the duty of care for

which D2 was vicariously liable by failing to explain to P (i) the meaning of the words in the Waiver Clause, and (ii) the Waiver Clause mis-stated inter alia the fact she inspected the Property (interior or otherwise) (see paragraphs 73 and 75-76 above); she did act on the 1st and 2nd Representations (collectively, Representations) and was induced thereby to sign the Shop 4 PASP and to pay the Deposits when in truth and fact the Representations were untrue/false or inaccurate/misleading; P accepted D1 s breach of the Shop 4 PASP when on 13 June 2013 she demanded D1 to refund the Deposits (see paragraph 67 above). So P claimed she suffered loss/damages by reason of D2 s breach of contract (ie the Agency Agreement), breach of common duty of care, breach of fiduciary duties and/or misrepresentation: (a) the Deposits she paid to D1 in the sum of \$1,524,798 or damages in such sum or such other sum to be assessed, and (b) wasted expenditure incurred in the course of investigating title in respect of the Property (ie \$7,000 paid or payable in respect of the RHL Invoice) to be assessed. On the other hand, D2 referred to the matters in paragraph 56 above, and denied Tong/D2 made the Representations. D2 claimed D2/Tong properly discharged their duty of care owed to P and were not negligent, and P agreed to the terms of the Shop 4 PASP (including those of the Shop 4 Appendix) and signed such contract without relying on any representation by D2/Tong as alleged or at all. In any event, it was said Tong and P well knew the meaning/effect of the Waiver Clause in the Shop 4 Appendix.

- (e) Reliefs P sought against D1 P sought the following reliefs against D1: (a) a declaration that D1 was in repudiatory breach of the Shop 4 PASP by inter alia having wrongfully forfeited a sum of \$1,524,798.00 being the Deposits and part payment of the purchase price that P had paid to D1 under the Shop 4 PASP; a declaration that P was not precluded from raising requisitions concerning the presence of any UBWs, and that such requisitions had not been satisfactorily answered by D1; a declaration that D1 failed to prove good title to the Property pursuant to the Shop 4 PASP; an order that D1 do repay to P the sum of \$1,524,798.00 being the Deposits and part payment of the purchase price that P had paid to D1 under the Shop 4 PASP; a declaration that as security for the sum due from D1 under (d) above, P was entitled to an equitable lien on such interest which D1 possessed in the Property; further/ alternatively to (d) above, damages.
- (f) P s claim against D2 P claimed against D2 for inter alia damages (see footnote 29 above).
- (g) D1 s counterclaim against P D1 repeated its defence to P s claim, and counterclaimed against P for a declaration that the Shop 4 PASP was terminated by P s repudiatory breach and the Deposits paid thereunder were validly forfeited by D1.
- (h) D2 s counterclaim against P As for D2 s counterclaim against P, I need to explain the procedural history of the present action. P through C&A commenced the present action against Ds on 4 August 2014, and P s Re-Re-Amended Statement of Claim was filed on 7 February 2017. D1 and D2 gave notice of intention to defend by their respective solicitors W&G (D1) and Tai, Tang & Chong (D2). On 19 March 2015 D2 filed its Amended Defence and Counterclaim, and on 19 June 2015 P filed her Reply to D2 s Amended Defence and Defence to D2 s Amended Counterclaim. On 14 April 2015, D1 s new solicitors Kok & Ha filed Notice

of Change of Solicitors. On 7 March 2017 D1 filed its Amended Defence and Counterclaim against P and D2, and on 5 April 2017 P filed her Amended Reply to D1's Amended Defence and Defence to D1's Counterclaim. On 1 June 2015, D2 filed its Defence to D1's Counterclaim. On 26 May 2016, D2 filed Notice of Change of Name giving notice it had changed its name to Fung Sing Marketing Limited. Pursuant to the order of Master Chow dated 22 September 2016 and the certificate under Order 67 rule 6(1)(c) of the Rules of the High Court () filed by Tai Tang & Chong on 14 October 2016, such solicitors ceased to act for D2 in the present action. Thereafter, D2 failed to appear at the case management conference heard on 11 April 2017, so Master Ho provisionally struck out D2's counterclaim against P pursuant to Order 25 rule 1C(2) of the RHC.

- (i) D1's counterclaim against D2 D2 did not appear at the trial. From the various affidavits of service filed by P and D1, I am satisfied D2 had been properly served with the relevant papers, and it had been properly notified of the trial. On the 1st day of the trial, I granted leave for D1 to withdraw its counterclaim against D2 with no order as to costs. Thus, the remaining claims before the court at the trial were (a) P's claim against Ds, and (b) D1's counterclaim against P. III. ISSUES
- (a) Issues between P and D1 P submitted the disputed issues between P and D1 were as follows:
 - (a) whether D1 knew about the Alleged UBWs prior to the date for completion of the Shop 4 PASP; whether D1 failed to show P good title to the Property by failing to satisfactorily answer P's requisitions about the Alleged UBWs;
 - (i) whether D1 could rely on the Waiver Clause in the Shop 4 Appendix, and (ii) if so, whether D1 could refuse to answer P's requisitions about the Alleged UBWs. D1 submitted the present action essentially turned on the issue in paragraph 87(c)(i) above, ie (a) whether the Waiver Clause in Shop 4 Appendix was drafted in such clear and wide terms that it would cover the Alleged UBWs and would alert a reasonable and ordinary purchaser of risks as to title of the Property, and (b) if so, whether such clause would preclude P from raising objections to D1's title to the Property on the ground that the Alleged UBWs were or might have been UBWs. D1 accepted the issue in paragraph 87(c)(ii) above as to whether D1 was entitled to answer requisitions raised by P over the Alleged UBWs by relying on the Waiver Clause in the Shop 4 Appendix would essentially stand or fall with the court's construction of such clause. Indeed, if the court's determination on the construction of such clause under paragraph 87(c)(i) above would favour D1's contention, D1 suggested the issues in paragraph 87(a)-(b) above would essentially fall away.
- (b) Issues between P and D2 P contended the essential issues between her and D2 were (a) whether D2 was in breach of the implied term under the Agency Agreement (see paragraphs 70-71, 73 and 76-77 above), (b) whether D2 was in breach of the implied duty of care and/or the fiduciary duty owed to [P] under the [Agency Agreement] and [the Shop 4 PASP] (see paragraphs 70, 72-74 and 76-77 above), and (c) whether D2 was liable to P for misrepresentation by way of the Representations made to P (see paragraphs 75-77 above). IV. WITNESSES, PLANS AND PHOTOGRAPHS

- (a) Witnesses P gave evidence at trial and adopted her witness statement dated 13 October 2016 (s WS) as part of her evidence, but she did not call other witness(es). Mr Wong Yee Ho Gabriel (Wong), D1 s property manager, gave evidence at trial on behalf of D1 and adopted his witness statement dated 18 August 2016 as part of his evidence. D2 was absent at the trial, and did not call any witness to give evidence. Various aspects of this case fell to be decided on the facts, so the question of witnesses credibility/reliability became relevant. In assessing witnesses credibility, I bear in mind not only their demeanour in court but also the intrinsic value of their evidence upon considering the totality of their evidence against the pleadings, chronology of events, documentary evidence and inferences based on inherent probabilities and/or undisputed facts. Cross-examination of P was a revealing process, particularly when it required her to face intensive questioning over various topics/ documents. In my view, P did not present herself as a trusting purchaser who (as she alleged) was guided by Tong and who would sign PASP without appreciating the contractual significance of the terms therein. Her poor attempt to portray herself as an uninformed and inexperienced property investor failed to hide her commercial shrewdness and brashness as a dealer in properties with penchant for profit return upon quick turnaround purchase and sale notwithstanding known or suspected commercial/property risks. I find P was not above embroidering her testimony and/or sidestepping matters that she perceived might not be of advantage to her case. In my view, much of P s evidence was self-serving and unreliable, and sought to put a positive but hopeless spin on the situation. In all, I find her to be an unsatisfactory witness, and except for the matters I accept in the discussion below, on balance I reject her evidence on the core matters. On the other hand, Wong presented himself as straightforward and open in his dealings and evidence. He was a confident executive and witness, and was unshaken under cross-examination. He was clear in his recollection and was well-reasoned, and he gave credible and convincing account of the commercial considerations that drove the deals for D1 in respect of the Head Property as well as the Property. I find his evidence on the core matters honest and reliable.
- (b) Plans The Assignment Plan and the Floor Plans showing inter alia shops/units on G/F and C/F of Phase 2 of the Development of the Buildings were adduced at trial. From such plans, the following were evident: (a) There was a row of 10 street-level shops (including the adjoining Shops 4-6) on G/F of Phase 2 of the Development of the Buildings. The front parts of these shops faced Tsuen King Circuit. At the rear parts of each of Shops 4-6 was an open air yard that abutted the open passage or rear lane (Rear Lane On C/F above Shops 4-6 were Stores 4-6. Stores 4-6 were correspondingly connected to Shops 4-6 by internal staircase.
- (c) Photographs The photographs adduced at trial were taken by D1 on 4 April 2018 (C/958-962) and by P in late April to early May 2018 (C/963-967): (a) The photographs at C/958-959 showed the front parts of Shops 4-6 and Stores 4-6 facing Tsuen King Circuit, and both Mr Lau and Ms Cheung, counsel for D1, agreed such photographs reflected the physical state in 2012/2013 save that such shops were occupied by other tenants. The photographs at C/960-961 showed the rear parts of Shops 4-6 from the vantage of the Rear Lane. The photograph at C/962 showed the rear parts of Shop 6 from the vantage of the Rear Lane with

a corrugated metal sheet canopy seen at the Shop 6 Yard. The photographs at C/963 and 965-966 showed the Rear Lane at the back of the shops on G/F of Phase 2 of the Development of the Buildings with a gate where the Rear Lane joined the public pavement (Rear Lane Gate The photographs at C/964-967 showed (i) metal security cage for window-type air-conditioner at a rear window of Store 4 that faced the Rear Lane, and (ii) concrete canopy at the Shop 4 Yard. V. LEGAL PRINCIPLES

- (a) First principles The vendor has an obligation to show good title even if the agreement is wholly silent on the question of objections and requisitions as to title. The vendor also has an obligation to answer requisitions and objections within a reasonable time to enable the purchaser to satisfy himself on the matter, get his money ready and complete on the date fixed. If the vendor fails to satisfactorily answer requisitions and objections that are properly raised, he fails to show good title even if he has in fact good title. But the vendor and purchaser are free to make and modify such obligations in their conveyancing contract, eg a vendor may by contract preclude the purchaser from raising any objection or requisition as to title in relation to UBWs: An agreement to sell and convey an interest in land is, like any other contract, a matter for the parties themselves. Generally speaking, the court would give effect to the parties intentions as evidenced by their agreement. the obligation to make a good title requires the vendor to show that he can convey the whole legal estate and equitable interest in the land sold, free from encumbrances except for those disclosed by the contract This is an implication arising from the obligation to make a good title: an obligation which the parties are free to modify by their own agreement. (see *Jumbo King Ltd v Faithful Properties Ltd & ors* [1999] 3 HKLRD 757, 770-771) 24. .. The parties to a contract for the sale and purchase of land are free to agree to any term they like. The parties are free to agree to the sale and purchase of a property with defective or imperfect title and the purchaser may agree to waive his right to raise requisition in respect of [UBWs]. the question is what have the parties agreed in the light of the surrounding circumstances and the factual matrix. (see *Ip Kam Wah & anor v Fair City Group Ltd* [2005] 4 HKLRD 168, 182-183)
27. As with any other commercial contract, the parties to a conveyancing transaction are free to make their own agreement and, in particular, to modify any obligation regarding the title to be shown and given by the vendor and the requisitions that may be raised by the purchaser 28. it is not in dispute that it was open to the parties to reach an agreement in advance that would have the effect of precluding such requisition and imposing on the plaintiff notwithstanding the defect in title. (see *Long Life Chinese Health Food Ltd v Luen Fat Air Condition (HK) Trading & Engineering Co Ltd* [2015] 3 HKLRD 511, 520)
- (b) Construction of a waiver clause The ambit and effect of a waiver clause in a conveyancing contract turn on its construction. The applicable principles of contractual construction are trite, and they have been helpfully summarised by Ms Cheung and Mr Lau as follows: (a) Lord Hoffmann NPJ in *Jumbo King Ltd* explained at pages 773-774 that: The construction of a document . is an attempt to discover what a reasonable person would have understood the parties to mean. And this involves having regard, not merely to the individual words they

have used, but to the agreement as a whole, the factual and legal background against which it was concluded and the practical objects which it was intended to achieve. If the ordinary meaning of the words makes sense in relation to the rest of the document and the factual background, then the court will give effect to that language, even though the consequences may appear hard for one side or the other. The court is not privy to the negotiation of the agreement - evidence of such negotiations is inadmissible - and has no way of knowing whether a clause which appears to have an onerous effect was a quid pro quo for some other concession. Or one of the parties may simply have made a bad bargain. the overriding objective in construction is to give effect to what a reasonable person rather than a pedantic lawyer would have understood the parties to mean. Therefore, if in spite of linguistic problems the meaning is clear, it is that meaning which must prevail. (my emphasis) Le Pichon JA in *All Ports Holdings Ltd v Grandfix Ltd* stated that in construing a contract all parts must be given effect where possible, and no part of it should be read as inoperative or surplus. This is the presumption against redundant words A contract should be construed objectively, but not in disregard of its factual context and purpose. Accordingly, the subjective intention of one party to a contract, even if communicated to the other party before the contract is made, will not usually be a relevant consideration. This explains why evidence of the parties subjective intention is inadmissible. Lord Hoffmann NPJ at page 776 in *Jumbo King Ltd* further explained that the courts will be very reluctant to construe such a term [ie a waiver clause] as enabling a vendor to mislead the purchaser As is stated in Farrand, *Contract and Conveyance* (4th ed.) at p.93, such conditions are subject to the overpowering principle that the vendor must not mislead the purchaser in any way; this means that a sufficient indication of the risk must be given before the contract is made. for my part I think it is better regarded as a matter of construction. Thus it is inconceivable that a term will be construed as enabling a vendor to impose upon a purchaser a serious defect in title of which he actually knew. No purchaser would sign a contract which was bare-faced enough to stipulate expressly that the vendor need not disclose serious defects in title of which he had actual knowledge and, even if there was no objection on grounds of public policy, nothing less than the most express language would do. On the other hand, the position is different if the vendor did not actually know of the defect but had the means of knowledge, or if the matter was technically a defect in title but something which a purchaser might reasonably be prepared to accept. Prima facie, it is the duty of the vendor to deduce and then convey a good title and if he relies upon the terms of the contract to shift the risk of any defect in title to the purchaser, the language must clearly do so. As Farrand says, the question is whether the purchaser would have been aware of the risk he was being asked to take. (my emphasis) Godfrey JA in the Court of Appeal in *Jumbo King Ltd* made a similar point in relation to UBWs as follows: Unauthorised structures are all too common in Hong Kong and present a real problem for conveyancers. A vendor whose title is, or may be, open to objection because there is, or may have been, erected on the property of which he is granting exclusive use to his purchaser some unauthorised structure is well advised to protect himself by precluding his purchaser, by contract, from raising any requisition or objection to the title based on an unauthorised structure point. Of course, if the vendor's

contract is tricky or unfair; if by concealment or non-disclosure, he misleads the purchaser about the matter, it will be held that he has disqualified himself by his conduct from relying on any such provision. (my emphasis) Where the vendor did not actually know of the defect but had the means of knowledge (see paragraph 98(d) above), the relevant questions as identified by Godfrey Lam J at page 520 in *Long Life Chinese Health Food Ltd* are as follows: (a) whether the waiver clause imposes subject matter limits on the vendor's obligation to show and give good title and the purchaser's entitlement to raise requisitions and objections, and (b) whether the defect in title complained of falls clearly within such subject matter limits as understood by a reasonable and ordinary purchaser.

- (c) Relevance of vendor's actual knowledge, if any There was dispute as to whether D1 had actual knowledge of the Alleged UBWs. But as seen below, I find D1 had no such actual knowledge. Nevertheless, in case I am wrong, I shall briefly discuss the issue of the vendor's actual knowledge and any non-disclosure. The starting point is that a waiver clause cannot be tricky, unfair or (by concealment or non-disclosure) misleading, and the vendor cannot refuse to disclose serious defect in title of which he has actual knowledge (see paragraph 98(d)-(e) above and paragraph 111(c)-(d) below). But that said, [the] courts will be very reluctant to construe such a term [ie a waiver clause] as enabling the vendor to mislead the purchaser Subject to the primary principles in the above paragraph, the authorities show that even if a vendor has actual knowledge of a defect in title that the purchaser is complaining of, if a waiver clause on proper construction clearly covers such defect, the vendor can still rely on such waiver clause: (a) *Anderson Chow J in Join Union Investment Ltd v China Tree Investment Ltd* cited Hoffmann NPJ's observations in *Jumbo King Ltd* (see paragraph 98(d) above), and went on to say as follows:
60. In the context of a simple contract for the sale and purchase of land in Hong Kong, the vendor's duty, in general, is to prove and give a good title. It is not a defence for the vendor to say that he did not have knowledge of any defects in title at the time of the making of the contract. The issue of knowledge becomes relevant, however, when the vendor seeks to rely on a contractual provision limiting the title to be proved or given. In such a case, the proper inquiry is whether, upon the true construction of the limitation provision, it is intended to apply to the relevant defect in title notwithstanding the vendor's knowledge of it at the time of the making of the contract
61. There is no general rule that only actual knowledge of the relevant defect in title on the part of the vendor is relevant to this inquiry. Whether the vendor will be debarred from relying on a contractual provision limiting the title to be proved or given by reason of actual, or some lesser degree of, knowledge of the defect in title would depend on the true construction of the contractual provision in question.
62. For the reasons mentioned above, the proper question is not whether the defendant failed to make disclosure of defects in title of which it was aware, but whether the defendant is entitled to rely on the relevant contractual provisions limiting the title to be proved or given notwithstanding its knowledge of such defects in title. This raises an issue of construction of

the contract (my emphasis) In *Ni Tiee Bor Robert & anor v Golden Crane Industries Limited*, Recorder Edward Chan SC again cited Hoffmann NPJ's observations in *Jumbo King Ltd* (see paragraph 98(d) above), and went on to say as follows: 32. In my view, it is important to note that at the end of the day, the real question was not whether the vendor had the knowledge or not. The real question was whether the clause relied upon by the vendor on its true construction could protect the vendor from this challenge to the title. If the wordings were wide and clear enough, there is no rule of law to say that the vendor may not rely on the clause simply because he was aware of the defects which the clause is designed to cover. (my emphasis)

