IN THE COURT OF APPEAL 1996, No. 258
(Civil)

BETWEEN

LO HUNG BIU	Plaintiff/ Respondent
and	
LO SHEA CHUNG	1st Defendant/ 1st Appellant
LI HOI SING	2nd Defendant/ 2nd Appellant

Coram : Hon. Nazareth, V-P, Ching, J.A. & Cheung, J. in Court

Dates of hearing : 24th & 30th April, 1997

Date of handing down judgment : 4th June, 1997

J U D G M E N T

Ching, J.A. :

On 6th July, 1996, the Defendant vendors and the Plaintiff purchaser entered into a provisional agreement for the sale and purchase of Lot No. 281 in D.D. 106 in Yuen Long. A deposit of $288,000 has been paid. The purchaser raised requisitions as to title which the vendors refused to answer, taking the view that they were not obliged to do so having regard to the provisions of section 13 of the Conveyancing and Property Ordinance,

Cap. 219. The purchaser applied by way of originating summons for a declaration that his requisitions had not been properly answered, a declaration that the vendors had not shown good title to the property with the result that he was entitled to annul the provisional agreement, an order for the repayment of his deposit with interest and for his costs. In a judgment that was almost cursory, Deputy Judge W. Wong made the declarations sought, ordered the return of the deposit without interest and made no order as to costs. The vendors now appeal.

The property had been registered in the name of Sham Shun Tsing. He executed a power of attorney on 25th April, 1961, in Djakarta in which his name is given as "Sim Joen Sen also named Sham Shuen Ching". It gave powers over all his properties in Hong Kong to Sham Kwan Yiu whose address was given as being in a village in Yuen Long. It was registered in the Land Registry, the Memorial giving the donor's name as being "Sham Shun-Tsing (or spelt as Sham Shuen-Ching)" with an address in Djakarta and "of Yuen Kong" and the donee as being "Sham Kwan-yiu of Yuen Kong". The Memorial shows that it related to numerous properties including Lot No. 281 and Lot No. 282 in D.D. 106. There was an assignment of all of the properties on 11th August, 1961. The assignment has been lost but Memorial No. 145221 shows that it was registered as an assignment by way of gift by "Sham Shuen-tsing (or spelt as Sham Shun-ching) by his Attorney, Sham Kwan-yiu, of Yuen Kong, as Assignor" in favour of "Sham Sun-wing and Sham Cheung-shun with Ng Yuk-ying as Trustee, of Yuen Kong, as Assignee". This Memorial was signed by Sham Kwan-yiu and Ng Yuk-ying. It is probable that "Yuen Kong" is a misspelling of "Yuen Long" and that there is no beneficiary

by the name of "Yuen Kong". It is not clear whether Sham Shun-wing and Sham Cheung-shun were beneficiaries or whether they were co-trustees with Ng Yuk-ying. In the circumstances of this case it does not matter. There was then another assignment of Lot No. 281 and Lot No. 282 in D.D. 106 on 27th November, 1969. Again, the assignment has been lost but Memorial No. 163823 shows that again it was an assignment by way of gift this time by "Sham Sun-wing and Sham Cheung-shun with Ng Yuk-ying as trustee of Yuen Kong, as Assignor" and "Sham Cheung-shun with Ng Yuk-ying as trustee of Yuen Kong, as Assignee". This Memorial was signed by Ng Yuk-ying alone, his identity card number being given. This assignment was not made pursuant to the power of attorney. The vendors, claiming to show their title in accordance with section 13, have produced to us a Memorial No. 170626 which shows registration of a Conveyance on Sale dated 14th April, 1972, being a conveyance for value by "Shum Cheong-shuen of Yuen Kong" as vendor and another party as purchaser. No point has been taken on the various spellings of any of the names.

