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HCA 3725/2001

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**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION**

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D

COURT OF FIRST INSTANCE

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ACTION NO. 3725 OF 2001

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BETWEEN

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HONG KONG SHUI FUNG (HOLDINGS) LIMITED Plaintiff

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H

and

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TOP TALENT DEVELOPMENT LIMITED Defendant

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Before: Deputy High Court Judge Mayo in Court

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Dates of Hearing: 11, 12, 13, 14, 18 & 19 October 2004

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Date of Judgment: 29 October 2004

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1. The Plaintiff entered into a Contract for the purchase of a House being Block A on the Amersham Estate at Repulse Bay (Block A) at the price of HK\$82.2 million. The Defendant was the Vendor.

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2. Very shortly before Mrs Xie of the Plaintiff signed the Provisional Sale and Purchase Agreement, the Defendant had given

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B instructions to Midland Realty Estate Agents (“Midland”) to attempt to sell B
C the property by Private Tender. C

D 3. A Brochure had been prepared which contained a statement D
E that the saleable area of Block A was approximately 6,301 square feet. E

F 4. Mrs Xie’s attention was first drawn to Block A on 20 April F
G 2001. As it happened this was set as the closing date for Tenders to be G
H received for the property. H

I 5. Mrs Xie expressed an interest in Block A. She had learnt that I
J the highest bid made under the Tender was \$78 million. She asked her J
K friend Mr Harry Lam to assist her in obtaining the property. K

L 6. He entered into negotiations and advised Mrs Xie that the L
M Defendant was prepared to sell Block A for \$82.2 million. She was M
interested in purchasing the property at this price.

N 7. In the evening of the following day which was a Saturday Mrs N
O Xie signed a Provisional Sale and Purchase Agreement and gave a cheque O
P to the persons who attended upon her for \$2 million as part payment of the P
Q deposit. The people who attended upon her were representatives of Q
R Midland. Mrs Xie did not insert the Plaintiff’s name in the Provisional R
S Sale and Purchase Agreement at this point of time as she had not decided S
T which of the companies controlled by her husband and herself would be T
U the purchaser. U
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B 8. On Monday 23 April Mrs Xie arranged for her solicitor Mr B
C Chang to come to her office to vet any documents which may be produced C
D by Midland in connection with the proposed purchase. D

E 9. The meeting on Monday morning was attended by E
F representatives of Midland including a Mr Michael Chan. In addition to F
G the Provisional Sale and Purchase Agreement, Mr Chan produced what G
H was described as being a “Supplemental Agreement”. H

I 10. In the context of this litigation, this was an important I
J document. It will be considered in detail later in this judgment. J

K 11. In it the Purchaser was stated to be aware of the existence of K
L unauthorised structures in the basement and those disclosed in the “no L
M objection letter” which had been registered in the Land Registry by M
N Memorial no. 8050161. It was also acknowledged that these structures N
O constituted defects in title and that the Purchaser could raise no O
P requisitions on title in relation to this. Also the contents of the P
Q Supplemental Agreement would not be superceded by the formal Sale and Q
R Purchase Agreement. R

S 12. Mrs Xie gave evidence that it was her understanding that the S
T Supplemental Agreement related to structures falling outside the T
U parameters of the 6,301 square feet of property the Plaintiff was U
V purchasing. V

13. It was the Defendants case that what was being referred to in
the Supplemental Agreement related not only to the relatively small area of

903 square feet, the subject of the letter of no objection but also to the remainder of the unauthorised structures in the basement.

14. The Plaintiff paid the balance of the deposit on 7 May 2001 of \$6.22 million.

15. The formal Sale and Purchase Agreement was exchanged on 11 May and completion was fixed for 20 July 2001.

16. On the same day, Mrs Xie inspected Block A. She was not satisfied that the property corresponded with the description contained in the Brochure previously referred to.

17. She accordingly instructed, Ms Ng, the Architect who she intended would undertake responsibility for the rebuilding of the House, to survey the property. On 25 May, Ms Ng reported that the saleable area of the property only amounted to 3,141 square feet plus 903 square feet included in the letter of no objection. The remaining 2,000 odd square feet constituted an illegal structure.

18. Correspondence was then exchanged between the solicitors representing the parties.

19. The Plaintiff's solicitors requested either formal confirmation that the saleable area was 6,301 square feet or alternatively permission for the Plaintiff's Architect to undertake a survey of the property to ascertain the true position.

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20. The Defendant’s solicitors refused this. Their contention was that no representation had ever been made by the Defendant to the Plaintiff that the saleable area of Block A was 6,301 square feet.

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21. Also placing reliance upon the terms contained in the Supplemental Agreement they claimed that the Plaintiff was not entitled to raise requisitions in relation to the unauthorised structures and that even if they were such requisitions were either out of time or had already been satisfactorily answered.

22. The Defendant did permit a survey to be undertaken by the Plaintiff’s surveyor on 18 July, two days before completion was due to take place.