- (d) Subject matter limits The first of the 2 key questions explained in paragraph 99 above concerns the subject matter limits of a waiver clause. As referred to paragraph 98(d) above, Lord Hoffmann NPJ at page 776 in *Jumbo King Ltd* said as follows: Prima facie, it is the duty of the vendor to deduce and then convey a good title and if he relies upon the terms of the contract to shift the risk of any defect in title to the purchaser, the language must clearly do so. As Farrand says, the question is whether the purchaser would have been aware of the risk he was being asked to take. (my emphasis) I agree with Ms Cheung that a waiver clause has to identify a defect in title and not a mere defect, and that defects in title are those defects which detract from the vendor's good right to convey the estate he is selling, i.e., they affect his ownership itself But must the vendor itemise all defects in title that come within the ambit of the subject matter limits? Deputy Judge A To at page 179 in *Ip Kam Wah* referred to Godfrey JA's observations in *Spark Rich (China) Ltd v Valrose Ltd*, and said as follows: 18. In any event, I do not think that by full disclosure of the problem Godfrey JA meant a full identification of each and every unauthorised structure, fixture, fitting or erection which did not comply with Building Ordinance (Cap.123) [] or its subsidiary regulation or any related legislation. If a vendor can make a full list of all possibly offending structures or fixtures, it would of course be most ideal, but that is not essential. As a matter of conveyancing law and practice, there is nothing to prevent the parties from agreeing to the sale and purchase of a property with a defective or imperfect title or to agree to waive any right to raise requisition in respect of any unauthorised works whether they constitute any blot in title. Indeed, not every unauthorised structure constitutes a blot on title or goes to title. (my emphasis) In *Jumbo King Ltd*, the relevant waiver clauses were clauses 18(e) and 19 of the written agreement for sale and purchase. Litton PJ at page 771 helpfully summarised those provisions as follows:
- (3) By cl. 19 the purchaser declared that it was purchasing the property in its present state and would make no objection as to title in connection therewith: the property was sold on an as is basis.
- (4) One then comes to cl. 18(e) which clearly contemplates that there might be structures on the property not erected in compliance with the [BO] and its subsidiary legislation The clause in plain terms passes the risk of government action being taken in relation to such structures to the purchaser. Although clauses 18(e) and 19 did not specifically identify unauthorised

cocklofts as their subject matter which would debar the purchaser from raising objections to the vendors title, Litton JA at page 771 was of the view that the vendors would have been entitled to reply [to any objection to title based on the (alleged) unauthorised nature of the cocklofts] that, by virtue of cl. 18(e), the purchaser was not entitled to take that objection to the title. I note Rogers VP at the Court of Appeal in Jumbo King Ltd approached the matter differently by saying clause 18(e) failed to identify the cocklofts with sufficient particularity (pages 251-251): I bear in mind that the clause contains more than simply a general exclusion of liability in respect of a broad range of defects but specifically refers to any erection or structure which might be in contravention of the [BO]. As I have indicated above, this goes further than being a reference to defects in title but draws attention to structures. A cockloft is clearly an erection or structure but although I have had my doubts about it, I have come to the conclusion that the wording of the clause does not identify the cocklofts with sufficient particularity to take it out of the general exceptions category. But seen in the above paragraph, Litton PJ in the Court of Final Appeal disagreed, and found such reasons difficult to follow (page 770). Lord Hoffmann NPJ at page 777 clarified the position as follows: In the present case, however, the language of cl. 18 (e) was entirely apt to cover the cocklofts. No one who had read that clause and saw the cocklofts could have failed to appreciate that he was being asked to bear the risk that they were unauthorised structures. The language seems to me perfectly clear. And therefore, in the absence of any evidence that the vendor actually knew that they were unauthorised, the purchaser was in my opinion bound by the clause. (my emphasis) Thus, a waiver clause has valid subject matter limits if it identifies a category of possible defects in title, eg structure in or to any part of the property which is in contravention of the [BO] and/or its subsidiary legislation in clause 18(e) of the written agreement in Jumbo King Ltd. This is to be contrasted with clause 19 of the written agreement in All Ports Holdings Ltd which provided as follows (page 641): The Purchaser agrees and accepts all existing condition/states of the property and shall not rely upon any pretext to refuse to complete the transaction or to raise any objections. Le Pichon JA noted the issue in that case was whether such clause was capable of being construed as including illegal unauthorised structures, and at page 642 the learned judge concluded as follows:

30. [Counsel for the defendant] accepted that prima facie, the phrase all existing condition/states of the property would not extend to illegal structures. It is really saying no more than that the property was being sold as is 31. no ambiguity arises. It is the vendor's case that the parties understood between themselves that condition/ states included illegal structures. That is not evident from a reading of cl.19. It is dependent on parol evidence that is not admissible save where there is an ambiguity on the face of the document. If none arises, that is the end of the matter. Mr Lau strongly relied on Long Life Chinese Health Food Ltd, so I will say a few words on the facts of that case. In that case, the sale was aborted because the purchaser raised and maintained requisitions relating to a notice and subsequently a demolition order issued by the BA concerning a UBW addressed to the vendor's predecessor-in-title (collectively, UBW Order). The question was whether condition 2 in the annex to the PASP, which was also expressly incorporated in the FASP, limited the vendor's obligation to

show title and precluded the purchaser from raising requisitions about the UBW Order. Godfrey Lam J held the purchaser was not debarred by condition 2 from raising such requisitions. The starting point in Long Life Chinese Health Food Ltd is that the vendor had actual knowledge of the UBW Order, which must be contrasted to D1 in the present action, who (as I find below) had no actual knowledge of the Alleged UBWs. Mr Lau drew my attention to condition 2(A) in Long Life Chinese Health Food Ltd that referred to 3 specific aspects of the condition of the property and showed the parties paid particular attention to these 3 matters in terms of unauthorised works, but did not mention the UBW Order even though the vendor was aware of its existence. It was held at page 527 that [a] reasonable potential purchaser might be led into thinking that there was nothing other than the three matters specifically mentioned that the vendor knew as a fact to be unauthorised. The express mention of certain unauthorised works in the clause makes it all the more surprising that an actual demolition order relating to a different unauthorised structure was not disclosed. Also, conditions 2(B)-(E) would not assist the vendor as they referred to general matters, eg existing state relevant condition and/or existing condition rather than specific categories of defect in title, and thus were too ambiguous to cover the UBW Order (pages 527-529): (a) Condition 2(B) The purchaser knew that part of the relevant condition of the property had not been authorised, but there was no evidence and no basis to suggest that the purchaser knew of the UBW Order. Condition 2(C) The vendor gave no warranty as to whether or not the relevant condition amounted to unauthorised or illegal works, but the purchaser did not have to rely on a warranty in order to object to a title defect. After all, the PASP provided that the property was to be sold free from encumbrances, and the FASP provided that the vendor had to give good title to the property. Condition 5 of the annex also stated the basis of the contract was the title being in good order. Further, there was no contradiction between condition 2(C) and clause 19 of the FASP whereby the vendor warranted that the property was not adversely affected by any liability of which he was aware, other than those disclosed in the agreement and those of which the purchaser was aware and could have ascertained on reasonable inspection of the property. Condition 2(D) Such provision did not mean the purchaser was prepared to assume liability under any existing enforcement order against the vendor of which the latter was aware. The most express language is required if a vendor wishes to shift to the purchaser risks arising from serious defects in title of which the vendor had actual knowledge but which he had not disclosed to the purchaser. In my view sub-cl. (D) does not mean that the [purchaser] was prepared to assume liability under any existing enforcement order against the [purchaser] of which the [vendor] was aware. To have that meaning the sub-clause would have to be much clearer and more explicit than it is. (page 528) Condition 2(E) The reference to existing state was a general term. [It] is inconceivable that a term will be construed as enabling a vendor to impose upon a purchaser a serious defect in title of which he was aware. In the absence of some very special circumstances I would be most reluctant to hold that a general agreement not to raise requisition on title arising from the existing condition of the property precluded the purchaser from objecting to a defect which the vendor knew of but failed to disclose before the contract. (pages 528-529) From the above authorities, I agree with Ms

Cheung that what is not permissible is a general and/or sweeping statement that serves as a general exclusion clause without identifying specifically by most express language a category of potential defects in title .

- (e) **Relevance of purchaser's knowledge** The next considerations (which form part of the factual matrix to be considered when construing a waiver clause) are: (a) whether the vendor must particularise in the contract the specific defect in title in question to bring it within the knowledge of the purchaser before the vendor can rely on the waiver clause on the basis that by reason of such disclosure the waiver clause is not regarded tricky, unfair or misleading; if the purchaser has actual knowledge, whether he has contracted on the basis there may be potential defects in title and therefore cannot complain of having been misled into thinking he was contracting for a clean title. On these issues, it is necessary to look more closely at the trilogy of cases, ie *Ip Kam Wah, Channel Green Ltd v Huge Grand Ltd and NieTiee Bor Robert & anor* before returning to the principles laid out by the Court of Final Appeal in *Jumbo King Ltd*. Issue in paragraph 113(a) above In *Ip Kam Wah*, the PASP was accompanied by a collateral agreement which provided that (a) the property was to be sold as is , (b) the vendors gave no warranty that there was no unauthorised or illegal structure, and (c) the purchaser confirmed he had inspected the property or had been afforded such opportunity before entering into the PASP so he would make no objection to title and would not refuse to complete if there was an unauthorised or illegal structure (page 172). The purchaser subsequently raised requisition concerning an illegal structure covering the first floor terrace facing the main entrance. It was argued on behalf of the purchaser that (a) the collateral agreement lacked particularity as to the unauthorised structure in question, and (b) in order for the waiver to be binding on the purchaser, he had to know in respect of which particular unauthorised structure it was agreeing to waive its right to raise requisition, and a general description would not be sufficient. Deputy Judge A To rejected such argument (see paragraph 104 above), saying that the reference to full disclosure of the problem by Godfrey JA in *Spark Rich (China) Ltd* does not mean full identification of each and every unauthorised structure, fixture, fitting or erection that does not comply with the BO or its subsidiary legislation or any related legislation, and it is ideal but not essential to make a full list of all possibly offending structures or fixtures, especially as not every unauthorised structure constitutes a blot on title or goes to title. The learned judge next turned to (a) clause 18(e) in *Jumbo King Ltd*, which (i) was similar to the collateral agreement in *Ip Kam Wah*, (ii) was equally unspecific and lacking in particularity as to the unauthorised structures , and (iii) covered virtually any structure or fixture which is in contravention of the law (page 180), and also to (b) Godfrey JA's conclusion (approved by the Court of Final Appeal pages 181-183) that the vendors were entitled to rely on clause 18(e) to debar the purchaser from objecting to the title based on the (alleged) unauthorised nature of the cocklofts as well as Godfrey JA's guidance set out in paragraph 98(e) above (page 180). Deputy Judge A To in *Ip Kam Wah* went on to say at page 181 as follows:

21. It appears that Godfrey JA did not approach the duty of disclosure on the basis of any specific principle applicable to property transactions. He approached that issue on the basis of general principle in contract and in construction of contract. He must be of the view that the sale and purchase of property is a matter of agreement between the parties and that it is open to the parties to agree to the sale and purchase of a property with defective or imperfect title or for the purchaser to agree to waive his right to raise requisition in respect of unauthorised building works. He considered the duty of disclosure in the context of the effect of non-disclosure, ie whether the contract was tricky or unfair and has the effect of misleading the purchaser. I do not think his Lordship has laid down any principle in *Spark Rich (China) Ltd v Valrose Ltd* (unrep., CACV No 249 of 1998, [1999] HKEC 847) that in order that a waiver may be valid the unauthorised structures must be particularised in the contract in which a purchaser agrees to waive his right to raise requisition. (my emphasis) In my view, there is no dichotomy in Deputy Judge A To saying on the one hand that the collateral agreement was unspecific and lacking in particularity as to identification of the unauthorised structure in question, and on the other hand concluding that the collateral agreement is capable of constituting a waiver of the [purchaser s] right to raise requisition on the unauthorised structure (page 183). The learned judge at page 183 explained as follows: 25. The question is what the parties meant by unauthorised or illegal structures in the Collateral Agreement and whether the [purchaser] was in any way misled if the court should give effect to that construction. The words unauthorised or illegal structures are ordinary words and must be given their ordinary and plain meaning. It must include the unauthorised structure which covered the terrace on the first floor of the Property converting the open terrace into roofed accommodation. Giving these words their ordinary plain meaning, the [purchaser] must have agreed to waive its right to raise objection to title in respect of the said unauthorised or illegal structure in question. (my emphasis) The above showed it was not essential for the waiver clause in that case to specifically identify the particular unauthorised/illegal structure covering the first floor terrace facing the main entrance (being the specific defect in title in question) so long as it identified the relevant category of defects in title, ie the category of unauthorised or illegal structures expressly adopted in the collateral agreement was in its ordinary and plain meaning sufficient to cover the very defect in title that was in issue (see also paragraphs 107 and 112 above). Likewise, the unauthorised cocklofts being the defects in title in question in *Jumbo King Ltd* were covered by the category of any structure in or to any part of the property which is in contravention of the [BO] in clause 18(e) in its ordinary and plain meaning. In *Channel Green Ltd*, clause 30 of the agreement for sale and purchase provided that the property was sold on an as is basis; the purchaser had inspected the property and understood its existing state; and the purchaser could not raise any requisitions or refuse to complete or delay completion on the ground that there were any unauthorised additions, alterations or illegal structures. The issue was whether clause 30 covered requisitions raised by the purchaser concerning breaches of 2 special conditions of sale under the government lease, ie car park spaces in the forecourt had become occupied by stalls, and some shops had extended into the areas required not to be built over. Upon construing clause 30 in its natural and ordinary

meaning, it was held that the vendor was entitled to rely on such clause (pages 667-671): (a) Illegal structure means any structure erected against the law whether in breach of the BO, the terms of the Government lease or the DMC. Unauthorised additions or unauthorised alterations can include those in breach of the Government lease or the DMC, irrespective of their status under the BO. Further, unauthorised additions or alterations are wide enough to encompass physical states of the property occasioned by additions or alterations which do not involve the erection of a structure, so whether stalls-on-wheels could be regarded as structures was not important. The plain meaning of clause 30 was that it applied to any unauthorised physical state of the property irrespective of whether authorisation by the relevant authorities could have been obtained as a matter of law. As regards breaches of the BO, the BA is not empowered to authorise any illegal structure. Further, unauthorised alterations include alterations by way of converting car park spaces into stalls or common areas into part of a private unit. The substance of the requisitions, read in their proper context, was the same whether based on the presence of unauthorised additions, alterations or illegal structures or on the non-provision of car park spaces and conversion of common areas. There was no sound reason to confine the effect of clause 30 to one facet of the underlying source of the problems and not another. Taking into account the factual background, a reasonable person would have understood the parties to ascribe the ordinary and natural meaning to clause 30. There was no reason not to give effect to that language. From the above, it is clear a waiver clause should be given its sensible, ordinary and plain interpretation, and a narrow and legalistic approach should be avoided. Ms Cheung fairly accepted there are no hard and fast rules as to what full disclosure entails (where the vendor has actual knowledge of the defect in title) and/or what clear and express language drafting requires. I agree that ultimately it is a matter of common sense construction in the relevant factual matrix and surrounding circumstances and, as Ms Cheung suggested, in the spirit of encouraging completion as explained by Litton JA at page 413 in *Active Keen Industries Ltd*: The contractual duty to answer requisitions properly is not an onerous one. All that is required of the vendor is candour and commonsense. The purchaser is not an adversary. The parties have already arrived at an agreement and, normally, it is as much in the purchaser's interest as it is in the vendor's that completion should take place. A good title, or a good marketable title, does not mean a perfect title. If there are, or might be blemishes upon it, these should be faced squarely. Nazareth JA at pages 414-415 associated himself with the above observations, saying that the time has come for Hong Kong conveyancers to cease magnifying difficulties that are really non-existent and that frequently keep apart parties themselves eager to conclude their bargain . Issue in paragraph 113(b) above Mr Lau noted Godfrey Lam J at page 529 in *Long Life Chinese Health Food Ltd* distinguished *Ip Kam Wah and Channel Green Ltd*. The question is whether these cases can be distinguished on the ground that, as Mr Lau suggested, the purchasers in those cases were found to have knowledge or to have been told of the UBWs in question. Turning first to *Ip Kam Wah*, it was true the central question of fact in that case was the purchaser's own knowledge of the defect in title , ie he knew the unauthorised structure in question existed before he signed the collateral agreement so he could not have been misled, but in my view such issue of fact

was significant in that case because the purchaser raised an argument of misrepresentation against the vendor, which Deputy Judge A To eventually rejected at pages 172 and 176: it would not be difficult to note that this transaction is typical of a speculative transaction with a very long completion period of nine months and with a very small initial deposit of about 1% of the purchase price paid while the balance of usual 10% was paid by a third party. This transaction is the first of a series of five transactions of very valuable property entered through the same estate agent on similar terms. It is obvious that this transaction is not an ordinary consumer sale but one made by a dealer in real property for speculative purposes.

12. Chan [ie a purchaser] said that he had no chance to inspect the Property as it was tenanted, but he did not deny he had inspected the exterior of the Property with Lai [ie the estate agent] on at least two occasions. Chan did not seek to respond to Lai's affirmation. From the photographs taken from outside the Property, the unauthorised structure is readily visible even from an external inspection of the Property. It is hardly credible that Chan did not notice the unauthorised structure while he was viewing the Property from the outside with Lai. Not only that, Chan confirmed in the Collateral Agreement that [the purchasers] had inspected the Property or had been afforded the opportunity to inspect the Property prior to entering into the Provisional Agreement. In the Collateral Agreement, the [vendors] refrained from warranting there were no unauthorised structures while the [purchasers] undertook not to raise objection to title by reason of any unauthorised structures. It is amply clear from the Collateral Agreement that the parties knew there were unauthorised structures appertaining to the Property. Chan was obviously carrying on the business of trading in real property on the [purchasers'] behalf, if not on his own. He is experienced in the business of trading in real property in Hong Lok Yuen and is very familiar about unauthorised structures in the houses in the development. This makes his allegation all the more incredible. In the light of the incontrovertible evidence, Chan's allegation that he had not inspected the Property or afforded the opportunity to inspect and had no knowledge of the unauthorised structure is incapable of belief.
13. Taking into account what Chan said in his affirmation in the context of so much of the background which is undisputed or beyond reasonable dispute, such as the photographs, that he was a dealer in real property and the contents of the Collateral Agreement he signed, I consider Chan's assertions in his affirmation are practically moonshine and incapable of belief, while Lai's affirmation is believable. I do not think this is a case which involves any genuine and substantial disputes on facts. I am satisfied with the evidence filed on behalf of the [vendors] and reject the evidence filed on behalf of the [purchasers]. I am satisfied that Chan had inspected the Property from outside and had knowledge of the unauthorised structure before he signed the Collateral Agreement. I also reject his evidence that he signed the Collateral Agreement as a result of the misrepresentation. (my emphasis) Turning to the waiver clause in the collateral agreement, Deputy Judge A To at pages 182-183 emphasised the guidance given by Lord Hoffmann NPJ in *Jumbo King Ltd* that this is a matter of construction such that if the ordinary meaning of the waiver clause makes sense in relation to the rest of the document and the factual background, then the court will give effect to that

language, even though the consequences may appear hard for one side or the other. It is only a rule of construction that the court will avoid construing a contract in such a manner as would enable a vendor to mislead the purchaser. The duty of disclosure is to be understood in this light. Thus, ultimately, the question is what have the parties agreed in the light of all the surrounding circumstances and the factual matrix. As explained in paragraphs 115-117 above, the learned judge's decision primarily turned on the construction of the waiver clause in the collateral agreement, ie the category of unauthorised or illegal structures in the collateral agreement in its ordinary and plain meaning covered the particular illegal structure in question. As for the next question of whether the [purchaser] was misled if the [collateral agreement] should be given that construction (page 183), the learned judge turned to view such construction against the relevant factual matrix in respect of the purchaser's knowledge and experience as explained in paragraph 121 above, ie the purchaser was a dealer in property who had purchased other properties in the same property development and who had inspected the exterior of the subject property before purchasing the same, which served to reinforce that the purchaser had knowledge of the unauthorised structure before he signed the Collateral Agreement, and could not have been misled about effect of the collateral agreement, so the purchaser clearly waived its right to raise requisitions in respect of the unauthorised structure in question. Secondly, the vendor in Channel Green Ltd had disclosed the unauthorised structures in question prior to the PASP, so the purchaser had knowledge of the potential problem and was not misled. Lam VP at pages 663-664 held that the purchaser with its substantial experience could not have been misled by the waiver clause as it must have been aware of the possible defects in title being the subject matter of its complaint: 16.