Under cover of a letter dated 12th September, 1996, the vendors sent to the purchaser what they described as the relevant title deeds and documents. This included what was described as "Certified copy Conveyance on Sale Memorial No. 170626" which appears to have been the Memorial and not the actual Conveyance on Sale although this is not clear. On 16th September, 1996, the purchaser raised his requisitions by way of letter which, after referring to the documents received, was in the following terms,

> "(a) By a Power of Attorney M/N 145119, Sham Shun Tsing appointed Sham Kwan Yiu as his lawful attorney to deal with the said property and other properties. There is no provision in the said Power of Attorney authorising Sham Kwan Yiu to assign the property by way of

> gift. However in Assignment M/N 145221, Sham Kwan Yiu assigned the said property to Sham Sun Wing and Sham Cheong Shun with Ng Yuk Ying as trustee by way of gift.
>
> (b) In assignment M/N 16823, Sham Sun Wing and Sham Cheong Shun with Ng Yuk Ying as trustee assigned the property to Sham Cheong Shun. Sham Shun Wing and Sham Cheong Shun did not sign their names on the said Assignment to signify their consent to the said arrangement."

The letter enclosed what was described as the relevant documents, presumably copies of the power of attorney and the two memorials. As already stated, the vendors stood upon Memorial No. 170626 as their root of title by reason of section 13.

Astonishingly, neither the power of attorney nor any of the Memorials referred to above was produced to the Judge below. They have been shown to us by consent. Alarmingly and in defiance of the best evidence rule the Judge nevertheless admitted and acted upon evidence from the purchaser's solicitor as to their contents. Of the power of attorney, the judgment reads,

> "The Power of Attorney of Sham Kwan Yiu only gave the power to the donee to sell, buy or exchange those properties, estates and buildings or any or more of them, to fix prices and conditions, to deliver or have delivered the same according to law, customs or regulations, to do and perform registrations and sign the registers."

This is an accurate quotation of one of the groups of powers given by the power of attorney but how the Judge came by it is unknown. He concluded this part by saying,

> "It did not empower the donee to dispose of the property by way of gift. So the title is defective."

The only "evidence" of this was from the purchaser's solicitor.

> Section 13(1) provides, in part, that,
>
> "Unless the contrary intention is expressed, a purchaser of land shall be entitled to require from the vendor, as proof of title to that land, only production of the Crown lease relating to the land sold and -
>
> (a) proof of title to that land -
>
> (i) .....
>
> (ii) ..... extending not less than 15 years before the contract of sale of that land commencing with an assignment ..... dealing with the whole estate and interest in that land ....."

The provisional agreement was silent as to any of the matters contained in section 13. The Judge said,

> "The Provisional Sales (sic) and Purchase Agreement was in the printed form commonly used by most of the estate agencies. It did not limit the root of title to that required by the Conveyancing and Property Ordinance."

It is not apparent whether the Judge considered that the section applied. Both parties understood him to mean that it did not. Certainly he did not go on to consider what effect the section may have had. The section does not provide that it is to have no application unless it is incorporated. To the contrary, it provides in express and clear terms that it is to apply unless it is excluded. Having regard to the wording of the provisional agreement it clearly applied and the Judge below was wrong if he thought it did not.

> In another passage the Judge below said,

> "Further in Memorial No. 163823, the trustee conveyed Lot Nos. 281 and 282 in Demarcation District No. 106 to one of the beneficiaries without the consent of the other beneficiaries (sic)."

A Memorial conveys or assigns nothing. It is the Conveyance on Sale or the assignment which conveys. It was not the trustee alone who conveyed. The Memorial names the assignors as Sham Sun-wing and Sham Cheung-shun with Ng Yuk-ying as trustee. The Memorial was signed by Ng Yuk-ying alone but that does not mean or indicate that he was the only assignor, for the First Schedule of the Land Registration Ordinance, Cap. 128, requires only that some or one of the parties should sign it. Nor was there any "evidence", save for that of the purchaser's solicitor, that the other beneficiary had not consented. Before us, Mr. Albert K.C. Yau who appeared for the vendors but who did not appear in the Court below, effectively did not really pursue the point. I am quite sure that it is unsustainable. The actual assignment being lost, the Memorial is good secondary evidence of its contents and shows an assignment by all three assignors. Requisition (b) as couched, was mistaken and called for no answer. So far as it is concerned, therefore, the appeal would succeed.