- (2) The transaction in question was a sale and purchase of substantial value and Ms Ho [ie the purchaser] was a person with substantial commercial experience. She did not come into the picture at the last minute shortly before the signing of the provisional agreement. She had been involved from an early stage when she participated at two presentations by the agent on 5 January and 2 March 2011. The Property was one of the properties presented on 2 March and at that presentation there were specific discussions about the use of the forecourt by the stalls-on-wheels as opposed to the provision of parking spaces. It defies logic and common sense that Ms Ho would not seek information from Mr Leung and that Mr Leung [ie the estate agent] would withhold the relevant information from Ms Ho; (my emphasis) The effect of such finding was to show there was no fact or matter in the factual background which indicates something had gone wrong in the language of cl. 30. In particular, there was nothing [the purchaser's counsel] could pinpoint to dictate a different meaning to be given to the clause as opposed to the plain and natural meaning as analysed by [the Court of Appeal] above. In other words, this is a case where a reasonable person, taking into account the factual background, would have understood the parties to ascribe a meaning which is the same as the ordinary and natural meaning of cl. 30 (page 671). More importantly, Lam VP went on to say as follows at pages 671-672, which again emphasised it is ultimately a matter of construction:

39. Once we reach this conclusion, it is quite beside the point whether the Judge was entitled to have regard to the potential problems with SC7 and SC8 [ie the specific defects in title in question] to reinforce his conclusion. There is simply no reason why full effect should not be given to the plain and natural meaning of cl. 30 which, as we have held, covers breaches of the Government Lease, the DMC as well as the [BO].
40. In any event, we are of the view that the judge was entitled to take into account of the knowledge of the [purchaser] as evidence of the genesis and the of the transactions [the obligation of the vendor to show and give good title] is defined by cl. 30 and the Court could have regard to the objective fact that the [purchaser] was aware that there were problems about the physical state of the property stemming not only from the [BO] (my emphasis) In *Ni Tiee Bor Robert & anor*, the vendor and the purchaser entered into a PASP and a side agreement. The property was full of unauthorised structures and alterations of which the vendor was aware, and the very purpose of the side agreement was to make sure the purchasers would not be able to take objection to those structures and refuse to complete (pages 17-18). Recorder Edward Chan SC adopted the guidance by the Court of Final Appeal in *Jumbo King Ltd* that this is a matter of construction of the contract such that the real question is whether the waiver clause relied upon by the vendor on its true construction can protect the vendor from challenge to the title, and it was held that if the wordings are wide and clear enough, there is no rule of law to say the vendor may not rely on the clause simply because he was aware of the defects which the clause is designed to cover (page 22). On construction of the side agreement, its effect was clear, ie that the purchasers were still bound to accept the assignment of the property even though there were illegal structures or unauthorized alterations to the property and even though there were enforcement orders directed at those alterations (pages 16 and 24). It was said that the width of the language adopted in the side agreement had the effect of making the purchasers bear the full risks of the existence of any unauthorized or illegal structures even though they were not aware of those structures and the requirement to rectify them because a Government notice requiring rectification had been served on the vendor (page 25). Thus, it was further said at page 25 that: In light of the width of the side agreement, I am of the view that the purchasers are not entitled to raise any requisition or objection to title on account of the presence of any unauthorized alterations or illegal structures which had been found and identified by [the architect]. Even though these structures existed and were unauthorized, the purchasers must still complete the sale and purchase. Accordingly the side agreement was a complete answer to the purported requisition raised by the purchasers in relation to these unauthorized alterations and illegal structures. As for the purchasers knowledge, the learned judge held that they were probably aware through their own observation at the inspection that there were alterations other than those they had been told. They were fully aware of the risk of enforcement against unauthorised structures. So even though the purchasers were unaware of some of the extensions or alterations, the question is whether in light of what [the purchasers were] told and shown, which formed part of the matrix of facts for the construction of the side agreement, the terms of the side agreement were such

that would prevent the purchasers from raising any objection to the existence of all these alterations and would bind them to complete the sale and purchase despite the presence of these alterations (my emphasis) (pages 22-23). It was held that since the purchasers were found to be aware of the consequences of the unauthorised alterations or illegal structures (ie government enforcement actions that would render the title defective), it did not detract from the express wordings of the contract that the purchasers were bound to complete notwithstanding the presence of these unauthorized alterations or illegal structure (pages 25-26). Although Mr Lau reminded that Long Life Chinese Health Food Ltd distinguished Ip Kam Wah and Channel Green Ltd, it does not follow that because the purchasers in Ip Kam Wah, Channel Green Ltd and Ni Tiee Bor Robert & anor had actual knowledge of the defects in title, the corollary (ie a waiver clause will be ineffective merely because the purchaser had no knowledge of the particular UBW or defect in title in question) is true. Quite apart from Godfrey Lam J's admonition at page 529 in Long Life Chinese Health Food Ltd that each case has to be decided on its own facts, the above authorities clearly showed that even though the courts found the purchaser had the relevant knowledge, ultimately the decision turned on the construction of the waiver clause, and the purchaser's knowledge merely formed part of the relevant factual matrix to be considered for the purpose of the construction of the express wording of the waiver clause. This was the essence of the guidance of the Court of Final Appeal in Jumbo King Ltd (see paragraph 98(a) and (d) above). As to the factual situation in that case at the time when the parties entered into the agreement, the evidence was neutral as regards the vendors knowledge. The purchaser on its part made no inquiries. Both parties must have been well aware of the possibility that some or all of the cocklofts were unauthorised structures. The parties were contracting on that basis, and hence the purchaser could not have been misled (page 769). This shows that the purchaser's knowledge (whether actual or constructive) or otherwise, which goes to the matter of whether he can credibly claim to have been tricked or misled, is but part of the factual matrix to aid the ultimate question of construction. As Ms Cheung submitted, it flied against the basic canons of construction of contract to say that a contractual party's subjective/ actual knowledge is more than relevant factual matrix for ascertaining the proper meaning of the contractual term. I should also add that Mr Lau sought to distinguish the above authorities on the basis that whilst the purchasers in those cases had actual knowledge of the defects in title that were in issue, P in the present action was not specifically informed about the Alleged UBWs, and hence could not be said to have actual knowledge. As seen below, I find that even though P had no specific knowledge of the Alleged UBWs before she signed the Shop 4 PASP, she contracted on the basis that there might be UBWs at the Property and that she knew and understood from the Waiver Clause in the Shop 4 Appendix (in respect of which she had a bit longer discussion with Tong) as to the possible existence of UBWs. In my view, P, like the purchaser in Jumbo King Ltd, was well aware of the possibility of UBWs at the Property. I also bear in mind that P's case against D1 did not rely on any misrepresentation by D1 or Tong/D2 on behalf of D1. In the end, Mr Lau in his oral closing submissions conceded P's contention that she had no actual knowledge of the Alleged UBWs (due to Tong's alleged default) would be immaterial in P's case against D1. VI.

P's RELATIONSHIP WITH TONG I find on balance P came to know Tong (a licensed estate agent working for D2) when he cold-called her in/about January 2011. Since then Tong took the initiative to keep P regularly informed about the Hong Kong property market by (a) updating her by telephone several times a month on the latest news/developments concerning the property market, and (b) furnishing her with information about property market trends, transaction records, and other property-related news. P admitted in evidence that Tong's investment returns (see, eg, the 1st, 2nd and 3rd Properties referred to in paragraphs 135, 136 and 143 below), P gradually treated him as a friend, and from time to time they talked about other matters. Tong introduced his then girlfriend (who also worked for D2 at the time) to P, and even consulted P on whether he should change his job. In my view, as time went by, P and Tong got along very well. They became friends, and looked after each other in property investment endeavours. P introduced Tong to her investment partners and to her younger brother Mr Li Wai Keung (), and she and Tong collaborated in property investment with a view to make profit gain. I find on balance that notwithstanding P's denial, she (supported by her estate agent Tong/D2) became a seasoned and adventurous dealer in real property with a number of property purchases/sales under her belt: (a) As seen in paragraph 132 above, P welcomed and received regular monthly updates on property market trends, property transaction records and property-related information, and from such updates she gained knowledge and insight into the property market. In my view, P never refused such information from Tong because she was an active and avid dealer in real property. As seen below, within a period of 3 months from April to June 2011, P purchased the 1st, 2nd and 3rd Properties for investment purpose by way of resale/letting. She even introduced Tong to Li and interested Li into purchasing the 4th Property referred to in paragraph 137 below, which was directly above the 2nd Property that she bought. Then in September 2011, she again explored possible purchase of the 5th Property referred to in paragraph 149 below, but was eventually out-bid by other potential purchasers. P's property acquisitions were made with various investment partners (including Tong and his colleague) using different corporate investment vehicles to acquire different properties, but each such corporate vehicle would only hold one investment property. P well understood the sale of the property itself. P appeared to be the front person who took charge to act on behalf of the investment partners for establishing the relevant corporate vehicles, and for liaising with Tong as estate agent to handle the conveyancing transactions. As P said, she and Tong looked out for each other. P (and presumably her investment partners as well) was eager to make property investments with a view to earn profit gain, and Tong was equally eager to identify investment opportunities to meet P's interest (and thereby earn commission income for D2 if a deal was struck), and at times he even collaborated with P in property investment for profit gain himself. Thus, when P claimed Tong struck her as honest and hard-working, I find on balance this merely reflected Tong's diligence in introducing property investment opportunities and in providing property-related information to P, his collaboration in making property investment with P, and also his willingness to facilitate investment by his colleagues(s). In my view, P was a venturesome property investor who was into non-consumer property dealing and who was not shy of entering into potentially risky property ventures,

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informed of the existence of unauthorised alterations and/or UBWs at the subject property by the terms of the PASP that the purchaser signed to accept they were within the subject matter limits of the waiver clause, the vendor would not be responsible for and the purchaser could not complain about such unauthorised alterations and/or UBWs, and (c) the position in (b) above was still applicable even if the purchaser chose not to inspect the property because he was already notified about such unauthorised alterations and/or UBWs by the terms of the PASP. IX. 3RD PROPERTY On 9 June 2011, P signed a PASP (in D2 s printed standard form) to purchase Unit No 16, 7th Floor, Wah Shing Centre, No 11 Shing Yip Street, Kowloon (3rd Property) for a consideration of \$6,210,000. P said under cross-examination her impression (even though she did not remember clearly) was that the 3rd Property was purchased directly from the owner & Tmi;N as a confirmor transaction with P as the sub-purchaser. Again, the 3rd Property was a partnership investment, but P s evidence was unclear as to who exactly was her investment partner s WS stated that P purchased the 3rd Property together with Tong who shared half of the purchase price, but P testified that from the beginning Tong told her P TkU, & & & & OUju[0& & Q T, N(u[& & & ZP0W"u & & & g(u[P T, & & TbOHQ, [ju[P T, hy@u[& & & , W \[& & & Q\N"V@b & & forward his mother as the nominal investment partner to avoid embarrassment as he would be earning profit from the assured eventual sale of the 3rd Property to the client of his colleague. This sat well with my finding above that P and Tong looked out for each other over property investment opportunities. Moreover, P was assured of profit gain by way of the assured re-sale of the 3rd Property to the client of Tong s colleague, which probably explained why she was unconcerned over who exactly was her investment partner for such property investment. This, in my view, underlined the fact (which on balance I find) that P was an venturesome property investor prepared to overlook basic prudence if opportunity arose for making quick profit gain from property dealings. Shortly after P bought the 3rd Property, Tong told her it was re-sold to the client of Tong s colleague, but P in her evidence did not give particulars of such re-sale except that a quick profit of about \$110,000 was made upon such re-sale, and she shared such profit with Tong who asked her to issue a cheque in the sum of about \$55,000 payable to his mother. P claimed the 1st and 3rd Properties had no illegal structures, and P s WS stated she was able to sell such properties without having to deal with any enquiries relating to any unauthorized structures of any kind from the purchasers solicitors . In my view, such statement plainly demonstrated that (quite irrespective of the existence or otherwise of any UBW) P knew purchaser s solicitors could raise requisitions about UBWs in respect of the property being the subject matter of the conveyancing transaction, and I find P s denial of such knowledge specious. X. 5TH PROPERTY P said in/about September 2012 she again teamed up with Tong with a view to jointly invest in the purchase of a unit at East Sun Industrial Building in Kwun Tong (5th Property). Tong was eager for such investment, and telephoned to tell P T5_/ehy[& & & & & & V1\q S-r, 0R}Y ot achieve the purchase price they had in mind. XI. HEAD PASP Before Ho as purchaser signed the Head PASP, Wong/Ho also reviewed the terms of the Head PASP which was in Midland Realty s printed standard form together with an appendix that set out the occupancy status of the shops/units at the Head Property, including: (a) from 15 March

2011 to 14 March 2012); vacant possession would be delivered for Store 4 and Store 6. Then on 9 November 2012, Ho entered into the Head PASP to purchase from Max Rainbow the Head Property which comprised a large number of shops/units at Phase 1 and Phase 2 of the Development of the Buildings (including the Other Property and the Property) for a consideration of \$350,000,000 (without apportionment of the overall consideration for each individual shop/unit). The estate agent who brokered the deal was Midland Realty. Ho intended D1 (of which Ho was a director) to eventually take up the assignment of the Head Property (including the Other Property and the Property), hence the purchaser in the Head PASP was described as Ho or his nominee. D1 was incorporated in 2012 as a corporate vehicle for (a) acquiring only the Head Property (and not any other property or project), (b) arranging sub-division of the Head Property with allotment of undivided shares for individual shops/units, and (c) sub-selling such sub-divided shops/units for profit return or letting any unsold shops/units to tenants for rental return. D1 did not have any employees, so operationally Ho (i) assigned 3-4 employees of his other companies to handle such project in relation to the Head Property, and (ii) instructed Wong to supervise and handle such project. By the Head Nomination dated 22 November 2012, Ho formally nominated D1 to enter into the assignment for the purchase of the Head Property from Max Rainbow. Wong fairly agreed that: (a) in principle the existence of any illegal structure(s) and/or UBW(s) might cause difficulty for D1 as confirmor/vendor to sub-sell the affected shop(s)/unit(s); there was no interested potential sub-purchaser of the shop(s)/unit(s) of the Head Property (yet to be formally sub-divided) when Ho as purchaser signed the Head PASP, so it was unknown for how long after D1's acquisition of the Head Property it would have to hold such shop(s)/unit(s) if they had illegal structure(s) and/or UBW(s); if any such shop(s)/unit(s) had illegal structure(s) and/or UBW(s) and could not be sub-sold in the short term, it/they would have to be let for rental return with consequent risk that (i) the BD might impose orders requiring demolition or rectification of the illegal structure(s) and/or UBW(s), and (ii) D1 might have to incur expenses (the amount of which was then unknown) to carry out any such works. Nevertheless, Ho/D1 agreed to Clause 27 of the Head PASP which provided as follows: The Purchaser has accepted the physical condition of the Premises even if If any unauthorised or illegal structure or alteration exists in the said premises and/or any part or parts thereof, and the Purchaser shall without prejudice to any other claims and remedies which he may have have no right to rescind the agreement to purchase the said premises for the aforesaid reason . Wong agreed the original intent of the printed term of this clause was to protect Ho/D1 as purchaser should unauthorised or illegal structures be found at the Head Property, and he understood the handwritten amendments meant Ho/D1 as purchaser accepted the then condition of the Head Property, and even if illegal structures and/or UBWs were found at the Head Property, Ho/D1 as purchaser would have no right to terminate the Head PASP. Mr Lau submitted that: (a) D1 had ample opportunity to inspect the physical condition of the Head Property (including the Property); it was difficult to conceive of D1 purchasing the Head Property in the course of its property investment business would blindly accept the physical state of the Head Property (i) without knowing its actual condition, (ii) without inspecting or engaging professional surveyor to inspect the Head

Property for illegal structures and/or UBWs, and (iii) with consequent risk of loss due to the presence (if any) of illegal structures and/or UBWs; the circumstances as a whole suggested D1 knew of the existence of the Alleged UBWs, but as P did not plead any particulars of D1's actual knowledge of the Alleged UBWs, she essentially relied on circumstantial evidence to urge the court to infer knowledge on the part of D1. Wong frankly agreed that as property investors he/D1 had healthy suspicion that the investment properties they looked into (including the Head Property) might have illegal structures and/or UBWs, ie V0RZPirmi & & , Nirmi & & & & & ^irbT#j"V & & the affected shops/units and not be able to quickly sub-sell or re-sell them, but this was not their core business concern when deciding whether or not to invest in and purchase the Head Property. Wong explained (and on balance I find) that as a property investment company D1's commercial/business approach towards acquiring the Head Property were as follows: (a) When the estate agent gave Wong information/offer concerning the Head Property, he/Ho would review the asking/offer price (and it was Wong's practice & & & & &](u, FU4X1\ Y}Y<ObT PFU4X[0 g~^ g~^ & & PFU4X S g}Y VMO n 0& & PFU4X, PFU4X l?b, & & nZivz l?bvz UqU, & & vuvQBf Pmi;N bTrU PFU4X, nZibTrU"V 0& & vuvQBf erU"Y l?b, PMOn & & & & &]GwN & & PFU4X, T g}Y YrU[V"V[SrU"Y V@b g bT#j"V & & bT#j[& & pbTrU & & & & & YrU & & VMO n & & & & & FU4X & & & & & T#j bT? rUFU6b]eQ0R S gS S g6 S gR & & ^k^o V0RGwGw v 0& & ZPzl & & & & @b & & bTrU V>k, & & KNsS & & & & & OrUW & & \[0& & & & S g & & FU6b, NbT & & & & S NN & & Q\N"V V0RZP & & NAm, gbTrU & & & & vQ-N g & & gk^ 0& & & & & vQ & & & & _bTrU he Property) to see whether or not there were illegal structures and/or UBWs, which was a considered commercial decision despite risk of possible presence of illegal structures and/or UBWs at such shops/units. The Shop 4 PASP did not refer to Units 4(A) and 4(B), and the Phase 2 Floor Plans only depicted a single Shop/Yard 4, but the street view of Shop 4 and the Price List showed it was divided into Units 4(A) and Unit 4(B). I find on balance that up to the date for completion Wong/Ho did not ask for entry & & QZPN & & P g_j P gP} i" Fr & & TbO, SHQ, O NKb OX[(W V"V & & & & 0& & _ g_j & & & & ^bT#j"V & & 0RBf g 1\vu U}Yi_ & & T#j & & &]1YV{ & & & & 0vuvQBf, }bTiQ & & & & OGwN & & & & ^bT#j"V, g`Oq v 0, /Uhs/f V1YV{ e Head Property (including the Other Property and Property), and such investment risk was factored and internalised in Ho's/D1's decision to buy the Head Property at the consideration of \$350,000,000. Ho's/D1's business strategy was to sub-divide the Head Property and to sub-sell the sub-divided individual shops/units rather than to hold them for self-use, so although the presence of illegal structures and/or UBWs was a commercial risk to be factored into such business decision, there were other more significant & & & & & 0& & Pirmi 0O0R N N0R & & & & & ^bT#j"V, g`Oq UMO, N0R bTrU"V N0R QOUL & & V>k, N0R 0& & v \0W NOrU & & nclude the price offered and the price per sq ft, the land search (eg whether any building order or litigation was revealed), whether any bank was willing to grant mortgage for payment of the purchase price as well as the customer flow, environment and condition of the property: [Ho/D1] Pirmi, 1\vu6qGw Nmi;N Nirmi N U N0R gGw 6qKN Rfxe, Nirmi the Buildings. In fact, it was only in/about 2014 (ie after the issuance of the writ of summons in the present action on 4 August 2014) that Wong/D1 accessed the Rear Lane whereupon Wong discovered steel security cage for window-type air-conditioner at the rear

window of Store 6 and metal sheet canopy at the Shop 6 Yard (see Part XXIII below). Thus, I find on balance that at the time (a) when/before Ho signed the Head PASP and/or (b) up to the time when HCP disclosed the RHL Report to W&G, D1 had not inspected the Other Property and/or the Property, and D1 did not have actual knowledge (i) whether there were any illegal structures, unauthorised alterations/ additions and/or UBWs at the Head Property, and if so, the extent of any such illegal structures, unauthorised alterations/ additions and/or UBWs, and (ii) whether the Alleged UBWs were in existence at the Property. In the circumstances, there was no deliberate non-disclosure or concealment of the Alleged UBWs from P by D1. Wong agreed that as property manager he was alerted by Clause 27 of the Head PASP that there might be illegal structures and/or UBWs at the Head Property, but for reasons explained above D1 did not on its own or engage surveyor to check whether there were in fact illegal structures and/or UBWs at the Head Property. Wong also understood that under Clause 28 of the Head PASP Max Rainbow agreed to permit Ho/D1 or their authorised agents to view the Head Property and/or any part(s) thereof at all reasonable times of the day before completion (a) upon prior notice being given to Max Rainbow, (b) subject to the consent of the tenant(s), and (c) subject to a maximum of 5 times. But Wong said (and on balance I accept) that for reasons explained above D1 did not make arrangements with Max Rainbow for appointment to inspect the Head Property. In my view, for all the reasons discussed above, Ho/D1 was not commercially concerned over the terms of Clause 27 of the Head PASP, and did not exercise the right to seek inspection under Clause 28 of the Head PASP. On balance, I further find D1 as property investor was also comforted by the protection afforded by the Waiver Clause that it intended to impose on sub-purchasers by way of a standardised appendix to be annexed to all PASPs for sub-sales of the individual shops/units of the Head Property. But more of this later. In the circumstances, D1 as property investor bought the Head Property with a view to sub-divide the same for sub-sale of the individual shops/units. Although D1 checked the land search records, it did not inspect the Property. So I come to the inevitable conclusion that D1 did not have actual knowledge of the existence of the Alleged UBWs, which meant P's claim against D1 would essentially turn on the construction of the Waiver Clause in the Shop 4 Appendix, ie whether it was so expressly wide and clear to cover the Alleged UBWs, or whether it was tricky, unfair or misleading. At the end of the day, this would be a matter of construction.

XII. SUB-SALE OF HEAD PROPERTY Soon after Ho entered into the Head PASP and pending sub-division of the Head Property, D1 began to sub-sell the individual shops/units to different sub-purchasers. Wong had no impression of having met Tong. He confirmed that any party (or the estate agent of any such party) interested to purchase any individual shop/unit of the Head Property could have approached Ho instead, but he had not heard Ho mention about having met Tong. There was no dispute that through the services of D2, D1 sub-sold and P sub-purchased the Other Property and the Property under the Shop 6 and Shop 4 PASPs, but D1 (including Wong) and P had not met before such PASPs were signed or indeed at any other material times. I find and accept that after the transaction in relation to the 5th Property fell through (ie in/about November 2012), Tong introduced to P *inter alia* Phase 2 of the Development of the Buildings, and asked if she would be interested to purchase from the

confirmor/vendor any of the shop(s)/unit(s) thereat. I also accept Tong told P that Phase 2 of the Development of the Buildings was situated in an ideal location in Tsuen Wan opposite a wet market, and that the then asking/offer price was very attractive making it one of the best deals. P was interested, so shortly thereafter but before P entered into the Shop 6 and Shop 4 PASPs (which date D2 averred was 20 November 2012 see paragraph 56(c) above), Tong arranged for a site inspection of the shops/units at Phase 2 of the Development of the Buildings. XIII. INSPECTION IN NOVEMBER 2012 At such inspection in November 2012, Tong accompanied P to view the exterior of the street-level shops on G/F of Phase 2 of the Development of the Buildings that faced Tsuen King Circuit. Tong also gave P the Price List and the Floor Plans, which showed inter alia the Other Property, Shop/Store 5 and the Property, and which P countersigned. In my view, the Phase 2 Floor Plans were straightforward drawings with little complexity, and clearly showed Shops 4-6 and Stores 4-6 with their front parts facing Tsuen King Circuit and their rear parts (including the Shops 4-6 Yards) facing the Rear Lane. Indeed, P was able to read the Phase 2 Floor Plans easily during cross-examination by identifying in the middle of the Phase 2 Floor Plan for G/F the larger rectangular shapes as Shops 4-6 and the adjoining smaller rectangular shapes at the back as Shops 4-6 Yards. I find on balance P did read and understand the Floor Plans, including the layout of the Other Property and the Property, which was why she countersigned the Phase 2 Flo UOR, signed the Shop 6 and/or Shop 4 PASPs, and (c) her belated explanation in re-examination that Tong did not explain the Floor Plans to her when he gave her a bundle of documents comprising the Floor Plans / Price List and merely told her to countersign the Phase 2 Floor Plans. P's WS stated Tong told P (a) there was an unauthorised partition wall that divided Shop 4 into Units 4(A) and 4(B), which units had been rented out so she could not inspect the interior of Shop 4, and (b) D1 had rented out Store 4 as a makeshift warehouse so she could not inspect the interior of Store 4, hence she did not have any opportunity to inspect the interior of the Property before she signed the Shop 4 PASP. But P testified under cross-examination that at the inspection in November 2012 she took the initiative to request inspection of the interior of the Property, and Tong replied it could not be arranged. On balance, I find Tong did not arrange for P to inspect the interior of the Property, but in my view P was content with that and did not take any initiative to request for inspection of the interior of the Property at all: (a) In my view, at the time of the inspection in/about November 2012, P did not have the Property in mind as yet as a target property to be acquired/purchased for investment purpose. This was borne out by the fact that even after such inspection P did not express interest in the Property. Instead, according to D2's pleadings (although I accept there was no direct evidence), P informed Tong after such inspection she was interested to sub-purchase Shop/Store 5 subject to lettings/tenancies, but it transpired such shop/unit had already been sold. Further, even on P's own case, after such inspection in/about November 2012, she expressed interest to sub-purchase the Other Property rather than the Property. Indeed, it was only in the morning of 28 November 2012 (ie the very day when P signed the Shop 4 PASP) that Tong telephoned to urgently ask P to sub-purchase the Property in order to help his colleague who was interested in it, OGw[Nk^[& & /about November 2012, for reasons explained in (b)-(d) below, I find it

improbable that P would have taken the initiative to ask for inspection of the interior of the Property. During the inspection in/about November 2012, P viewed the exterior of inter alia the Property or its frontage that abutted Tsuen King Circuit (C/970). It would have been patently obvious from such viewing that Shop 4 had been partitioned into Units 4(A) and 4(B), and they were respectively tenanted/occupied by a hardware/ plumbing store and by Midland Leasing. So quite apart from the Partition Clause in the Shop 4 Appendix, P must have seen for herself and must have known there was a partition wall that separated Units 4(A) and 4(B), and Units 4(A) and 4(B) were tenanted (which fact was also obvious from the Price List). As Wong testified (and I agree), had P been truly interested in the interior of the Property, she could have posed as a potential customer to enter the hardware/plumbing store and Midland Leasing as both shops were open to the public for business. There was no suggestion of any impediment for P to enter these shops at Units 4(A) and 4(B) in such manner. Whilst it was true that posing as a customer to enter Units 4(A) and 4(B) would not have enabled P to access the non-customer areas at the back of the shops (which Wong agreed & interior of the Property when/after Tong (on 28 November 2012) asked her to sub-purchase the Property in order to help his colleague who was interested in purchasing Store 4 (see paragraph 191 below), I still find it improbable that P would have taken the initiative to ask for inspection of the interior of the Property. In my view, P would not have done so because (i) Tong told her the Property would be sub-divided into Shop/Yard 4 and Store 4, (ii) she was unconcerned with the condition of the sub-divided Store 4 which Tong assured her would be taken up and acquired by his colleague whatever its condition, (iii) she knew from Tong and from her own observation that Units 4(A) and 4(B) were tenanted, (iv) she was buoyed by Tong's assurance that the sub-divided Shop/Yard 4 could be quickly and easily sold on its own for quick profit return, and (v) she was to urgently sign the Shop 4 PASP on the same day (see paragraphs 191-193 below). P in her pleadings claimed that [during] the said viewing, ie the inspection in/about November 2012, she specifically questioned Tong whether there were any UBWs at the Property, and Tong told her there were none (ie the 1st Representation). But P's WS (which P adopted at trial) stated that P questioned Tong whether there were other UBWs concerning the Property in addition to the unauthorised partition to which Tong replied there was none (which presumably referred to the 1st Representation made at the inspection in/about November 2012), and further added that Tong told her that although during the inspection in/about November 2012 P had any particular interest in the Property and/or Tong would have told P there were no unauthorised alterations that related specifically to the Property. Interestingly, when P was questioned under cross-examination whether Tong pointed out to her the unauthorised alterations that he said were on the outside, P testified that [Tong] & & g gbTrU, & & g-j Y W g & & O\N"V & & g g-j g 0, & & Pirmi[Y W g 0 uctures on the outside, but she did not do so during the inspection in/about November 2012 because Tong did not affirmatively say there were illegal structures on the outside. Such testimony, of course, did not sit well with P's WS that claimed Tong did tell her there were (and not there were possibly) some unauthorised alterations on the outside. When P was confronted with such discrepancy, P baldly said the statement in P's WS was wrong (even though it was verified by her own statement of truth and s & & V}Y'Yl UIQ>w0W

NrU4l & & =|bT N"V, _0RbT Pirmi she tried to switch attention to pipes/nails in the common parts of the Buildings (which areas were not necessarily on the outside), and (b) P acknowledged in evidence that notwithstanding her awareness of the possible existence of illegal structures (and/or UBWs) on the outside , she still signed a document to confirm she would proceed with completion of the sub-purchase of the Property, which in my view plainly referred to the Shop 4 Appendix that P signed as purchaser and that contained the Waiver Clause. I pause to note here the Alleged UBWs were on the outside of the Property. In my view, P s evidence in relation to Tong s alleged representation about UBWs (other than the partition of Shop 4 into Units 4(A) and 4(B)) at the inspection in/about November 2012 was inherently unreliable and unconvincing. On balance, I do not accept that at such inspection in/about November 2012, Tong made the 1st Representation to P and/or told her there were no unauthorised alterations and/or UBWs that related to the Property. I further note C&A wrote to W&G on 19 May 2014 to put on record that [prior] to signing of the [Shop 4 PASP], [Tong] represented to [P] that the as is basis refers to the external condition, not internal, of the [Property] (see paragraph 51 above), but such letter did not assert Tong represented to P that none of the unauthorised alterations located on the outside related to the Property. Rather, P s recognition of the as is condition that related to the external (not internal) condition of the [Property] was not inconsistent with the fact that the Alleged UBWs were on the outside of the Property. On balance, I find it was not at the inspection in/about November 2012 but just [prior] to signing the [Shop 4 PASP] when (as seen in paragraphs 198-199 below) P had a bit longer discussion with Tong about UBWs and the Waiver Clause in the Shop 4 Appendix that Tong told her there were unauthorised alterations (and/or UBWs) on the outside (see paragraph 200 below), but (as P herself acknowledged in paragraph 179(b) above) even though P was aware of such unauthorised alterations (and/or UBWs) on the outside , she was prepared to and did sign the Shop 4 Appendix with the Waiver Clause to confirm she would proceed to complete the sub-purchase of the Property. In my view, by the time P signed the Shop 4 PASP she knew that there unauthorised alterations (and/or UBWs) on the outside , and that she had to accept the external condition of the Property as is . P also claimed under cross-examination that at the inspection in/about November 2012 Tong did not bring her to see the rear parts of the Property, and that she did not know to ask or did not think of asking Tong to bring her to the Rear Lane marked as OPEN PASSAGE on the Phase 2 Floor Plans. For the reasons explained in paragraphs 172-173 above, I find on balance P did read the Floor Plans, and was aware of the existence of the Rear Lane from such floor plans. But similar to my view that P did not request to inspect the interior of the Property (see paragraph 175(a) above), I find on balance P did not ask to go to the Rear Lane to have a look at the Property. P also testified she did not know whether she could have accessed the Rear Lane even if she had asked Tong, but she later agreed with Ms Cheung s suggestion during cross-examination that U 0, BfeQ0R & & . & & eQ0R o not doubt P would not necessarily know how to go/walk to the Rear Lane, I have found she knew of the existence of the Rear Lane from the Phase 2 Floor Plans at the time of the inspection in/about November 2012. But I accept on balance she was not concerned at the time to check out (and actually she did not check out) the rear parts of the Property, and

she did not even try to go to the Rear Lane at all. Not having made such attempt at the time of the inspection in/about November 2012, I find on balance P would not have known whether she could have accessed the Rear Lane via the Rear Lane Gate, via the small path next to Shop No 10 of Phase 2 of the Development of the Buildings (Shop 10) or via any other means, and her evidence otherwise under cross-examination was merely an unintended slip on her part. Further, there was no clear evidence before me to show that in/about November 2012 the Rear Lane was accessible to the public via the Rear Lane Gate, and indeed Wong discovered it was locked when he visited in/about 2014 (but sometime after the issuance of the writ in the present action in August 2014) (see paragraph 265 below). Indeed, Wong was only able to access the Rear Lane on that occasion via a small path next to Shop 10 because he had the fortuity of being given directions by someone at a nearby & N9}N irmi & & & ^4X NU Virmi & & operty was in fact a joint investment of several investment partners including P and Fung Po Yin. Tong then prepared the Shop 6 PASP with the Shop 6 Appendix that contained the Waiver Clause and other terms, and such appendix was drafted, according to Wong, by D1 and its solicitors for incorporation into all PASPs for confirmor sub-sales of the shops/units on G/F and C/F of Phase 2 of the Development of the Buildings. Then on 22 November 2012, D1 as confirmor/vendor and P as purchaser entered into the Shop 6 PASP whereby D1 sub-sold and P sub-purchased the Other Property for a consideration of \$11,523,600 with completion to take place at 2:00 pm on 31 May 2013. By the Shop 6 Nomination, P nominated Yan Yau (of which P was a director, and P and Fung Po Yin were the 2 shareholders) to take up the assignment and to complete the sub-purchase of the Other Property. Clause 6 of the Shop 6 PASP provided that [D1] is selling as Confirmor and this Agreement is subject to the terms and conditions of the principal agreement made between [D1] and [Max Rainbow] (ie the Head PASP). P initialled against such clause on the Shop 6 PASP at Tong s request, and she confirmed under cross-examination that she understood the meaning of such clause. It was unsurprising that P well understood the meaning and effect of such clause as the very same clause also appeared in the PASPs for the 2nd Property (see paragraph 136 above) and the 3rd Property (see paragraph 143 above) in respect of which P took no issue. In the circumstances, I find that even if P did not have actual knowledge of the terms of the Head PASP, by Clause 6 of the Shop 6 PASP P confirmed and acknowledged she would be bound the terms in the Head PASP (including the restriction imposed by Clause 27 of the Head PASP see paragraph 154 above). Given that P signed the Shop 6 PASP, that she well understood the meaning of Clause 6 of the Shop 6 PASP, and that there was no suggestion of misrepresentation or other vitiating factor by D1 and/or Tong/D2 on behalf of D1, P was bound by such clause even if she did not care to read the contents as explained by the Court of Final Appeal in *Ming Shiu* http://lrs.jud.hksarg/lrs/common/search/search_result_detail_body.jsp?ID=&DIS=97875&QS=%26%2340%3Bming%2Bshiu%26%2341%3B%7C%26%2340%3B%7Bmarlene%7D+%25coram%26%2341%3B&TP=JU \l "ctx3" *Chung & ors v Ming Shiu Sum & ors* as follows:

84. It is in law highly immaterial to ask how or why the father nevertheless signed the documents. Reliance is universally placed on signatures appended to documents by persons of full age and understanding as signifying the signatory s assent or adherence to what that

document states. Where such a person has signed a document which purports to have legal effect, the law has never regarded it as enough to show that he signed without knowing its contents for the document to be disavowed. It is an everyday occurrence that people sign documents without reading the small (or even the large) print and therefore sign without actually knowing the terms (or all the terms) of the document signed. But they are held to the documents which they have chosen to sign unless there is shown to be a recognized legal basis for concluding that their apparent consent has been in some way vitiated or that reliance on that document by some other person falls into some category of unconscionable conduct justifying relief in equity.

87. The vitiating factors at common law include fraud, mistake, misrepresentation, non est factum, duress, undue influence and lack of mental capacity: I pause to note here that Ms Cheung did not seek to rely on Clause 27 of the Head PASP to debar P from raising requisitions in respect of the Alleged UBWs at the Property and/or to require P to complete the sub-purchase of the Property notwithstanding the Alleged UBWs. P was content to rely on the Waiver Clause in the Shop 4 Appendix. But in my view, P's understanding of Clause 6 of the Shop 6 PASP showed she was unconcerned about possible existence of illegal structures and/or UBWs at the Other Property (if she knew the contents of Clause 27 of the Head PASP) and/or about possible restrictions in the Head PASP that might be imposed on her as sub-purchaser of the Other Property (if she did not know the contents of Clause 27 of the Head PASP). This reinforced my view that P would not have taken the initiative to raise queries with Tong for him to make and/or reiterate his 1st Representation. & & Bf1's sub-purchase of the Other Property was significant in 2 ways: (a) The sub-sale and sub-purchase of the Other Property reinforced the fact that P was a seasoned dealer in real property (see paragraph 134 above), particularly as P proceeded to sub-purchase the Property (which was near to the Other Property separated only by Shop/Store 5) in the same Phase 2 of the Development of the Buildings 6 days later on 28 November 2012 by entering into the Shop 4 PASP with D1. The Shop 6 and Shop 4 PASPs in D2's printed standard form contained similar/identical terms (see Schedules 2-3 to this Judgment), and annexed thereto were the Shop 6 and Shop 4 Appendices. The Shop 4 Appendix contained terms identical to those in the Shop 6 Appendix, eg the Waiver Clause, which terms were imposed by D1 for incorporation into all PASPs for sub-sales of the shops/units of Phase 2 of the Development of the Buildings. XV. DECISION TO PURCHASE PROPERTY AND SHOP 4 PASP Then in the morning of 28 November 2012, Tong telephone RQYju@u[N 0, & & RQYI & & & S='Y RQY, RQY, ju@u[& & irmi, `Gw[Nk^[eQbT & & & OOHQ RQY, & & O ghs & & ghs V~v~^, N~v~^, N~v~^, & & ^ grU & & V}YU & & & & & he Property because, according to P, Tong told her that (a) after the sub-division of the Property [Tong] could make arrangement to let [P] have the title of Shop 4 only, and let his colleague to have the title of [Store 4], and she could easily re-sell Shop/Yard 4 to some willing purchaser to earn quick profit or investment return, (b) she had to help him otherwise his colleague would not be able to acquire Store 4, and (c) there was some urgency as the customer of another colleague of his was on the way to give D1 a cheque with a view to sub-purchase the Property. It was evident from P's above account that

from the very beginning P never intended to take up the assignment of the title to Store 4. Further, as Ms Cheung submitted and consistent with P's *modus operandi* when she purchased the 2nd Property, P was content not to meet with or speak to Tong's colleague. Indeed, P confessed she did not even know the name or financial ability of Tong's colleague who was supposed to acquire the title to Store 4 after the sub-division when she had to commit first to sub-purchase the Property by signing the Shop 4 PASP. More importantly, even though P said it was orally agreed via Tong that his colleague would take up and acquire Store 4 from her at the purchase price apportioned on the basis set out in the Price List, i.e. & & & V~v~^, _}Y}Y & & & \N"V[V& & T"V[vuBf & & accept, there was no commercially sensible reason for P to help Tong's colleague, and I find on balance that in agreeing to sub-purchase the Property P was largely motivated by her belief that this was a not-to-be-missed investment opportunity with promise for profit return from a re-sale of Shop 4 upon quick turnaround and with the comfort of reduced financial exposure since she thought Tong's colleague would take up and acquire Store 4. Indeed, P's experiences with the 1st, 2nd, 3rd and Other Properties showed she was keen on property investment (i.e. property purchases and re-sales via Tong) with an eye to making profit on quick turnaround, and in my view her previous investment successes also led her to look forward to a similar beneficial outcome with respect to the Property, which expectation put caution to the winds over unknowns about Tong's colleague discussed in the above paragraph. Thus, on the very same day of 28 November 2012, D1 as confirmor/vendor sub-sold and P as sub-purchaser sub-purchased the Property for a consideration of \$15,247,980, and they signed the Shop 4 PASP that (like the Shop 6 PASP) was in D2's printed standard form as well as the Shop 4 Appendix that contained *inter alia* the Waiver Clause and the Partition Clause. P knew that under the Shop 4 PASP she had to pay the balance of the purchase price and to complete the sub-purchase of the Property on/before 2:00 pm on 31 May 2013. By the Shop 4 Nomination, P nominated Win Yan (another of P's property investment corporate vehicles that was bought off the shelf from an accounting firm and that was used solely for acquiring the Property) to take up the assignment and to complete the sub-purchase of the Property. P said the Property was a joint investment by several investment partners, i.e. P, Fung Po Yin, a Ms Tang, a Mr Or and Tong's colleague. Clause 6 of the Shop 4 PASP was similar in terms to Clause 6 of the Shop 6 PASP (see paragraph 187 above) with the impact of Clause 27 of the Head PASP on P as explained in paragraphs 187-188 above & & & O& & g0} & & POUL & & rU1\ O=| TkU, & & & lause to her, which led to her full and correct understanding of the meaning and effect of such clause. I have also found that Tong told her during of such discussion that there were unauthorised alterations (and/or UBWs) on the outside. P claimed that (a) she again TOU & & & & V"V, & & & & & & & @b & & ^kU & & & & & & & ong had not inspected the interior of the Property, I find it implausible for Tong to have made the 1st Representation knowing that such representation was contradicted by the Waiver Clause (as well understood by P) that expressly left open the possibility of unauthorised alterations or additions at both the interior and exterior of the Property. Further, even if Tong did make the 1st Representation (which I disagree), I am not persuaded P would have been induced to rely on the 1st Representation when she clearly understood the meaning and effect of the