Upon requisition (a) both counsel addressed to us arguments on numerous points with which I do not intend to deal. The basis of the application by the purchaser was that the vendors were required to answer the requisitions that were made. So far as requisition (a) was concerned he argued that the power of attorney gave no authority to the donee to assign the property by way of gift. The only two issues properly before the Judge below and before us were, first, whether the power of attorney did give such authority

and, secondly, even if it did then whether the vendors were obliged to show a good title beyond the 15 years required by section 13.

The power of attorney begins the list of the powers given with the words,

> "..... in general ..... to represent the undersigned in connection with his real properties, estates and buildings situated in the colony of Hong Kong, to look after, to perform, to execute and or to take up their rights and interests and in the name and on behalf of the undersigned to do, act, execute and perform the following acts and things which are not limited however to what is mentioned hereinafter ....."

There follows a list of powers of which one was that cited by the Judge below and of which the last was,

> "Further to do, conduct, carry out, perform and execute all or such other acts, matters and things as the attorney shall think fit and proper and in the interests of the undersigned and the undersigned should or would do if present on the spot, all such unnamed acts, deeds and things are included in this power of attorney."

There was no specific power to make a gift. None of the specific powers necessarily includes such a power and if a power to make a gift is to be found it must be on the basis of general words.

Inevitably I was referred to the dicta of Russell, J., as he then was, in Reckitt v. Barnett, Pembroke and Slater, Ltd., (1928) 2 KB 244 approved in the House of Lords at (1929) AC 176, that,

> "It is said that the Plaintiff's statement to the bank that he wishes the power of attorney to cover the drawing of cheques upon them ..... 'without restriction', operates to enlarge the powers conferred by the power of attorney, and to such a sweeping extent that Lord Terrington became authorised to do what he liked with the plaintiff's moneys, even to the extent of applying them in payment of his own personal debts. It would need words

> unambiguous and irresistible to enable me to attribute such a meaning and intention to a power of attorney. The primary object of a power of attorney is to enable the attorney to act in the management of his principal's affairs. An attorney cannot, in the absence of a clear power so to do, make presents to himself or to others of his principal's property."

We were also shown three decisions in Hong Kong, namely Li Ming-on v. Lucky Apple, Ltd., (1994) 2 HKLR 111, Very Cheer Development, Ltd., v. Bring All, Ltd., (1994) 1 HKC 769 and Sham Wing Tai v. Ng Ting Biu (Unreported, 1994 No. MP 524) to like effect. Mr. Horace C.Y. Wong, who appeared before us for the purchaser but not in the Court below, pointed out to us that in each of these decisions the assets of the donor were used for or went to the benefit of the donee. If that be correct, then the words "or to others" in the judgment of Russell, J., were obiter dicta. The argument has a superficial attraction but I am convinced that it is wrong. The judgment in Reckitt v. Barnett (supra) has never been questioned. On the facts of that case the donee had used the donor's property by paying the money to the bank for his own purposes so that in fact the property was given to others. I agree that the primary purpose of a power of attorney is to enable the donee to manage the donor's property and that it would need very clear words to authorise him to make a gift of it or part of it to himself or to others. The general words in this present power of attorney were neither sufficiently unambiguous nor irresistible to cause such a meaning to be given to them. Subject to the other arguments advanced there was, therefore, on the face of the documents a defect in the vendors' title.

Section 13(4) was mentioned to us. This provides that,

> "A recital, statement, and description of any fact, matter or party contained in any document of title, mortgage, declaration or power of attorney relating to

> any land and dated or made not less than 15 years before the contract of sale of that land shall, for the purposes of any question as to proof of title concerning the parties to that contract and unless the contrary is proved, be sufficient evidence of the truth of that recital, statement and description."

This does not assist the vendors. The relevant assignment was not available. The Memorial was not a document of title. It showed only that that assignment was by way of gift purportedly made under the power of attorney. The power of attorney, as already seen, does not contain anything empowering an assignment by gift.