Waiver Clause when she signed the Shop 4 Appendix. As seen in Part XVI below, and given (a) P's experience with and understanding of waiver clauses in relation to the 2nd Property and (b) her understanding of the meaning and effect of the Waiver Clauses in the Shop 6 and Shop 4 Appendices, she must have known such Waiver Clause in the Shop 4 Appendix were for protecting the vendor's interests by requiring her as purchaser to complete the sub-purchase of the Property, which alleged representation was contrary to the obvious meaning and effect of the Waiver Clause that P confessed she well understood. Even if Tong did make the 2nd Representation (which I disagree), I also do not accept P would have meekly accepted such representation and would have been induced thereby to enter into the Shop 4 PASP and to countersign the Shop 4 Appendix without challenging Tong given her understanding of the meaning and effect of the Waiver Clause. On balance, I find it more likely than not that in the course of the bit longer discussion between P and Tong on the Shop 4 Appendix with focus on the Waiver Clause and UBWs, Tong mentioned about unauthorised alterations on the outside but did not make the Representations, and such discussion resulted in P's understanding of the meaning and effect of the Waiver Clause. XVI. WAIVER CLAUSE Wong explained (and on balance I accept) D1 imposed the inclusion of the Waiver Clause concerning unauthorised alterations or additions and/or UBWs in all PASPs for the sub-sales of shops/units of the Head Property to align with Clause 27 of the Head PASP, so the Waiver Clause was included in the Shop 6 and Shop 4 Appendices annexed to the Shop 6 and Shop 4 PASPs. Wong said (and on balance I also accept) D1 would not have agreed to sub-sell the Property to P without the Waiver Clause in the Shop 4 Appendix.

- (a) Construction of the Waiver Clause Ms Cheung submitted that (a) the language and ambit of the Waiver Clause in the Shop 4 Appendix was abundantly wide and clear, (b) on proper construction any reasonable and ordinary purchaser would understand such Waiver Clause covered any unauthorised alterations or additions at the Property as well as liability therefrom being encumbrance/blot on title, and (c) there was nothing tricky or unfair or misleading about such Waiver Clause that would trick/mislead any reasonable and ordinary purchaser as to its effect, so the Waiver Clause sufficiently/clearly shifted the burden of possible existence of unauthorised alterations or additions onto P. Ms Cheung contended the above construction was reinforced by the relevant factual matrix, but more of that later. On the other hand, Mr Lau submitted that given Tong's 1st Representation to P (ie the partition wall in Shop 4 was the only unauthorised structure with no further UBWs at the Property), it was not unreasonable for P, upon considering the Shop 4 Appendix as a whole and taking note that the Partition Clause immediately followed the Waiver Clause, to perceive that the unauthorised structures, alterations or additions mentioned in the Waiver Clause merely referred to the partition wall in Shop 4, so P could not be said to have known about the risk that she was going to take in accepting the Waiver Clause. On such basis, it was said the Waiver Clause was tricky or unfair or misleading, so D1 could not rely on it as answer to the requisitions raised about the Alleged UBWs, and consequently D1 failed to show/give good title to the Property, and P was entitled to rescind the Shop 4 PASP. It is

useful to note again (a) I have found D1 did not have actual knowledge of the Alleged UBWs, (b) I have found Tong did not make the Representations to P, and (c) it was common ground there was no misrepresentation given to P by Tong/D2 as agent for D1, so the vitality of the Waiver Clause essentially turned on its construction, and the court would look to see (i) whether its language was expressly wide and clear, and (ii) whether the Alleged UBWs fell within its subject matter limits, ie whether its language was sufficiently and expressly clear to disclose/cover any unauthorised alterations or additions at the Property (including the Alleged UBWs) and/or any defects in title caused by enforcement actions that might be taken by the authorities. I start by saying I agree with Wong that the Waiver Clause was written in explicit and easy to understand language. This was obvious from the fact that P well understood MO&N sBfP} MOX[g: NUO*g c k9e g k \ NUO*g c k9e NUO*g c k9e irmi vmi kUt MOmi k g \r NUO*g c k9e Qmi k N MO@bl\ vmi;N i(W N irmi NMR|v NUO}T NUOzlp vmi;N vlQqQ0W GW1u NUO*g c k9e g k \ NUO*g c k9e NUO*g c k9e irmi vmi kUt in its plain and ordinary meaning as apparent to any reasonable and ordinary purchaser should be clear and wide enough to cover any and all unauthorised alterations or additions to the Property. After all, alterations or additions not authorised by the BD encompass actual structures (or physical states of the property occasioned by alterations or additions which do not involve the erection of structure(s)), that are not authorised by the BD and in breach of the BO (since the BD is not empowered to authorise any alterations & & & S k9e But Mr Lau argued the Waiver Clause of the Shop 4 Appendix was misleading as it did not identify particular unauthorised alteration(s) or addition(s) at the Property when the Partition Clause of the Shop 4 Appendix specifically disclosed the existence of the partition wall between Units 4(A) and 4(B), so reading the Waiver and Partition Clauses in the Shop 4 Appendix as a whole would give a reasonable and ordinary reader the misleading impression that the unauthorised alterations or additions in such Waiver Clause only referred to the partition wall, which situation was more like the circumstance in Long Life, where Lam J held that the aspects mentioned in the clause showed that the parties paid particular attention to these aspects, the fact that the agreement had failed to disclose the demolition order would render the clause not able to preclude the purchaser to raise requisition in relation to the demolition order. I find myself unable to agree with Mr Lau's contentions. First, the Waiver Clause and the Partition Clause in the Shop 4 Appendix were drafted not as a single clause but as 2 separate clauses. The Partition Clause debarred P as sub-purchaser from raising requisitions/objections in relation to the partition wall between Units 4(A) and 4(B), and required P to take possession of Shop 4 in its as is condition at completion (ie MOKN fBfKN c6er NUOmi k no part of it should be treated as inoperative or surplus. I agree. Here, if the subject matter limits of the Waiver Clause were only referable to the partition wall that was already covered by the Partition Clause, then the Waiver Clause would become redundant as the Partition Clause already provided for waiver in relation to the partition wall. Indeed, P had no difficulty in appreciating that the Partition Clause specifically referred to the partition wall, and that the Waiver Clause generally referred to unauthorised structures. In my view, upon common sense, reasonable and sensible reading of the Waiver and Partition Clauses by a reasonable and ordinary purchaser, it was clear the subject matter limits of the Waiver Clause would not

be confined to the partition wall referred to in the Partition Clause. In paragraph 207 above, I have explained what unauthorised alterations or additions encompassed/included, which plainly showed the ambit of the Waiver Clause was much wider than just the partition wall. It would be limited to the partition wall and not extend to other possible unauthorised alterations or additions. In my view, to adopt the interpretation P advocated would impossibly strain the clear and wide language of the Waiver Clause. The above conclusion would be sufficient to deal with the construction point, but as Mr Lau drew support from Long Life Chinese Health Food Ltd, I will deal with this shortly. Mr Lau's submissions in paragraphs 203 and 208 above focused on condition 2(A) of the annex to the PASP in that case (see paragraph 111 and footnote 41 above). Godfrey Lam J at page 527 held that condition 2(A), which was a single clause that particularly referred to 3 specific aspects of the condition of the property, might lead a reasonable potential purchaser into thinking that by acknowledging he clearly knows of and accepts all the internal and external fitting condition of the shop premises there was nothing other than the 3 matters specifically mentioned in the clause that the vendor knew as a fact to be unauthorised. This was considered misleading because there was no express language to make clear the 3 specific aspects were not an exhaustive list of all UBWs of the property. But here there was no subject matter limitation in the general Waiver Clause to any particular unauthorised alteration(s) or addition(s), which was in contra-distinction to the Partition Clause being a specific clause. In short, the plain and ordinary meaning must be that the Waiver Clause covered all possible unauthorised alterations or additions at the Property. In my view, such clause was not tricky, unfair or misleading, and a reasonable and ordinary purchaser would not have been misled. This was also borne out by the relevant factual matrix discussed below, including P's understanding from her property investment experience (see paragraph 134 above), and P's understanding of the meaning and effect of the general Waiver Clause and the specific Partition Clause (see paragraphs 217-228 below).

- (b) Relevant factual matrix I now turn to the relevant factual matrix. On balance I am not persuaded D1's conduct could in any way be described as tricky, unfair or misleading. It must be remembered that (a) pursuant to Clause 6 of the Shop 4 PASP D1 was selling as confirmor and not as registered owner, (b) the Property was part of the Head Property (ie shops/units in Phase 1 and Phase 2 of the Development in the Buildings that D1 purchased pursuant to the Head PASP for investment purpose by way of sub-sale and failing which by way of letting), and (c) completion for the purchase of the Head Property and sub-purchase of the Property was to be done on the same day (ie 31 May 2013). Thus, when D1 and P entered into the Shop 4 PASP, Max Rainbow's sale and D1's purchase of the Head Property (which included the Property) was still in its infancy. D1's confirmor sale of the Property should have alerted any reasonable and ordinary sub-purchaser of the Property that D1 not being the registered owner might not have full and complete information of any illegal structures and/or UBWs at the Property (which was tenanted) in contra-distinction to, say, a re-sale of property that had been owned/held (and occupied) by the vendor for some time. Further, for reasons canvassed in paragraphs 155-168 above, D1 as property investor was

more concerned with the asking/offer price, customer flow, environment etc of a potential commercial investment property than with illegal structures and/or UBWs of individual shops / units, especially those of street-level shops, which were regarded as minor matters to be factored as part of the investment risk to be taken into account in deciding whether or not to purchase such investment property. D1 in deciding to purchase the Head Property (including the Property) did not inspect the Property at all on/before the date for completion even though Ho/Wong visited Phase 1 and Phase 2 of the Development of the Buildings before Ho signed the Shop 4 PASP. Thus, I have found D1 only knew of the partition wall between Units 4(A) and 4(B) (see the Price List at paragraph 55 above and paragraph 150 above), but had no actual knowledge of the Alleged UBWs. Nevertheless, D1 as a reasonable and prudent confirmor/vendor alerted P as purchaser that the Shop 4 PASP was a confirmor sale (see Clause 6 of the Shop 4 PASP) and that there were possibly unauthorised alterations or additions at the Property (see the Waiver Clause of the Shop 4 Appendix), which clauses were clearly worded and well understood by P (see paragraph 217 below). On balance, I find D1's reliance of the Waiver Clause in the Shop 4 Appendix could not be said to be tricky, unfair or misleading. P confirmed she understood the meaning and effect of the Waiver Clause in the Shop 4 Appendix (see paragraph 217 below), so she must have been aware of the possible presence of unauthorised alterations or additions at the Property. Further, I am not persuaded that in the factual matrix analysed below, (a) P was tricked or misled as to the meaning and effect of the Waiver Clause in the Shop 4 Appendix and/or (b) D1's reliance on such clause was unfair to her. I have found P to be a seasoned property dealer who received regular updates on property market trends and transaction price records from Tong. In 2011, she purchased the 1st, 2nd and 3rd Properties in collaboration with other investment partners for investment purpose (which were eventually re-sold with profit gain) using different corporate vehicles for different investment properties (with appreciation of the benefits of using companies to hold such investment properties to facilitate multi-party investments and convenient re-sale by sale of either shares or property). P did not shy from purchasing the 2nd Property even though she knew full well there were illegal structures and/or UBWs. In my view, her overriding consideration was to secure good property investment with probable profit return upon quick turnaround. This driving consideration led her to become close with Tong whom she thought was quite smart in finding properties with good investment returns for her, and to ignore cautionary prudence such as knowing the identity and/or financial ability of her investment partners for, say, the 3rd Property and the Property. Plainly, P purchased the Other Property and the Property for investment purpose, ie to re-sell such properties with a view for profit gain, except for Store 4 which was to be transferred to Tong's colleague at apportioned cost. P also knew D1 sub-sold the Other Property and the Property to her as confirmor/vendor & KNMR[& & & & N}Y g S0RK\ gbT & & & N1\q & & Bf1\ in relation to the structure, condition and the internal partitions of the Property prior to entering into the Shop 4 PASP, (b) there might be unauthorised alterations or additions at the interior or exterior of the Property, (c) the BD or other Government departments might take enforcement actions in relation to any such unauthorised alterations or additions, and (d) she would not take issue with or refuse to

complete the sub-purchase by reason of any such unauthorised alterations or additions. In light of (b) above, I reject P's evidence that whilst she understood the contents of the Waiver Clause, she did not appreciate the Property might have illegal structures or unauthorised alterations/additions. I also find P also understood that the presence of unauthorised alterations or additions at the Property (if any) could constitute a blot on title (see also paragraph 138 above). P claimed the Waiver Clause in the Shop 4 Appendix did not reflect the truth because before she signed the Shop 4 PASP (a) she did not inspect the interior of the Property and (b) she did not seek professional advice from, say, solicitors or surveyors. But I cannot see how such argument would assist P. Under the doctrine of contractual estoppel, where the terms of the agreement assume or stipulate a certain state of affairs to be the case, the parties will be bound to proceed on the basis that this is the position for the purposes of the agreement, whatever the true state of affairs may be as a matter of actual fact. In *Nokia Corporation v TCT Mobile Limited*, Barma JA referred to the English cases of *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* and *Springwell Navigation Corporation v JP Morgan Chase Bank*, and said as follows:

21. In *Peekay*, Moore-Bick LJ said, at paragraph 56 of the judgment: There is no reason in principle why parties to a contract should not agree that a certain state of affairs should form the basis for the transaction, whether it be the case or not. For example, it may be desirable to settle a disagreement as to an existing state of affairs in order to establish a clear basis for the contract itself and its subsequent performance. Where parties express an agreement of that kind in a contractual document, neither can subsequently deny the existence of the facts and matters upon which they have agreed, at least so far as concerned those aspects of their relationship to which the agreement was directed. The contract itself gives rise to an estoppel.
22. In *Springwell Navigation*, Aikens LJ pointed out (at paragraphs 143 and 144 of the judgment) that there was no reason in principle why parties should not agree what they liked, subject to any principle of law or statute to the contrary, and gave examples of warranties as to the existence of a state of affairs by the assured in marine insurance contracts, and conclusive evidence clauses in sale contracts. He regarded such provisions as being commercially useful, in that they enabled the parties to know precisely the basis on which they entered into their contractual relationship. He concluded (at paragraph 169 of the judgment) that the principles stated in *Peekay* as good law, which should be followed.
23. In Hong Kong, the concept of a contractual estoppel has been accepted (albeit obiter) by DHCJ J Pow SC in *DBS Bank (Hong Kong) Ltd v San-Holt Industrial Company Ltd* [2013] 4 HKC 1.
24. Mr Yan suggested that the concept was one which was relatively new, and had been criticised in academic writings, and submitted that it should not be accepted as good law at this stage. With respect, I do not agree. The concept is, in my view, now quite firmly established in English law, and it seems to be (as it did to Aikens LJ) that there are sound reasons for it to be adopted in Hong Kong, as it would promote certainty in contractual

relationships, and reduce the scope for disagreement and disputes in the working out of the contract. I would therefore accept Mr Sussex's argument that on the proper construction of the contract in this case, the parties have agreed that the plaintiff's patents are essential for the manufacture of mobile telephones meeting the GSM, GPRS and UMTS standards, and that it is not open to the defendant to contend otherwise in these proceedings. Here, P and D1 by the Waiver Clause agreed to a state of affairs as set out in paragraph 205(a) above, which P fully understood and agreed to. P chose to sign the Shop 4 Appendix to confirm and acknowledge to D1 the terms of the Shop 4 Appendix including the Waiver Clause which meaning and effect she well understood, and in my view D1 could not be faulted for holding P to such agreed state of affairs notwithstanding the matters in paragraph 218(a)-(b) above (which P also well knew). There was no vitiating factor, eg misrepresentation by D1 or by Tong/D2 on behalf of D1, to suggest any unfairness. In any event, I have found Tong did not make the Representations. Further, when P re-sold the 2nd Property to Mr Leung Chung Ming, she understood that similar waiver clause she imposed on the purchaser was still valid and effective even if he chose not to inspect the 2nd Property (see paragraph 142 above). I have also found that for the reasons set out in paragraph 175 above P did not ask to view the Property at the inspection in/about November 2012. In my view, all of the above matters showed (and on balance I find) that P was prepared to accept the shifting of risk of possible unauthorised alterations or additions (and/or UBWs) at the interior or exterior of the Property to her without actual inspection of the Property, and that she was therefore unconcerned over agreeing to the state of affairs set out in the Waiver Clause in paragraph 205(a) above. There is no merit in this complaint. Further, even though P engaged HCP to handle the conveyancing transaction for the sub-purchase of Property on her behalf, even up to the time when the sub-sale and sub-purchase of the Property fell through, she did not ask HCP about the Waiver Clause in the Shop 4 Appendix and/or about whether there were illegal structures, unauthorised alterations or additions and/or UBWs at the Property. P claimed she did not know she could ask HCP to check with D1 whether the Property had any illegal structures and/or UBWs. But as explained in paragraph 148 above, P herself claimed that she as vendor was able to sell the 1st and 3rd Properties without having to deal with any enquiries relating to unauthorised structures of any kind from the purchasers solicitors. As I have found, this clearly showed P knew a purchaser could via his solicitors raise requisitions about UBWs with the vendor via his solicitors (see paragraph 148 above). I find on balance P did not so raise requisitions about possible unauthorised alterations or additions at the Property referred to in the Waiver Clause because she well knew the meaning and effect of the Waiver Clause, ie she could not take issue with the existence of unauthorised alterations or additions (and/or UBWs) (if any) at the exterior or interior of the Property, and she had to complete the sub-purchase of the Property notwithstanding the existence of such unauthorised alterations or additions and/or UBWs (if any). Indeed, it was only quite shortly before the date for completion of the sub-sale and sub-purchase of the Property that P commissioned RHL to carry out a survey of the Property, but I will deal with P's motivation for such survey below. P tried to shy away from the effect of the Waiver Clause of the Shop 4 Appendix which she well understood by claiming Tong told her that the Waiver Clause was