Section 13(4A) then provides that,

> "Where any document is or has been produced by a vendor as proof of title to any land and that document purports to have been executed, not less than 15 years before the contract of sale of that land, under a power of attorney, it shall for the purposes of any question as to the title to that land be conclusively presumed -
>
> (a) as between the parties to that contract; and
>
> (b) in favour of the purchaser under that contract as against any other person,
>
> that the power of attorney -
>
> (i) was validly executed;
>
> (ii) was in force at the time of execution of that document; and
>
> (iii) validly authorised the execution of that document."

No question was raised under (i). Some argument was addressed to us under (ii) in that it was asserted that there was no evidence that the two assignments by gift had been executed pursuant to this particular power of attorney. There is nothing in this. The power of attorney was dated 25th April, 1961. It was

registered against, inter alia, the property in question. The first assignment by gift was on 11th August, 1961. There is no evidence that any other power of attorney ever existed. It is the provision under (iii), that the power of attorney is to be conclusively presumed to have validly authorised the execution of the document, that needs to be addressed.

Mr. Albert K.C. Yau submitted to us that section 13(4A) had no application because the document that was produced was the Memorial and not the actual assignment. I agree with him and therefore the section has no application. In addition neither of the Memorials in question was produced by the vendors as proof of their title. Indeed, section 13(1) begins with the words,

> "Unless the contrary intention is expressed, a purchaser of land shall be entitled to require from the vendor ....."

However, when a purchaser himself is in possession of pre-intermediate root documents there is nothing to prevent him raising proper requisitions upon them. That is what occurred in the present case. Requisition (a) was a proper one. It pointed out a possible defect in the pre-intermediate root of title. The defect consisted of the fact that the power of attorney gave no power to the donee to make a gift of the property.

Mr. Horace Y.L. Wong addressed to us an interesting argument on the burden of proof. He conceded that the vendors were obliged to show a good title but he argued that so far as pre-intermediate root title was concerned the burden was on the purchaser to prove that there was a defect before the vendors had a duty to comply with the requisition. I reject this argument. If

the purchaser were required to prove the defect first there would hardly be any point to a requisition. It is the duty of the vendors to show good title.

I find that the power of attorney gave no power to the donee to assign the property by way of gift. I find that requisition (a) was a proper one and that it has not been answered properly or at all. In these circumstances this appeal must be dismissed. Since the order as to costs in the Court below was by consent I would not disturb it but would make an order nisi that the costs of the appeal are to be paid by the vendors to the purchaser.

Cheung J. :

The appeal

The Appellants were the vendors ("the Vendors") of a property in the New Territories known as Lot No.281 in D.D.101 ("the Property"). By a Provisional Agreement dated 6th September 1996 ("the Agreement"), the Vendors agreed to sell the Property to the Respondent purchaser ("the Purchaser").

The Purchaser raised requisitions as to title of the Property and later issued a Vendor and Purchaser summons seeking a declaration that the Vendors had not answered the requisitions and that good title had not been shown on the Property. Deputy Judge Wong, upon hearing the summons, granted the declarations. The Vendors now appeal.

Vendors' duty to show good title

The Agreement was silent as to the obligation of the Vendors to prove title. However, the decision of the Court of Appeal in **Active Keen Industries Ltd. v. Fok Chi Keong** [1993] HKLR 396, clearly established that there was an obligation on the Vendors to show and make a good title. In the absence of contrary provisions, title was proved by s.13(1) of the *Conveyancing and Property Ordinance* ("the *Ordinance*"), namely the Vendors were required to produce to the Purchaser, first, the Crown lease of the Property and secondly an assignment, mortgage by assignment or legal charge, extending not less than 15 years before the Agreement. In the present case, it was agreed that the title was found in a Conveyance on Sale dated 14th April 1972. This title is usually referred to as the intermediate title.

The requisitions

The requisitions raised by the Purchaser were these : First, Sham Shun Tsing was the Owner of the Property. By a Power of Attorney dated 25th April 1961 ("the Power of Attorney"), Sham Shun Tsing appointed Sham Kwan Yiu ("the attorney") as his lawful attorney to deal with the Property and other properties. There was no provision in the Power of Attorney authorising Sham Kwan Yiu to assign the Property by way of gift. However in the Memorial of an Assignment dated 11th August 1961 ("the 1st Memorial"), it was recorded that Sham Kwan Yiu assigned the Property to Sham Sun Wing and Sham Cheong Shun with Ng Yuk Ying as trustee by way of gift.