included in the Shop 4 Appendix because the Head Property had to be sub-divided into individual shops/units for sub-sale and there were unauthorised alterations at other parts of the Head Property. Whilst I have found Tong did mention to P about unauthorised alterations on the outside, I cannot see how the sub-division of the Head Property would have any relevance to the Waiver Clause. On balance, I reject P's evidence in this respect. Indeed, P was not unfamiliar with the use of waiver clauses in the sale and purchase of properties with illegal structures and/or unauthorised alterations/additions. A waiver clause was incorporated by the vendor in the PASP when P purchased the 2nd Property, and she later incorporated a waiver clause in the PASP when she re-sold the 2nd Property. P was well aware such waiver clauses (including the Waiver Clause in Shop 4 Appendix) was to protect the interests of vendors (including D1 as confirmor/vendor under the Shop 4 PASP), and she well understood from her re-sale of the 2nd Property that the effect of such clauses (eg Clauses 1-2 of Appendix 2 to the relevant PASP) was to shift the risk of potential consequences of the illegal structures and/or unauthorised alterations/ additions (ie title problems, difficulty in re-selling, and reinstatement cost) to the purchaser, who would thereby be bound to complete the purchase of the property despite any failure to carry out inspection and/or despite the existence of such illegal structures or unauthorised alterations/ additions. Although I have found P was not specifically aware of the existence of the Alleged UBWs from the inspection in/about November 2012 and/or also in December 2012 (see Part XVIII below), she was specifically alerted to the possibility of there being unauthorised alterations and/or UBWs on the outside Y W) Y W) & & p`OrU"V nZi, VMOn & & & KNMR t@T? Y W) & & & QOUL bTrU VkU, VkU, 5 0& & Appendix) were standard terms, and (b) P's right to demand D1 to prove/give good title in respect of the Property would not be circumscribed. On balance, I do not accept Tong made such representation, especially in light of P's overall lack of credibility and when Tong well knew (i) P's experience with and understanding of the imposition of Clauses 1-2 of Appendix 2 annexed to the PASP for the re-sale of the 2nd Property (which were waiver clauses) was for protection of P as vendor, and (ii) P understood the true meaning and effect of the Waiver Clause in the Shop 4 Appendix through their bit longer discussion on the same. In any event, D1 could not be faulted on this when there was no suggestion that Tong made the 2nd Representation (which I disagree) on behalf of D1. In short, what it boiled down to was that P alleged she signed the Shop 4 PASP and the Shop 4 Appendix (that included the Waiver Clause) because she trusted Tong whom she thought was honest, reliable and responsible from past dealings (which transactions were problem-free) even though she understood the meaning and effect of the Waiver Clause in the Shop 4 Appendix as explained in paragraph 217 above, and further understood the purpose of such Waiver Clause was to protect D1 and not her. But on balance, whilst I accept Tong and P looked out for each other over property investments, I do not agree P entered into the Shop 4 PASP and the Shop 4 Appendix merely because she trusted Tong. I find that whilst she understood the meaning/effect of Shop 4 PASP and the Shop 4 Appendix (including the Waiver Clause and the Partition Clause), she was commercially encouraged by the expectation that Tong's colleague would take up and acquire Store 4 from her and that she would make a quick profit/investment return from

easy eventual re-sale of Shop/Yard 4, which I find to be the reason why P (and her investment partners) committed themselves to sub-purchase the Property despite awareness of the possible existence of unauthorised alterations or additions and/or UBWs in relation to the Property and their legal consequences. In my view, Wong could not be faulted in thinking that by signing the Shop 4 Appendix P as sub-purchaser accepted the risk of possible unauthorised alterations or additions and/or UBWs at the Property, that P's refusal to complete the sub-purchase of the Property by reason of the Alleged UBWs lied against her acknowledgment/waiver in the Waiver Clause in the Shop 4 Appendix, and that D1 should not be held liable to P who was precluded by such Waiver Clause from complaining about the Alleged UBWs or using the Alleged UBWs as excuse not to complete the sub-purchase of the Property. In my view, there was nothing tricky, unfair or misleading for D1 to rely on the Waiver Clause in the Shop 4 Appendix which (as P understood) disclosed that there might be unauthorised alterations or additions at the interior and exterior of the Property, which might lead to enforcement actions by relevant Government departments, and which confirmed that P as sub-purchaser would be debarred from raising requisitions/objections regarding possible unauthorised alterations or additions. I further find P's subjective contentions would not sway against such conclusion in light of her relevant experience and the objective factual matrix.

XVII. PARTITION CLAUSE P agreed the Shop 4 Appendix (including the Partition Clause) was to protect the interests of the vendor, and she knew the Partition Clause was by nature a waiver clause. P understood the partition wall at Shop 4 was unauth KNMR[& & . g gbT N1\q ition wall between Units 4(A) and 4(B). XVIII. DECEMBER 2012 P claimed that after she signed the Shop 4 PASP, she asked Tong if she could inspect the interior of the Property, but he replied he did not have the keys. But Tong arranged for a Ms Ho of Midland Realty (), ie the estate agent for the registered owner Max Rainbow, to accompany P to inspect the Property. P claimed under cross-examination that at the end of December 2012 she (with [P] Vmi;N P0W"uUO the visit as the [G/F] was still occupied by the tenants . In my view, since the reason (as given by P) for being unable to inspect Shop/Yard 4 was that it was still occupied by the tenants , the only reason must be that consent was not forthcoming from the tenants, especially when the inspection was arranged by the estate agent of Max Rainbow, the registered owner and landlord of such tenants, which showed Max Rainbow did not stand in the way of inspection of the Property. Indeed, I note that even when RHL carried out their survey. On 24 May 2013, Midland Leasing still refused entry to Unit 4(B). In the circumstances, I find P's complaint about not being able to inspect the interior of the Shop/Yard 4 before signing the Shop 4 PASP would not take her case against D1 any further when even up to December 2012 no consent was forthcoming from the tenants for such inspection. Interestingly, neither Tong nor his colleague who was interested to take up and acquire Store 4 attended the inspection in December 2012, and there was no evidence that P ever asked Tong why he and/or his colleague did not attend such inspection. Anyway, by the time of such inspection, P had already signed the Shop 4 PASP and expected Tong's colleague to take up and acquire Store 4 (whatever its condition) from her, so she did not expect to be the ultimate owner of Store 4. Thus, P confessed she inspected Store 4 merely out of curiosity and the focal purpose of

such inspection was to view the Other Property, t1uGw6 UGw4 kQfS, WbOq & & & N N? OOR N 0bOq [Y, & & g_j gGw0R hough there was no tenant at Store 6 and vacant possession would be delivered upon completion. Importantly and in any event, I find on balance that P did not intend to check out any possible UBWs because she understood and was content with the terms of the Waiver Clause. In my view, she was unconcerned with the physical state of the Property, and merely had a look at Store 4 out of curiosity and to have an idea of the height of the ceiling. Indeed, it appeared Tong s colleague was also unconcerned and did not attend the inspection as, according to P s understanding, he would take up and acquire Store 4 whatever its condition. In my view, this explained why P only had a cursory look at Store 4 just for a few minutes. She knew from the Price List vacant possession of Store 4 would be delivered upon completion, but noted nRf@b g & & P0}0} & & S}Y, W,g N}Y<O[N0R & & & _ju-N PMOn & & Q#l_j & & & _ju-N & & T@umi;N & & O g_j Y W g & & & b grU understood the meaning and effect of the Waiver Clause to which she agreed. XIX. TONG s COLLEAGUE RESILED FROM STORE 4 Tong s colleague never contacted P after she signed the Shop 4 PASP, and as in the case of the 3rd Property in which P never met her co-investor being Tong s mother, P had no idea who Tong s colleague was and had never met him. P s intended transfer of Store 4 to Tong s colleague for about \$4,000,000 odd (but P never gave a precise amount in her evidence) upon sub-division of the Property fell through. In paragraph 29 of P s WS, P claimed that (a) in/about February/ March 2013 Ms Ho telephoned to inform her there were still certain problems concerning the sub-division of the Head Property without specifying the nature of the problem, and Ms Ho was also uncertain whether this would affect the completion of the sub-sale of the Property, and (b) even in April 2013 P was still asking Ms Ho whether the problems with the sub-division would affect the completion date. Under cross-examination, P & & OUju ~^Bf & & & ~^Bf=[gOU[& & ~^Bf RQY, RQY 0, 0~^Bf & & YSb@u[OU~^Bf R0RQY=[0& & & & Pirmi, Y}Y<O1 U0RQY, g_j U0R, & & R}YQY*g, 1\T[R}YQY, c1\Sb@u[R0RQY, 0RbT? wKNxe & & U0RQY, g_j U0RbT Pirmi U0RQY, U0RbT T"Vq & & w~^Bf, & & & p'Ymi;N0R & & R0RQY, & & OO1\ bO1\ VQY, WbO[& & bO1\ VQY, & & & g_j & & Sb@u[Sb@u[_+^q U0RQY, U0R, U}Y? & & & }\O N & & & _YGY*` & & lay would have more impact on the Property as Tong s colleague was supposed to take up and acquire Store 4 from her. P also agreed she understood Tong s suggestion to mean she had to become the owner of both Shop/Yard 4 and Store 4 upon completion of the sub-purchase of the Property as Tong s colleague would not take up and acquire Store 4, but as she had already signed the Shop 4 PASP she did not have much choice, ie & & pectively (see paragraphs 30, 32 and 35 above). W&G informed HCP of such successful sub-division on the following day (see paragraph 30 above). At first P claimed that even up to mid-June 2013 when completion finally fell through HCP/C&A did not tell her whether the sub-division of the Head Property was successful, but she later agreed [P] & & out inspection on his own in the absence of P. In my view, P did not give any satisfactory reason for commissioning such professional survey at such a late stage. In paragraph 30 of P s WS, P said [because] of these complications regarding the status of the Property (ie the uncertainty over sub-division of the Property), she realised in May 2013 that she had to arrange for a surveyor report to be prepared on the condition of the Property. But under

cross-examination, P agreed (and on balance I find) that & & ing the period from when she first learned that the sub-division of the Head Property was successful until she approached RHL she was unaware of any other problem that would have prevented completion of the sub-sale and sub-purchase of the Property between her and D1. In such circumstances, P should have been quite relieved because the only outstanding hurdle that might have prevented the completion of the sub-sale and sub-purchase of the Property had been overcome, and she could have comfortably awaited completion of such sub-purchase. In my view, P's decision to commission RHL to conduct a survey of the Property was quite inexplicable on her own case, and I find on balance that she was not relieved by the successful sub-division because: (a) all along she never intended to take up and sub-purchase the entire Property as she anticipated that Tong's colleague would take up and acquire Store 4; she had not expected Tong's colleague to resile from the understanding that he would take up and acquire Store 4; but when Tong's colleague resiled from such understanding, she knew she had no choice under the Shop 4 PASP but to take up and sub-purchase the entire Property (including Store 4), which was against her original intent and she was reluctant to do so; the delayed sub-division fortuitously gave her hope of a convenient excuse not to complete the sub-purchase the Property (including Store 4); such hope was dashed when the sub-division was successful by 9 May 2013; she then became anxious to see whether there could be any other excuse to ground her intention not to sub-purchase the Property (as she all along did not want to take up or acquire/hold Store 4), so she engaged RHL to check the physical state of the Property; had she been genuinely concerned with the physical state of the Property, she would have commissioned surveyor inspection much earlier than 1 week or so before the date for completion (eg at least by December 2012 (if not earlier) when she herself carried out inspection). The above finding is, in my view, consistent with P's admission under cross-examination that the only reason why she did not complete the sub-purchase of the Property was because she commissioned RHL to conduct a survey of the Property, and the RHL Report reported the Alleged UBWs at the Property. P also engaged RHL to conduct a survey of the Other Property, and said under cross-examination that RHL's surveyor could not gain access to the Other Property (including Store 6), [RHL] NT{[U0R, 1ubO gOUN N@T? & & OGw4 & & & UrU"V, istered owner / head vendor, and the Price List showed that vacant possession of Store 6 was to be delivered upon completion of the sub-sale and sub-purchase of the Other Property in a week's time. Further, even if inspection of Store 6 could not be arranged initially, there was no sensible reason why P just accepted Ms Ho's assertion that the Other Property had no problem and did not press for a proper inspection when RHL found the Alleged UBWs at the Property and told her they suspected there were UBWs at Gw0R u g & & & UrU"V, VkU, P was keen to check the physical state of the Property for an excuse not to complete the sub-purchase, so she liaised with Ms Ho to let RHL inspect the Property. When pressed under cross-examination on whether RHL reported any UBWs were observed in relation to the Other Property, P testified that Gw0R u g & & & & & [bO g QeQ0R l sheet rather than concrete. Further, Wong said (and on balance I accept) that when he went to the Rear Lane to view the rear parts of the Other Property and the Property in/about 2014 shortly after P

commenced the present action on 4 August 2014, he discovered the Other Property had structures similar to the Alleged UBWs which P found objectionable, ie steel security cage for window-type air-conditioner at the Store 6 rear window and canopy at the Shop 6 Yard. Whilst the metal sheet canopy at the Shop 6 Yard was still there when photographs were taken in April 2018 (see paragraph 95(c) above), the steel security cage similar to the Cage UBW was no longer evident in April 2018. P had not met RHL's surveyor. At first she said she had not spoken with him by telephone, but later said she could not remember whether she did so or not, and still later said she had a telephone conversation with him after his inspection. However, although RHL reported to her about the observations in paragraphs 242-244 above, she did not (a) ask whether RHL took any photographs of the canopy and the suspected UBWs on the outside of the Other Property, and if so, whether she could view such photographs, and/or (b) ask to visit the Other Property to view the canopy structure at the Shop 6 Yard for herself, especially when RHL reported that its surveyor could not enter the Other Property at all and could not be certain whether there were any UBWs (although RHL suspected there were). But even more interestingly, P did not take issue over (i) the canopy structure at the Shop 6 Yard and/or (ii) other suspected UBWs at the Other Property (eg possibly the Cage UBW at the rear window of Store 6), and instead proceeded to complete the sub-purchase of Other Property on 31 May 2013. When pressed on why she completed the sub-purchase of the Other Property, P said gOUL P d1Y & nNO}Y wN\ [& Gw0R u g & nopy structure in the open rear yard of both the Other Property and the Property (irrespective of their construction materials), and it appeared even on P's own case she was not really concerned over the existence of such canopy structures but over the economic cost of possible reinstatement. In my view, P took such view because she was well aware and understood the meaning and effect of the Shop 6 Appendix (including the Waiver Clause), and decided not to take issue with such structure at the Other Property & n, P did not ask RHL for photographs (if any) of the Alleged UBWs, and she did not ask for personal inspection of the same. And yet P relied on the Alleged UBWs to refuse completion of the sub-purchase of the Property (even though she well understood the meaning and effect of the Waiver Clause in the Shop 4 Appendix and she would complete the sub-purchase of the Other Property), and the reason she gave under cross-examination was as follows: Pmi;N gOUL 0& g-N & & 0& & & }Y'Y, & jBT? 0& ^-Nzz TbOHQ 5 0, TbO@T? & }YGY 0& & & 1\OU[& O-Nzz 0, T"V-Nzz@T? 0-Nzz 0 0& \N"V, & & 1\OU[N"V[& Pmi;N 0& MRb ^-Nzz TbOHQ OMRb V-Nzz & }MRb V-Nzz & \ N & -Nzz VMon TbO, & SZP-Nzz, & 0RbT & VMRb -Nzz VMon & ^-Nzz TbOHQ & & OiQ#j N0R[& & KNMR V"V, N0R[& flected her reluctance to complete the sub-purchase of the Property, which led her to commission RHL for the survey of the Property for the reasons explained in paragraphs 240-241 above. However, P did not explain why, after hearing what Ms Ho said about & ^-Nzz TbOHQ & & pvuBf, & & T#jBT? do so because she was reluctant to complete the sub-purchase of the Property, and was content to seize on any available excuse not to complete. When P was shown photographs of the Alleged UBWs (ie the Cage UBW and the concrete Canopy UBW) under cross-examination, she testified that she suspected there were other UBWs at the Property, but gave no grounds for such belief. I am not satisfied on

balance that there were any other structures and/or UBWs that could be the subject matter of complaint. Further, on ba -Nzz VMO On ALLEGED UBWs Mr Lau in his closing submissions argued that as a matter of fact the Alleged UBWs being unauthorised structures constituted a blot on title and justified P's rescission of the Shop 4 PASP. When asked how he would define unauthorised structures for the purpose of establishing the same as a matter of fact, Mr Lau submitted they would be structures that were not permitted under the BO and not authorised by the BD and/or BA. Mr Lau agreed (as he must since the court had not granted any expert directions) the RHL Report was not any expert evidence, but suggested it was still evidence for the court to consider along with all other evidence as a whole to demonstrate that the Alleged UBWs were unauthorised structures, so the burden fell on D1 as the confirmor/ vendor to show good title to the Property, and the court should consider whether it was established beyond reasonable doubt that P as purchaser would not be at risk of any successful action against her by the BD and/or BA and she might safely be advised to disregard the risk. Mr Lau also noted the observations by Rogers J in *Citiward Ltd v Tai Ping Wing* that even if the risk of enforcement in relation to the unauthorised structures is low, the purchaser is entitled to be cautious, and good title may not have been made out. Ms Cheung took a pleading point on the basis that there was no plea by P that as a matter of fact the Alleged UBWs were unauthorised structures that constituted a blot on title and therefore justified rescission of the Shop 4 PASP. I prefer to deal with the matter in substance. The only evidence before the court that had any relevance to this issue was the RHL Report and the photographs referred to in paragraph 95 above, but the photographs were not taken contemporaneously. Mr Lau did not articulate how the Alleged UBWs infringed the BO (indeed Mr Lau did not refer me to any provision in the BO that was said to have been infringed), and did not explain how they were not authorised by the BA or BD, which presumably meant they were not in accordance with the approved building plans. Although W&G provided copies of the approved building plans to HCP (see paragraph 40(a) above), they were not adduced at trial. In the end, Mr Lau in his oral closing submissions acknowledged that on the existing evidence it would be difficult for the court to find the Alleged UBWs were unauthorised structures. Ms Cheung noted that even if the Alleged UBWs were found to be unauthorised structures, not all unauthorised structures are encumbrances or liabilities. She drew attention to Litton JA's observations at page 407 in *Active Keen Industries Ltd* as follows: In this case, the purchaser's solicitors, in their letter of 22nd October 1992 stated that according to the decision in *Giant River v. Asie Marketing Ltd.* (supra) the existence of unauthorized structures renders the title of a property defective. If they had paused to consider the proposition, they would have realized that, stated in such wide terms, it must be wrong. Were it otherwise there can be no sale and purchase of flats in buildings where there are illegal structures on the roof, or where there are unauthorized balconies. *Active Keen Industries Ltd* explained at pages 407-409 that an unauthorised structure will only go to title if, say, the BA, BD or other government department seeks to exercise its powers under the BO with regard to unauthorised works belonging to individual owners, eg a demolition order, which therefore constitutes a potential encumbrance as being a claim, lien or liability attached to the property. Thus, the

mere existence of unauthorised structures is insufficient, so the true question is whether there is a real risk of enforcement so as to constitute an encumbrance on the vendor's title. However, Mr Lau in his closing submissions failed to explain how the existence of the Alleged UBWs (even if they were unauthorised structures) amounted to defects in title of the Property, and there was paucity of evidence, whether expert or factual, before this court as to (a) any enforcement action that had been taken in respect of the Alleged UBWs by the BA, BD or any other Government department in respect of the Alleged UBWs, and (b) the risk of future enforcement action in respect of the Alleged UBWs. More importantly, the issue of whether the Alleged UBWs were in fact unauthorised structures that would constitute encumbrance on D1's title to the Property was in fact neither here nor there because D1 was content to assume the Alleged UBWs were unauthorised structures for the purpose of construction of the Waiver Clause in the Shop 4 Appendix. If the Alleged UBWs were unauthorised structures, they would clearly fall within the subject matter limits of such Waiver Clause, and as discussed above, the Waiver Clause would have precluded P from raising objections/requisitions over the Alleged UBWs and/or from declining to complete the sub-purchase of the Property by reason of the Alleged UBWs. Indeed, Litton PJ at page 771 in *Jumbo King Ltd* said that ultimately the focal issue was the construction of the Waiver Clause, and [it would burden this judgment unnecessarily by considering whether the presence of unauthorised structures within the premises agreed to be sold constitutes an encumbrance, so as to affect the vendor's obligation to pass a good title. No ready answer can be given. Assuming the matter did go to title, Godfrey JA and Mortimer V-P are plainly correct when they found for the vendors on the basis of cl. 18(e). XXII. SUB-PURCHASE OF PROPERTY FELL THROUGH I accept P did not have actual knowledge of the Alleged UBWs until they were revealed in the RHL Report. But P alleged Tong as estate agent acting for her and D1 must have known there were UBWs at the Property beyond the unauthorised partition wall at Shop 4, and Tong betrayed her trust by deliberately withholding information on the Alleged UBWs from her and choosing to lie to her about the Alleged UBWs. P claimed she confronted Tong who ignored her complaints, [Tong] UT[Omi;N, O@ubOCT ledge of the existence of the Alleged UBWs, and hence there was no basis to say Tong/D2 deliberately withheld information on the Alleged UBWs from P. In my view, D1 was sincere in its intention to complete the sub-sale of the Property, but for reasons explained above, the same could not be said for P. On 30 May 2013, HCP wrote to W&G to enclose the RHL Report that referred to the Alleged UBWs, and to complain that D1 failed to satisfactorily answer HCP's requisitions on title and failed to show/prove good title to the Property. Had P still wanted to complete the sub-purchase of the Property but was concerned, as she said, with the economic cost of reinstatement of a concrete canopy at the Shop 4 Yard in contra-distinction to the metal sheet canopy at the Shop 6 Yard, there was no sensible reason why P did not even attempt to negotiate a discount of the purchase price or at the very least to ask D1 through Tong and/or C&A for a discount as an alternative to demolition/removal of the Alleged UBWs when D1 offered & & gOU[& & _+^OU[0& & _+^ & & O g, & & gOUN _+^ & & & d such allegation specious as P had experience of negotiating for and achieving a significant discount in the purchase price for the 2nd Property due to the

presence of unauthorised alterations and/or illegal structures. P then claimed she negotiated for a discount in price before she signed the PASP for the purchase of the 2nd Property, and she did not know she could still ask for a discount after she signed the Shop 4 PASP, & bTiQ & OUjumi;N tju & parties reached agreement on a discounted price, it would overtake the original agreed price. On P's case, she discovered the Alleged UBWs 4 days before the date for completion, and in my view there was no reason for P with her past experience not to ask for a discount in price had she wanted to complete the sub-purchase of the Property on the fixed date or on the extended date. Whilst HCP by their letter dated 30 May 2013 (see paragraph 39 above) did ask W&G what step [D1] is going to take to reinstate the defect condition to ensure the Property would be sold free from encumbrance, I find neither P nor C&A pursued this further in June/July 2013 because P in fact knew she was precluded from raising complaint about the Alleged UBWs by reason of the Waiver Clause of the Shop 4 Appendix, which terms/effect she well understood, but she merely put forward the Alleged UBWs as an excuse not to complete the sub-purchase of the Property. P claimed she also asked Tong @b g & V"V, QT{[O}Y!| @u0R2 QT{N NUO"V, Tong was correct in saying that D1 gave P another 21 days to complete the sub-purchase of the Property. In my view, Tong was also correct in urging her to complete the sub-purchase of the Property because the existence of the Alleged UBWs and the requisitions raised by HCP on her behalf were insufficient to justify not completing the sub-purchase of the Property. In my view, they were nothing more than a poor excuse for P to try to resile from the Shop 4 PASP. XXIII. SUBSEQUENT MATTERS Wong/D1 learned about the Alleged UBWs (presumably from W&G) after P failed to complete the sub-purchase of the Property on 31 May 2013. On 4 August 2014, P commenced the present action. Sometime thereafter in 2014, Wong went for a site visit and walked to the Rear Lane. Wong agreed the Rear Lane was shown on the floor plan & & & SvQ-N & & & gHQ[O gr N@u[GwGw, 0 NN ObOq & & ^eQ0R & & O1u & & & 1\ g NeQ, 0ReQ & & & was the first time Wong/D1 had a serious look at the Property and could see for themselves the Alleged UBWs. In my view, Wong/D1 had no actual knowledge of the Alleged UBWs prior to the scheduled date for completion, and hence there was no deliberate non-disclosure or concealment of the Alleged UBWs from P. In/about May 2016 (ie almost 3 years after the date of completion), P lodged a formal complaint against the Estate Agents Authority, which complaint she claimed was still under investigation when she made P's WS. P did not say what was the outcome of such investigation when she gave evidence at trial. XXIV. CONCLUSION ON P's CLAIM AGAINST D1 I have found neither D1 nor P had actual knowledge of the Alleged UBWs before the signing of the Shop 4 PASP, but even if D1 did have such actual knowledge (which I disagree), it was ultimately a matter of construction of the Waiver Clause, and I have found it was expressly wide and clear to any reasonable and ordinary purchaser with understanding of the relevant factual matrix that it would cover the identified defect in title being any unauthorised alterations or additions and/or UBW at the Property (which would include the Alleged UBWs). P understood the meaning and effect (including the effect on title to the Property) of the Waiver Clause and the Partition Clause in the Shop 4 Appendix which were in clear and unequivocal language, and P with experience of non-consumer property transactions was not tricked or misled. In my view, it was

reasonable in the circumstances for P to assume, which she did by signing the Shop 4 Appendix, the risk of unauthorised alterations or additions and/or UBWs (including the Alleged UBWs) at the Property. By reason of all of the above matters, it was clear the commercial risk that there might be unauthorised alterations or additions and/or UBWs at the Head Property (including the Property) was shifted to D1, and the commercial risk that there might be unauthorised alterations or additions and/or UBWs at the Property was shifted to P. Both parties contemplated there might be such at the Property, and the Waiver Clause in the Shop 4 Appendix was binding on P. In my view, D1 was entitled to rely on the Waiver Clause as complete answer to the requisitions on title raised by P in relation to the Alleged UBWs. P repudiated the Shop 4 PASP when she refused to complete the sub-purchase of the Property on 31 May 2013 and/or within 21 days thereafter, so D1 was entitled to forfeit the Deposits. XXV. P s CLAIM AGAINST D2 There was no dispute that D2 was the estate agent acting for D1 and P in respect of the sub-sale and sub-purchase of the Property (see Clause 17 of the Shop 4 PASP), that Tong was D2 s employee at the material time, that D2 owed P duty of care as estate agent, and that D2 would be vicariously liable for any breach of such duty of care committed by its employee Tong.

- (a) P s case against D2 Mr Lau summarised P s case against D2 for breach of its duty of care owed to the P as follows: (a) Tong/D2 failed to use reasonable diligence and/or due care and skill to make reasonable, sufficient and proper enquiries and disclosure in relation to the Alleged UBWs to give accurate replies to P s enquiries. Tong/D2 failed to arrange for and accompany P to inspect the interior of the Property. When asked by the court how inspection of the interior of the Property would be relevant when the Alleged UBWs were on the outside , Mr Lau suggested P would have noticed the Alleged UBWs if she were able to visit the interior of the Property. Tong/D2 failed to properly and correctly explain to P the full meaning and effect of the Waiver Clause, particularly that by agreeing to such clause P might risk being precluded from raising requisitions in relation to UBWs, including the Alleged UBWs. In his oral closing submissions, Mr Lau accepted Tong/D2 had no obligation to volunteer explanation of the Waiver Clause to P, and submitted their duty was to be accurate if they replied to P s enquiry or if they chose to volunteer such explanation to P. Tong/D2 wrongfully and misleadingly told P the Waiver Clause was standardised and mere formality, and P s right to demand D1 to show / give good title to the Property would not be circumscribed (ie 2nd Representation). Tong/D2 knew P was unable to view/inspect the interior of the Shop/Yard 4, but still enticed [P] to agree on the Waiver Clause of which the statements contained therein were inaccurate and not true
- (b) Legal principles The standard and scope of care and skill expected of the agent depends on the nature of the contractual relationship with his principal. The test is stated in *Midland Bank Trust Co v Hett Stubbs & Kemp* (a firm) to be what a reasonably competent practitioner would do having regard to the standard normally adopted in his profession . If a professional agent is engaged for reward, there arises an implied contractual duty to exercise reasonable care and skill on behalf of his client. The standard of care applied to professional agents is not to be applied with the benefit of hindsight. The sophistication of a professional agent s

client may affect the applicable standard of care and skill. The scope of a contractual agent's duty of care should be determined by the terms of the contract and, accordingly, a tortious duty of care that is more extensive than set out in the contract itself should not be imposed. Mr Lau drew my attention to the Code of Ethics (1 February 2007) (Code) published by the Estate Agents Authority as follows: 3.2.2 Estate agents and salespersons should keep themselves informed of any laws, government regulations, essential facts and developments in the real estate market in order to be in a position to advise their clients in a responsible manner. They should strive to provide services and opinions based on knowledge, training, qualifications and experience in the real estate business. 3.3.1 Estate agents and salespersons shall, in the course of business, provide services to clients with honesty, fidelity and integrity. They should protect their client against fraud, misrepresentation or any unethical practices in connection with real estate transactions. 3.5.1 Estate agents and salespersons shall, in fulfilling their duties, exercise due care and diligence. In *Jopard Holdings Ltd v Ladefaith Ltd & anor*, the purchaser sought rescission of a PASP and return of the deposit after the purchaser pulled out of a deal to buy a flat upon finding out through another party that the vendor's son fell to his death from it. It was held that the agent had not undertaken reasonable enquiry before giving assuring replies to the purchaser's queries, and was accordingly in breach of his duty under contract and tort as the purchaser's agent. Recorder B Yu SC said as follows:

36. A professional agent engaged for reward is under an implied contractual duty to exercise reasonable care and skill on behalf of his client. Such duty arises both in contract and in tort. What is expected of the agent in the present case is the passing on of accurate and reliable information about the property concerned.
37. The standard of care and skill is that possessed by a person of ordinary competence exercising the same calling.
39. However, in the present case, the purchaser specifically raised a query with the agent. The agent did not answer the query by simply disclaiming any knowledge. As stated above, I find that [the agent] assured [the purchaser] that there was nothing unusual about the property.
40. It was one of the express terms of the Estate Agency Agreement between the purchaser and the agent that the agent would obtain information concerning the property for the purchaser. It must be implied that the agent would exercise reasonable care and skill when providing such information. The relationship between the parties is also such that the law would impose that duty in tort. [The agent] must have known [the purchaser] would rely on the information he was providing, and it was certainly foreseeable that the purchaser may suffer loss and damage if the agent did not exercise reasonable care and skill in the collection and passing on of information concerning the property. In *Shum Kong & anor v Chui Ting Lin Teresa & anor*, the village house stood on a concrete terrace with 3 fenced sides and a concreted slope at the back, and access to the house was by steps from the road with a garage next to the steps. Any potential purchaser looking at the property would naturally assume it consisted of the house with garden and garage, but in fact the garden

and garage were not part of the property. The purchaser was not told about this (page 22), and the agent also did not know this when he got the purchaser to sign the PASP (page 23). However, it was held that by showing the purchaser the property without telling him it only comprised the house, the vendor and the agent made misrepresentation by conduct, which the purchaser relied to enter into the PASP (page 24). Although the agent did not have actual knowledge, there were express contractual duties under the written agency agreement on the part of the agent (a) to make reasonable enquiries and to assist in entering into a [FASP], and (b) to act bona fide in performing its services and use its best endeavours to ensure that all reasonable representations it makes are accurate (pages 26-27). It was also held there would be an implied term in the agreement that the Agency would exercise reasonable care, skill and diligence in acting for the Purchasers. Reasonable enquiries should have included investigation of the Rectification Agreement shown on the land search. This shows properly the relationship of the house, garden and slope. It would have put [the estate agent] on his inquiry if he had seen it. Ultimately therefore, [the estate agent] is certainly liable to the Purchasers as their agent (page 27).

- (c) Alleged failure to conduct proper enquiries and/or to give accurate replies to P P gave evidence as to her enquiry with Tong as to whether there were any other unauthorised structures at the Property to which Tong gave the 1st Representation that there were none, and added that there were some unauthorised alterations all of which were all located on the outside, but none of those related to the Property. Mr Lau submitted such representations were wrong given the existence of the Alleged UBWs. However, I have rejected the 1st Representation and found Tong did not tell P that the unauthorised alterations or additions on the outside were not related to the Property (see paragraphs 176-181 and 198-200 above). Mr Lau suggested that an estate agent is under a duty of care to provide accurate information to the purchaser as to the physical state of the property, including whether the property had any unauthorised structures. Mr Lau submitted that (a) if Tong knew of the existence of the Alleged UBWs, then he was in breach of his duty of care in failing to reveal this upon P's request, but (b) if Tong did not know of their existence when P raised query about UBWs, then as a professional estate agent he should

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(d) Failure to arrange for and to accompany P to inspect the interior of the Property There was no dispute that P made 2 inspections, ie in/about November 2012 before she signed the Shop 6 and Shop 4 PASPs (when she had a street view of the frontage of the street-level shops of Phase 2 of the Development of the Buildings), and in/about December 2012 after she signed the Shop 4 PASP (when she visited Store 4 with Ms Ho and not Tong). P did not inspect the interior of Shop/Yard 4 at all although she could have posed as customer to enter Unit(s) 4(A) and 4(B). Mr Lau repeated the complaint that at the inspection in/about November 2012 Tong did not explain to P the contents of the Phase 2 Floor Plans, and she did not know how to read them, but I have rejected such evidence (see paragraphs 172-173 and 279 above). It was also said that P requested inspection of the interior of Shop 4, and that there was no evidence Tong/D2 made enquiries/arrangements for inspection of the interior of Shop/Yard 4. I have found that P did not make such request to Tong at any time before she signed the Shop 4 PASP (see paragraph 175 above). Further, I have found P could not have inspected

Shop 4 because when despite liaising directly with Ms Ho, the estate agent of Max Rainbow (ie the registered owner, head vendor and landlord of the tenants at Shop 4), for a long time to arrange the inspection in December 2012, inspection could not be arranged for the tenanted Shop/Yard 4 (see Part XVIII above). As for Store 4, I have explained that non-inspection before P signed the Shop 4 PASP had no material causative relevance because P would not have been able to see the Cage UBW at the rear window even if she had inspected Store 4 (see paragraph 231 above), and that being the case, she would not have seen the Canopy UBW in the Shop 4 Yard outside and below such rear window.

- (e) Breaches in relation to the Waiver Clause Mr Lau submitted that an estate agent's failure to fully explain the contents of an agreement or the meaning of the clauses therein may be breach of duty of care owed to the client. He referred to *Midland Realty (Comm. & Ind.) Ltd v NCF (HK) Ltd*. In that case, the vendor entered into a PASP to sell the property to the 1st purchaser through the 1st estate agent, but the escape clause in the PASP was deleted. The vendor then entered into another PASP to sell the property to the 2nd purchaser through the 2nd estate agent at a higher price, but the escape clause was also deleted. The vendor could not rescind the 1st PASP and later rescinded the 2nd PASP, but did not compensate the 2nd estate agent. The vendor settled the 2nd purchaser's claim for damages, and complained that the 2nd estate agent induced him to enter into the 2nd PASP by telling them the 1st PASP could be cancelled and the deposit under the 1st PASP could be surrendered. The court found that (a) the vendor told the 2nd estate agent about the 1st PASP but the 2nd estate agent without having sight of such agreement remarked to the vendor that the 1st PASP could be rescinded (paragraphs 39-41), and (b) the vendor showed the 1st PASP to the 2nd estate agent, who did not care to properly consider the same and just told the vendor it could be rescinded (paragraph 43). It was held that the vendor relied on such misrepresentations by the 2nd estate agent in entering into the 2nd PASP (paragraphs 69-73). The court considered a competent professional estate agent would understand the effect of deleting an escape clause in a PASP (ie the PASP could not be rescinded) (paragraph 81), and would not have acted as the 2nd estate agent did, ie when he knew about the 1st PASP he still told the vendor/client the 1st PASP could be rescinded without reading the same, and when the vendor showed him the 1st PASP he still told the vendor the deposit could be surrendered (ie pronouncing the effect of the 1st PASP) without taking care to properly consider the 1st PASP (paragraph 82). It was said that [by] making false representations without verifying or making reasonable enquiries in relation to the accuracy of the representations, [the 2nd estate agent] was in breach of his duty as an estate agent to the [vendor] (paragraph 83). The court also held that the 2nd estate agent was liable for negligent misrepresentation (paragraphs 87-89). Mr Lau submitted that in explaining the Waiver Clause in the Shop 4 Appendix to P Tong represented that every sub-purchaser of the sub-divided shops/units of the Head Property would have to sign an appendix like the Shop 4 Appendix which was just a formality (ie 2nd Representation), that the Waiver Clause was included in the Shop 4 Appendix because the Head Property had to be sub-divided before individual shops/units could be sub-sold, and that whilst there were unauthorised alterations in other parts of the

Head Property they did not relate to the Property (ie the 1st Representation). Mr Lau submitted the Waiver Clause in providing that MOX[g NUO*g c k9e g k \ NUO*g c k9e e in the Shop 4 Appendix, ie P would have to accept title to the Property despite any UBWs, and would have to give up the right to raise requisitions or objections as to title in relation to any UBWs and/or to demand compensation from D1, so Tong s explanation in relation to the Waiver Clause was not true or accurate. Mr Lau argued that (a) if Tong knew the meaning/ effect of the Waiver Clause, the fact he conveyed a false meaning to P amounted to breach of the duty of care owed to P, but (b) if he did not know or was not sure about the meaning/ effect of such clause, he should have made proper enquiry to ascertain the true meaning before giving explanation to P, so D2 would be vicariously liable for Tong s breaches of duty. In my view, the short answer to such contentions is that I have rejected P s evidence (including the Representations) on the matters set out in paragraph 285 above (see paragraphs 176-181, 197-200 and 217-225 above).