The second requisition was that by another Memorial of an Assignment dated 27th November 1969 ("the 2nd Memorial"), it was recorded that Sham Sun Wing and Sham Cheong Shun with Ng Yuk Ying as trustee assigned, inter alia, the Property to Sham Cheong Shun. The requisition was that the assignment was defective because Sham Sun Wing and Sham Cheong

Shun did not sign their names on the 2nd Memorial to signify their consent to the arrangement.

Sham Cheong Shun by the Conveyance of Sale dated 14th April 1972 sold the Property to Law Chuen Chau and the Vendors eventually became the registered owners of the Property.

The response of the Vendors was contained in the letter of 23rd September 1996 which stated that "The root of title of the Property is Conveyancing on Sale Memorial No.170626. Any deeds or documents before this is irrelevant. Therefore, we are not obliged to entertain your requisitions." This response was repeated in subsequent letters.

Purchaser to show aliunde title defective

Counsel for the parties accepted that, notwithstanding s.13(1) of the *Ordinance*, the Purchaser was not precluded from showing *aliunde* (or in modern language, from another source) that the pre-intermediate title was defective.

In **Re Cox and Neve's Contract** [1891] 2 Ch. D.109 in which the conditions of sale provided that the title should commence with a mortgage executed in 1852. North J. held that the purchaser was not precluded from raising objection to title in relation to deeds executed prior to 1852. Mayo J. (as he then was) in **Lam Lee v. Lui Yem Bun** (HCMP No.3799 of 1993) likewise held that a purchaser was entitled to show that the earlier title was bad.

Although the parties agreed that the Purchaser might show aliunde that the title was defective, they differed as to whether the Purchaser was entitled to raise requisitions as to title. The Vendors said that the Purchaser was not entitled, whereas the Purchaser maintained that right was not in any way affected by s.13(1) of the *Ordinance*.

The principle is that the obligation to show a good title includes the obligation to answer requisitions satisfactorily. If requisitions are not answered satisfactorily, it does not matter whether in fact the vendor has a good title to the property and the purchaser is entitled to rescind : **Kok Chong Ho and Another v. Double Value Developments Ltd.** [1993] 2 HKLR 423. **Active Keen Industries Ltd.** is a case where the vendor had a good title but failed to show a good title by failing to answer requisitions satisfactorily.

Vendors' argument

Mr Wong, Counsel for the Vendors, argued that if the Purchaser wished to go beyond the intermediate title which otherwise was good, then the burden was on the Purchaser to show that the pre-intermediate title was defective. Because of this burden, the Purchaser must show by positive evidence that the attorney was not properly authorised to execute the Assignment dated 11th August 1961. All that the Purchaser did was to point to the Power of Attorney to say that the instrument did not give the attorney express power to assign the Property by way of gift. Mr Wong argued that the value of s.13(1) was not confined merely to the production by the Vendors of the title deeds but productions of such deeds as proof of title. In view of this burden on the Purchaser, the Vendors were not obliged to answer the requisitions. He argued s.13(1) would be rendered meaningless if the Vendors were still required to answer the requisitions as to title by the Purchaser.

Purchaser is still entitled to raise requisitions

In my view, although because of s.13(1), the Purchaser has to establish a defective title in respect of pre-intermediate matters, the right by the Purchaser to raise requisitions is not taken away except by legislation or by agreement between the parties. Caution must be exercised in relying on English cases because of the wording of the English legislation. Section 45(1) of the
Law of Property Act 1925 precluded the purchaser from, inter alia, making requisitions or objections with respect to documents or title prior to the time prescribed by law or stipulated for the commencement of the title.

> The section provided, inter alia, that *:-*
>
> "(I) A purchaser of any property shall not :-
>
> (a) require the production, or any abstract or copy, of any deed, will, or other document, dated or made before the time prescribed by law, or stipulated, for the commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the Purchaser; or
>
> (b) require any information, or make any requisition, objection, or inquiry, with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title, is recited, agreed to be produced, or notice;
>
> and he shall assume, unless the contrary appears, that the recitals, contained in the abstracted instruments, of any deed, will, or other document, forming part of that prior title, are correct...."

In the earlier *Vendor and Purchaser Act 1874*, it provided that, inter alia :-

> "1. In the completion of any contract of sale of land made after the thirty-first day of December one thousand eight hundred and seventy-four, and subject to any stipulation to the contrary in the contract, forty years shall be substituted as the period of commencement of title which a purchaser may require in place of sixty years, the present period of such commencement;

> nevertheless earlier title than forty years may be required in cases similar to those in which earlier title than sixty years may now be required.
>
> 2. In the completion of any such contract as aforesaid, and subject to any stipulation to the contrary in the contract, the obligations and rights of vendor and purchaser shall be regulated by the following rules; that is to say,
>
> First. Under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold.
>
> Second. Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations, twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions."

On the other hand, there are no similar restrictions in s.13(1) of the *Ordinance*. Section 13(1) is as follows :-

> "13. (1) Unless the contrary intention is expressed, a purchaser of land shall be entitled to require from the vendor, as proof of title to that land only production of the Crown lease relating to the land sold and :-
>
> (a) proof of title to that land :-
>
> (i) where the grant of the Crown lease was less than 15 years before the contract of sale of that land, extending for the period since that grant; or
>
> (ii) in any other case, extending not less than 15 years before the contract of sale of that land commencing with an assignment, a mortgage by assignment or a legal charge, each dealing with the whole estate and interest in that land."

The view that requisitions can only be excluded by express provisions is supported by *Fry on Specific Performance* 6th Edn. (1920) at page 614 :-

> "The cases on the question whether and how far the inquiry into title has been limited fall into two categories; first, where the stipulations of the contract preclude the purchaser from making requisitions upon or inquiries from the vendor as to his title, — which relieves the vendor from the necessity of complying with or answering any such requisition or inquiry, but does not

> prevent the purchaser from showing, by any means in his own power, that the vendor's title is defective; and secondly, cases in which the stipulations preclude the purchaser, not only from making such requisitions upon and inquiries from the vendor, but from making any inquiry or investigation about the title anywhere;—which may quite validly be stipulated, and will generally, provided that the stipulation be clear, altogether preclude inquiry and investigation for every purpose."

The burden of the Purchaser to show a defective pre-intermediate title and his entitlement to raise requisition on the pre-intermediate title are not mutually exclusive. The raising of requisitions may enable the Vendors to remedy any defects in title. **In Re Cox and Neve's Contract** is a case in which requisitions were raised on pre-intermediate title when the agreement provided that the title was to commence with a deed of a later date. The nature of the application appeared at page 110 of the judgment :-

> "SUMMONS under the *Vendor and Purchaser Act*, 1874, by a purchaser of real estate, asking a declaration that his requisitions and objections in respect of the title to the hereditaments comprised in the contract of sale had not been sufficiently answered by the vendor, and that a good title to the hereditaments had not been shewn in accordance with the particulars and conditions of sale, and asking that the vendor might be ordered to return to the purchaser his deposit, with interest, and to pay his costs of investigating the title and the costs of the application."

<u>Requisition proper</u>

Whether a purchaser can establish that the vendor's title is defective is a matter that can only be determined when the matter is before the court. However, if the objections are properly formulated and they show that the pre-intermediate title is defective, the vendor must respond to the requisitions.

In **In re Scott and Alvarez's Contract** [1895] 1 Ch. D.596, the condition of sale provided that :-

> "… the purchaser should be furnished with an abstract of the lease, of the assignment of the lease, and of the subsequent title, and should not make any

> objection in respect of the 'intermediate title' between the lease and the assignment, 'notwithstanding any recital of or reference to such title contained in the assignment or any subsequent document of title, but shall assume that the said assignment vested in the assignees a good title for the residue of the term.' "

The Court of Appeal held that the condition cast upon the purchaser the burden of proving a defective title, and that, to relieve him from his contract, it was not enough for him to shew merely that the title was doubtful or open to suspicion; and, therefore, that the vendor was entitled to a declaration that a good title had been shewn "according to the terms of the contract".