- (f) Summary of P s claim against D2 I find on balance that P had not sufficiently shown Tong/D2 to be in breach of contract, in breach of duty of care and/or in breach of fiduciary duty, and/or that Tong/D2 made any misrepresentation to her. In the circumstances, Tong/D2 should not be held liable for her loss and damages (if any) in relation to the subject transaction.
- XXVI. CONCLUSION In the premises, P s claim against D1 and D2 are dismissed. In respect of D1 s counterclaim, I grant judgment in favour of D1 against P for a declaration that the Shop 4 PASP was terminated by P s repudiatory breach, and that the Deposits paid thereunder were validly forfeited by D1. There is no reason why costs should not follow event. I therefore grant a costs order nisi that P shall pay D1 and D2 their costs of the action, including costs of D1 s counterclaim and all costs reserved if any, to be taxed if not agreed. Although D2 had not appeared at trial, they were previously legally represented and had taken steps in its defence which was ultimately successful. (Marlene Ng) Judge of the Court of First Instance High Court Mr Kenny Lau, instructed by Chak & Associates, for the plaintiff by original action and the 1st defendant by counterclaim Ms Prisca Cheung, instructed by Kok & Ha, for the 1st defendant by original action and the plaintiff by counterclaim The 2nd defendant by original action and counterclaim, acting in person and absent Schedule 1 Head PASP No N/ICI/SP/SA 0000222 [logo of Midland Realty (Shops) Ltd] PROVISIONAL AGREEMENT FOR SALE AND PURCHASE Vendor This AGREEMENT is made on 9/11/2012 BETWEEN the first party Max Rainbow Enterprise Limited (hereinafter called the Vendor); and Purchaser the second party Ho Chi Yung or his nominee(s) (hereinafter called the Purchaser); and Agent the third party MIDLAND REALTY (SHOPS) LTD (hereinafter called the Agent NOW IT IS HEREBY AGREED as follows: Premises The Vendor agrees to sell and the Purchaser agrees to purchase, through the Agent subject to the terms and conditions herein contained, all tha 0W@W ial deposit in the sum of HK\$10,000,000- shall be paid upon signing of this Agreement. Further deposit in the sum of HK\$25,000,000- shall be paid on or before 27-11-2012. Completion date Balance of purchase price in the sum of HK\$315,000,000- shall be paid upon completion on or before 31-5-2013 at the Vendor s solicitors. Stakehold deposit The deposits payable under (a) and (b) and (c) above shall be paid to the Vendor s

solicitors as stakeholder who may release the same to the Vendor provided that the balance of the purchase price is sufficient to discharge the existing charge / mortgage against the said premises. Formal agreement for sale and purchase Formal agreement for sale and purchase shall be signed on or before 22-11-2012. Encumbrances The said premises shall be sold to the Purchaser, its nominee or sub-purchaser free from encumbrances. Vacant possession / Existing Tenancy Upon completion, The Purchaser agrees to purchase the said premises subject to the existing & & & & & & & N T, ^lQQY SlQQY (u1u[e=|r NMR, e g k }B}bkKN S g2 h>ks & & /ehy*g e g kB}bk,g irmi irmi0W@W & & irmi 0 x', g&T/ [B}bk & & & & & & bBf, N Ncbd e=|r irmi(t=|r e=|r The Vendor shall be responsible for the payment of all reinstatement, repair costs in respect of the said premises and/or any part or parts thereof and/or the Building and/or any contribution to be made by the owner of the said premises and/or any part or parts thereof of any notice or order of such reinstatement, repair and/or contribution exists or shall have been issued or served on or before the completion date by the Government, the manager and/or the Incorporated Owners of the Building or other similar or competent authorities. The Purchaser has accepted the physical condition of the premises even if any unauthorised or illegal structure or alteration exists in the said premises and/or any part or parts thereof, and the Purchaser shall have the no right to rescind the agreement for the aforesaid reason. [Clause 27 Agreed and confirmed by: [Max Rainbow s chop with signature] Signed by the Vendor [signature] Signed by the Purchaser [no signature] Signed by the eirmi & & haser the second party LI YAN PING or its nominee (hereinafter called the Purchaser); and Agent the third party Flourish Property Agency Ltd (hereinafter called the Agent NOW IT IS HEREBY AGREED as follows: Premises The Vendor agrees to sell and the Purchaser agrees to purchase, through the Agent subject to the terms and conditions herein contained, all that Shop no 6 AND YARD ADJACENT THERETO ON GROUND FLOOR AND STORE No 6 ON COCKLOFT FLOOR OF PHASE 2 OF COMMERCIAL DEVELOPMENT ALLWAY GARDENS, NO 187-195 TSUEN KING CIRCUIT & 2-22 ON YAT STREET TSUEN WAN NT (hereinafter called the said Premises Consideration and payment The purchase price of the said Premises shall be HK\$11,523,960.00 which shall be paid by the Purchaser to the Vendor in the manner as follows: [Clause 2 Initial deposit shall be paid upon signing of this agreement in the sum of HK\$500,000.00. [Clause 2(a) The formal agreement for sale and purchase shall be signed on or before 13 Dec 2012. Fu & & NHS) he sum of HK\$10,371,564.00. Encumbrances The said Premises is to be sold to the Purchaser or its nominee(s), sub-purchaser(s) free from encumbrances. [Clause 4 Vacant possession / Existing Tenancy Upon completion, the Vendor shall deliver vacant possession of the said Premises to the Purchaser / The Purchaser agrees to purchase the said Premises subject to the existing tenancy as set out in the schedule attached hereto. Selling as confirmor The Vendor is selling as Confirmor and this Agreement is subject to the terms and conditions of the principal agreement made between the Vendor and the Head Vendor. [Clause 6 Solicitors and stamp duty The Vendor and the Purchaser agree that they shall separately appoint their own solicitors. The Vendor shall be represented by Messrs Wilkinson & Grist Solicitors & Notaries Whereas the Purchaser shall be represented by Messrs & & \$115,230.00 from the Vendor and HK\$115,230.00 from the Purchaser as

professional service charge. Such service charge shall be paid on or before the date of signing the formal agreement for sale and purchase. As is basis The said premises is to be sold to the Purchaser on an as is basis. [Clause 12 Appointment of Agent It is hereby declared that the Agent is for both the Vendor and the Purchaser Clause 17 Remarks UMO0W Q.U, jMOn e N@W UOO*gU RQYKb w g(uKN (umi;N Q/e, Agreed by the Agent Name: Tong Chun Lung Licence No: Sxxxxxxx [signature] Agreed by the Purchaser: Name: [P] ID No: Cxxxxxx(x) Received from the Purchaser the initial deposit in the sum of HK\$500,000.00 Cheque No 9390 Bank HSBC Signed by the Vendor [signature] Name: ID No: irmi irmi0W@W irmi 0 wdkirmi RQY, Smi k NMRf} & & MO&N sBfP} MOX[g NUO*g c k9e g k \ NUO*g c k9e NUO*g c k9e irmi vmi kUt MOmi k g \r NUO*g c k9e Qmi k N & & MOKN fBfKN c6er NUOmi k & & e=|r t=|r e=|r eirmi & & d party LI YAN PING or its nominee (hereinafter called the Purchaser); and Agent the third party Flourish Property Agency Ltd (hereinafter called the Agent NOW IT IS HEREBY AGREED as follows: Premises The Vendor agrees to sell and the Purchaser agrees to purchase, through the Agent subject to the terms and conditions herein contained, all that Shop no 4 ON COCKLOFT AND Shop No 4 on GROUND FLOOR OF PHASE 2 OF COMMERCIAL DEVELOPMENT ALLWAY GARDENS, NO 187-195 TSUEN KING CIRCUIT & 2-22 ON YAT STREET TSUEN WAN NEW TERRITORIES (hereinafter called the said Premises Consideration and payment The purchase price of the said Premises shall be HK\$15,247,980.00 which shall be paid by the Purchaser to the Vendor in the manner as follows: [Clause 2 Initial deposit shall be paid upon signing of this agreement in the sum of HK\$300,000.00. [Clause 2(a) The formal agreement for sale and purchase shall be signed on or before 8 Jan 2013. Further deposit in the sum of HK\$1,224, & & NHS1 & & brances The said Premises is to be sold to the Purchaser or its nominee(s), sub-purchaser(s) free from encumbrances. [Clause 4 Vacant possession / Existing Tenancy Upon completion, The Purchaser agrees to purchase the said Premises subject to the existing tenancy as set out in the schedule attached hereto. Selling as confirmor The Vendor is selling as Confirmor and this Agreement is subject to the terms and conditions of the principal agreement made between the Vendor and the Head Vendor. [party shall pay its own legal costs, subject to clause 8 hereof, all stamp duty shall be borne by the Purchaser solely. Agent s Commission In consideration of the services rendered by the Agent, the Agent shall be entitled to receive HK\$152,470.00 from the Vendor and HK\$152,470.00 from the Purchaser as professional service charge. Such service charge shall be paid on or before the date of signing the formal agreement for sale and purchase. As is basis The said premises is to be sold to the & & & & & UMO0W Q.U, jMOn irmi irmi0W@W irmi 0 & & MO&N sBfP} MOX[g NUO*g c k9e g k \ NUO*g c k9e NUO*g c k9e irmi vmi kUt MOmi k g \r NUO*g c k9e Qmi k N & & MOKN fBfKN c6er NUOmi k & & e=|r t=|r e=|r h portion was shown coloured pink on the G/F Plan of Phase 2 annexed to the Assignment registered at the Land Registry by memorial no 08020102520014 which portion was shown coloured pink on the C/F Plan of Phase 2 annexed to the Assignment registered at the Land Registry by memorial no 08020102520014 the terms of the Shop 6 PASP were similar to those of the Shop 4 PASP referred to in para 7 below (see Schedules 2-3 to this Judgment) the Land Registry acknowledged receipt of such additional registration SIQQY (u1u to be certified by an Authorised Person and to be attached to the

Assignment of the Property upon completion in due course (see para 40(a) below) see Clause 3 of the Appendix to the Shop 4 PASP signed by a senior consultant of RHL s Department of Project Management & Building Consultancy John Y K Ho the appendix to the Shop 6 PASP also contained a Waiver Clause identical to that in the Shop 4 Appendix W&G referred to Queen Energy Ltd v Chan Shu Keung [2000] 3 HKLRD 152 and Gladson China Ltd v Lam Alexander Chen June [2001] 1 HKC 318 the Assignment Plan showed the sub-divided shops/units of G/F and C/F of Phase 2 of the Development of the Buildings, including the Other Property that comprised Shop 6, Shop 6 Yard and Store 6, and the Property that comprised Shop 4, Shop 4 Yard and Store 4 including acceding to HCP s alleged unreasonable requests such as sending certified copies of the tenancy agreements (when copies thereof had been provided on 28 March 2013 and when W&G were only informed by HCP on 30 May 2013 that those copies were insufficient) and copies of approved building plans obtained from the BD (even though they were not necessary for proving title given the production of a copy of the Assignment Plan prepared by an Authorised Person) it was unclear from such letter what was the subject matter of the invoice see HCP s requisitions at para 39 above and W&G s answers thereto at para 40 above ie the oral Agency Agreement, and the written Shop 4 PASP signed by P as purchaser and Tong on behalf of D2 as estate agent Mr Lau, counsel for P, confirmed D2 gave the Floor Plans to P for her intended purchase of the Other Property, which meant P already had the Floor Plans before she signed the Shop 4 PASP Mr Lau confirmed that D2 gave the Price List to P for her intended purchase of the Other Property, which meant P had the Price List before she signed the Shop 4 PASP P and D1 did not sign any FASP, but proceeded to completion of the sub-sale and sub-purchase of the Other Property on 31 May 2013 pursuant to the Shop 6 PASP whereupon Yan Yau (nominated by P to take up the assignment of the Other Property) became the registered owner of the Other Property see the Price List and para 55 above in reply to D1 s averments, P denied she could have discovered the Alleged UBWs much earlier: (a) P was provided with an opportunity to only inspect the exterior of the Property, and she did not inspect the interior of the Property before she signed the Shop 4 PASP, (b) P was not professionally qualified to ascertain the existence/nature of the Alleged UBWs upon any inspection of the Property, so the Alleged UBWs were not patent upon any such inspection, (c) it was impossible for P to discover the Alleged UBWs, so she relied on D1/D2 to disclose them, (d) whether the Alleged UBWs were patent upon any inspection of the Property would not absolve D1 from proving and showing good title to the Property, (e) P did not have any opportunity to seek professional advice in respect of the Property before she signed the Shop 4 PASP, and she only discovered the Alleged UBWs from the RHL Report on 27 March 2013, and (f) insofar as it was suggested professional advice referred to in para 63(c)(iii) above meant D2 s professional advice, D2 failed to provide P with any information regarding the Alleged UBWs despite P s express request in reply to D1 s averments, P claimed (a) the effect of Clause 6 of the Shop 4 PASP was not that she had to accept the physical condition of the Property, but (b) if Clause 6 of the Shop 4 Appendix had such effect (which P denied), then by virtue of the Control of Exemption Clauses Ordinance Cap 71 (CECO) and/or the Misrepresentation Ordinance Cap 284 (), D1 could not rely on Clause 6 of the Shop 4 PASP and/or Clause 27 of the Head PASP

to restrict or limit its liability since such clauses were unreasonable in the circumstances. MOX [g NUO*g c k9e g k \ NUO*g c k9e NUO*g c k9e irmi vir kUt MOmi k & & g k \ NUO*g c k9e NUO*g c k9e irmi vir kUt he MO, D1 was precluded from relying on the Waiver Clause of the Shop 4 Appendix to restrict/limit its liability since it would be unreasonable in the circumstances, and that the following were irrelevant: (a) P's alleged experience in property transactions regarding any properties whether similar or not, (b) P's purchase of the Other Property, and (c) the Shop 6 PASP and its contents in reply to D1's averments, P denied having any such knowledge in reply to D1's averments, P denied having any knowledge of any legal consequences of the Waiver Clause P claimed she accepted D1's breach of the Shop 4 PASP on 13 June 2013 when she demanded D1 to refund the Deposits (see para 67 above). Mr Lau confirmed that apart from the return of the Deposits the only other damages P intended to claim were the sum of \$7,000 being the amount of the RHL Invoice paid or payable by P. Wong explained that since about 2010 he worked at the property investment department in Ho's company, that many estate agents would try to int & & Vxe, Rf@b g & & SORN O g}Y V1X, N9}@u[23/2002, Chung J (unreported, 13 August 2005) para 12 (see also Four Seas Fishballs Co Ltd v Yeung Hung Sin & anor HCA4159/2003, Chung J (unreported, 25 August 2006) para 20, Esquire (Electronics) Ltd v Hong Kong and Shanghai Banking Corp Ltd [2007] 3 HKLRD 439, 494, Lee Fu Wing v Yan Po Ting Paul [2009] 5 HKLRD 524, Hui Cheung Fai & anor v Daiwa Development Limited & ors HCA1734/2009, DHCJ Eugene Fung SC (unreported, 8 April 2014) paras 76-83, and Hua Tyan Development Ltd v Zurich Insurance Co Ltd [2012] 4 HKLRD 827, 835-836) see Active Keen Industries Limited v Fok Chi-kong [1994] 1 HKLR 396.

[2001] 2 HKLRD 630, 642 see Lewison, *The Interpretation of Contracts* 6th ed para 2.03 at pp 34-41.

[1999] 3 HKLRD 231, 244 see *Jumbo King Ltd* at p 776.

[2016] 2 HKLRD 901, 917-919 HCMP4407/1998, Recorder Edward Chan SC (unreported, 21 March 2000) see Emmet and Farrand on Title 19th ed para 4.023 at p 4/28 CACV249/1998 (unreported, 9 March 1999) (A) The Purchaser declares that it has conducted an on-site inspection of the Property in person, and clearly knows of and accepts all the internal and external fitting condition of the shop premises and clearly knows of (a) cockloft(s) constructed within the shop premises, (a) staircase(s) connecting the cockloft and the ground floor shop, and the existing extended area of the cockloft. (p 515) (B) The Purchaser knows of no application has been made to the Government or relevant authorities in respect of part of the relevant condition. (C) The Vendor gives no warranty as to whether or not the relevant condition is amounting to unauthorized alteration, illegal or non-compliant project, or related matter. (D) After consideration, the Purchaser has decided to accept the existing condition and is willing to undertake the liability of retaining the existing condition. (E) The Purchaser and its legal representatives shall not raise any requisition on title and/or claim compensation and/or seek a reduction in purchase price by reason of the existing state of the Property and/or the aforementioned

condition, and shall also not refuse to complete the transaction by reason thereof.

[illegible]

- [1995] 2 HKC 181, 185 see Chitty on Contracts: Hong Kong Specific Contracts 6th ed para 1-132 at pp 63-64 (and see Midland Realty (Comm. & Ind.) Limited v NCF (HK) Limited HCA1830/2013, DHCJ Nicholas Cooney SC (unreported, 22 May 2015) paras 74-75) see Midland Realty (Comm. & Ind.) Limited paras 76-77 citing Chiu Wai Ling v Chan Yau Chi [2002] 2 HKC 154
- [2005] 1 HKLRD 317, 326-328 (see also Midland Realty (Comm. & Ind.) Limited para 78) HCA16227/1999, DHCJ Muttrie (unreported, 6 June 2001) (see Midland Realty (Comm. & Ind.) Limited para 79) HCA1830/2013, DHCJ Nicholas Cooney SC (unreported, 22 May 2015) English translation: despite the fact that there are any alterations or additional structures not authorized by the [BD] and despite the fact that the [BD] or other government department may hold the owner liable English translation: see attached for address English translation: to be appointed English translation: See attached for details of tenancy agreement. Vacant possession to be partially delivered. The Vendor shall agree to assist the Purchaser in carrying out the matter of the sub-deed and all matters relating to the [DMC]. The [illegible] shall be responsible for paying all Sub-Deed costs and [DMC] Costs. After the signing of the [FASP] and prior to completion, the Purchaser has the right to sign tenancy agreement commencing after completion with the existing tenant or a new tenant without the Vendor's consent. [Illegible] tenancy agreement shall include a clause stating that if the Purchaser fails to complete this Agreement, it will result in the termination of the tenancy agreement. English translation: See schedule for additional terms of clauses 23-32 English translation: Bank of China English translation: If the cheque for the deposit is not honoured, the Vendor shall have the right to terminate this Agreement and claim damages from the Purchaser English translation: Date: 9 November 2013 English translation: Schedule to Midland Realty Provisional Agreement for Sale and Purchase English translation: Property [PASP] No N/ICI/SP/S/A0000222 English translation: Property Address English translation: hereinafter called the said Premises English translation:
- (1) Details of tenancy agreement as follows: The vendor has used best endeavours to verify the accuracy of the information in the tenancy schedule below but the Vendor does not guarantee that there are no errors in the tenancy schedule below, if any tenant terminates the tenancy agreement prior to completion, the vendor shall only deliver vacant possession of the relevant unit. English translation: * Upon completion of the sale and purchase, the rental deposit shall without any deductions be transferred to the new purchaser English translation:
 - (2) This Agreement is must-buy and must-sell, both parties cannot cancel the Agreement English translation: Signed and Agreed by the Vendor Name of Signatory English translation: Midland Realty (Shops) Limited English translation: Signed and Agreed by the Agent Name of Agent English translation: Signed and Agreed by the Purchaser Name of Signatory English translation: Flourish Property English translation: before pm 1400 English translation: to be appointed English translation: Schedule to [PASP] English translation:

[illegible]

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Prepared on 26 October 2026 · Esheria