In the present case, the requisition regarding the Power of Attorney goes straight to the validity of the title of the Vendors and not merely showing that the title was doubtful or open to suspicion. In **Reckitt v. Barnett, Pembroke and Slater Ltd.** [1928] KBD 244 Russell J. held at p.268 and p.269 that :-

> "The primary object of a power of attorney is to enable the attorney to act in the management of his principal's affairs. An attorney cannot, in the absence of a clear power so to do, make presents to himself or to others of his principal's property."
>
> "Powers of attorney are to be construed strictly; and where authority to do an act purporting to be done under a power of attorney is challenged, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument either in express terms or by necessary implication : *Bryant's* case. [1893] A.C. 170, 177."

The judgment was expressly approved in the House of Lords [1929] AC 176 by
Lord Hailsham L. C. and Lord Warrington. The dicta of Russell J. was expressly followed in subsequent Hong Kong decisions such as **Overseas Trust Bank Ltd. v. Tang Che Ching and others** (Civil Appeal No.47 of 1989), **Li Ming On v. Lucky Apple Ltd. and Lo Sai Cheong** [1994] 2 HKLR

111 and **Very Cheer Development Ltd. and another v. Bring All Ltd.** [1995] 1 HKLR 213 and **Sham Wing Tai and others v. Ng Ting Biu and others** (HCMP No.524 of 1994). Mr Wong argued that in **Reckitt** the attorney benefitted himself, thus, Russell J.'s judgment that an attorney could not, in the absence of a clear power so to do, make presents to others of his principal's property was by way of obiter only. Likewise, the other Hong Kong cases, except **Sham Wing Tai**, were all concerned with the attorney benefitting himself.

In my view, the principle set out in **Reckitt** is too well established to be disturbed. Although the case itself is concerned with an attorney benefitting himself, the principle that the primary object of a power of attorney is to enable the attorney to act in the management of his principal's affairs forms the corner stone of the rule that an attorney cannot in the absence of a clear power so to do make presents to others of his principal's property. The Power of Attorney in this case was no doubt in very wide terms, but there was no specific provision enabling the attorney to assign by way of gift to others of the donor's property. The Power of Attorney provided that :-

> "… to empower and authorize the person of SHAM KWAN YIU of Sham Ka Wai Village, Pat Heung New Territories, Yuen Long, Hongkong, ---------- ---------- in general ---------- to represent the undersigned in connection with his real properties, estates and buildings situated in the colony of Hongkong, to look after, to perform, to execute and or to take up their rights and interests and in the name and on behalf of the undersigned to do, act, execute and perform the following acts and things which are not limited however to what is mentioned hereinafter :
>
> - To manage, rent, use…
>
> ----------
>
> - Further to do, conduct, carry out, perform and execute all such other acts, matters and things as the attorney shall think fit and proper and in the interest of the undersigned and the undersigned himself should or would do if present on the spot, all such (illegible) acts, deeds and things are included in this power of attorney. ----------

----------"

True that the Purchaser had not said in the requisition that the title was defective but in my view that must be the basis of the requisition because if the attorney had no power to make gift to others, then the person who received the gift could not pass a good title to subsequent assignees of the Property.

Other arguments

Mr Wong argued that it was not shown that the Power of Attorney was the very same instrument which was relied upon by the attorney. This argument has no merits. The Power of Attorney was the only such document registered in the New Territories District Office in respect of the Property. The Assignment of 11th August 1961 was executed shortly after the Power of Attorney. In all probability, that was the very document which the attorney derived his authority.

Likewise, in view of the decision of Bokhary J. (as he then was) in **Leung Woon Chau v. Gladeal Limited** (HCMP No.597 of 1990), the Vendors cannot rely on the presumption in s.13(4A) of the *Ordinance*. The Vendors argued that as the Assignment dated 11th August 1961 was executed under a Power of Attorney, it was conclusively presumed by s.13(4A) that the Power of Attorney was validly executed, and in force at the time of the execution of the Assignment and validly authorised the execution of the Assignment. The presumption is not applicable because the Power of Attorney which was produced at this appeal did not confer on the attorney the express power of making gift of the Property to others.

In any event, the last two points were not relied upon by the Vendors when the Purchasers raised the requisitions. To the requisition, the Vendors' response was simply that they were not required to answer the requisitions because of s.13(1). This was clearly wrong. Based on the failure of the Vendors to answer the first requisition, the learned Judge was right to make the orders in the court below. Whether the Purchaser was entitled to raise the second requisition or not became irrelevant.

Conclusion

The appeal should therefore be dismissed with costs *nisi* to the Purchaser.

Nazareth V-P:

I agree with my Lords that the appeal must be dismissed for the reasons they have given. I would, however, add the following.

In the absence of any contrary intention being expressed in the provisional Sale and Purchase Agreement, by s.13(1)(a)(ii) of the Conveyancing and Property Ordinance, the purchaser is entitled to require from the vendor as proof of title only production of the Crown Lease and intermediate root of title extending to 15 years.

It is not suggested before us, even by Mr Horace Wong for the appellant vendors, that s.13(1) means that the purchaser has no right whatsoever to raise requisitions as to the pre-intermediate root of title. What

he contended for, however, is that the purchaser had to first prove a defective title before the vendor's became subject to a duty to comply with a requisition. But that cannot be right, for, as Ching JA has pointed out in his judgment, there would then be hardly any point to a requisition.

At the other extreme, if a bare possibility of a defect in the title entitles the purchaser to raise requisitions (as in effect Mr Yau for the respondent purchaser suggests in contending that the standard, criteria and relevant duty to provide answers is the same in relation to intermediate title as to pre-intermediate root of title), then as Mr Wong complains, s.13(1) will become pointless.

Of necessity, the criteria must lie between the two extremes. The only formulation of possibly applicable criteria brought to our attention was that in *In re Scott v Alvarez's Contract* [1895]1 ChD 596, to which Cheung J has referred in his judgment. There, under a condition of sale (which is set out in my Lord's judgment), the purchaser agreed to take the property on the term that he would not make any objection in respect of the intermediate title. There had earlier been a change of title apparently by fraud. Nonetheless the vendor had a good possessory title. Lindley LJ held that the purchaser, having entered into that very special bargain, was bound by it. Lopes LJ acknowledged that the title was a somewhat curious one but pointed out that the effect of the condition was to cast upon the purchaser the burden of proving a defective title. He added:

> "To enable the purchaser to escape from his contract, it is not enough for him to shew a doubtful or difficult title: he must shew more: he must shew a defective title."

Kay LJ said:

> "I quite understand the doctrine that, even in the face of a condition like this, if the purchaser can shew there is no title at all, then, notwithstanding the condition, he can say, 'I will not complete the purchase.' But the purchaser in this case cannot shew that there is a bad title; he only shews that there is suspicion."

It seems to me therefore that *In re Scott v Alvarez's Contract* has no inherent applicability to the present circumstances in particular in the condition there requiring the purchaser to show that the title was defective. Nonetheless, the concept of it not being enough to show merely that the title is doubtful or open to suspicion, may prove of assistance in providing a formulation of that which is not sufficient to found an entitlement to raise a requisition as to pre-intermediate root of title.

However that may be, it does not seem to me this Court is in a position to formulate any sort of criteria, if indeed that is possible. Nonetheless, for myself, I am satisfied that having identified the deficiency in the power of attorney, which was an essential link in the chain of title, the purchaser was clearly entitled to raise the requisition he did. The vendors should have been far better placed than the purchaser to provide the answer. More to the point, without being able to comply with the requisition, they would be unlikely to be able to make good title. The requisition was certainly not founded on any bare possibility, doubt or suspicion.

(G.P. Nazareth)	(Charles Ching)	(Peter Cheung)
Vice President	Justice of Appeal	Judge of the High Court

Mr. Horace Wong (M/s. Baker & McKenzie) for Appellant/Defendant

Mr. Albert K.C. Yau instructed by M/s. Leung Kin & Co. for Respondent