23. In addition to the unauthorised basement, the surveyor also expressed the opinion that the private entrance on the property was unauthorised as was the concrete platform which had been erected on the premises. Also the internal partition layout did not conform with the latest approved plans.

24. The line taken by the Plaintiff is that the Defendant has been guilty of misrepresentation quite possibly fraudulent misrepresentation in stating that the saleable area of Block A was 6,301 square feet. Alternatively they were guilty of material non disclosure. Also the Defendant had failed to adduce evidence of a good title to the basement area which is not the subject of the “no objection letter” and had not satisfactorily dealt with requisitions properly raised on title.

25. Be that as it may these issues were not resolved in time for completion and the date was put back until 6 August 2001 while correspondence was still being exchanged.

26. Completion did not take place on 6 August and the present proceedings were commenced.

27. For the most part the facts upon which this summary of the position is based are derived from the evidence of Mrs Xie.

28. She was subjected to an able cross examination by Mr Warren Chan SC. He focused in particular upon the meeting at the Plaintiff's office on Monday 23 April 2001 when the representatives from Midland had attended for the purpose of obtaining Mrs Xie's signature to the Supplemental Agreement. Mrs Xie had made arrangements for the Company solicitor Mr Chang to attend for the purpose of perusing the documentation. This would have consisted of the Provisional Sale and Purchase Agreement and the Supplemental Agreement.

29. Mrs Xie had agreed that the Estate Agents had referred to illegal structures. She said that she had inquired about these and had been informed by Mr Chang that where the subject of a sale was a detached house, it would usually be the case that there would be illegal structures. She had been reassured by this and had indeed thought that the illegal structures would have been separate from the property she had been contracting to buy and that she would be getting something extra. When she was pressed by Mr Chan she accepted that she had never inquired of the Estate Agents what the illegal structures were. This does seem to be

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rather surprising particularly as her lawyer was present and available to give advice. It does however need to be borne in mind that it is common ground that Mr Chang had never physically been at the premises and accordingly the amount of assistance that he could give would be limited.

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30. Mrs Xie was also cross-examined in some detail concerning the visit she made to Block A on 11 May 2001. She insisted that she had not noticed any significant discrepancies in relation to the property from the Brochure.

31. In this connection what needs to be borne in mind is Mrs Xie's evidence that it had been the Plaintiff's intention to demolish the building and redevelop the site. She was aware of the fact that any redevelopment of the site would be restricted to the authorised size of the present house and that any unauthorised areas would not be included in the calculation.

32. Mrs Xie agreed that this being the case the most important matter for the Plaintiff was the area which would be available for the company's redevelopment plans.

33. She insisted that from the outset she had proceeded upon the assumption that the area of the House being sold was 6,301 square feet. When she first attended at the site there was a large signboard displayed which referred to the area of the house being 6,301 square feet. The Estate Agents had given her a Brochure which also referred to the area being 6,301 square feet. She had not appreciated any distinction being drawn to the saleable area of property and its usable area.

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34. During the discussions with the Estate Agents on a number of occasions reference had been made to the size of the property and it had been implicit from this that what was being referred to was an area of 6,301 square feet.

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35. There was one rather telling part of Mrs Xie's evidence in this connection. She was asked if she had ever said to anyone when the illegal structures were being discussed that she thought she might be getting more than the 6,301 square feet she had bargained for. She said that she had in the presence of her lawyer Mr Chang and the 2 representatives from Midland. All of them had reacted to this by laughing and apparently thinking that she was rather smart. What is significant if this evidence is believed is that the two Midland representatives must have realised that she was labouring under a misapprehension and did nothing to put the record straight.

36. It may be helpful at this juncture to make some observations upon Mrs Xie's evidence.

37. I was satisfied that she was essentially a truthful and reliable witness. I fully accept her evidence that when she first attended at Block A she was given a Brochure by the representative of Midland and that the Brochure which described the property contained a statement in clear terms that the size of the property being sold was 6,301 square feet. I am also satisfied that all of the discussions which ensued were predicated upon the premise that this was the size of the property and the that the purchase price eventually agreed was on the basis of this square footage.

B 38. I accept that she did not enter the building herself and B
C confined her inspection to the exterior of the premises. In that connection C
D there was no reason for her as a lay person to suspect that approximately D
E 1/3 of the house was an illegal structure. E

F 39. I am satisfied that the issue of illegal structures was raised at F
G an early stage but that the nature and extent of the structures was never G
H explained to Mrs Xie. In the context of the meetings, there was no reason H
I for her to believe that the Plaintiff would not be getting a property of 6,301 I
J square feet which could be redeveloped to that extent. J

K 40. I have no doubt that when she requested Mr Harry Lam to K
L assist her in purchasing the property her instructions were based upon the L
M fact that what was being purchased was a detached house the size of which M
N was 6,301 square feet. Unfortunately we do not have Mr Harry Lam's N
O evidence on this aspect of the matter as he died last year. O
P

Q 41. What is important is that Mrs Xie was adamant that she had no Q
R idea that what the Supplemental Agreement purported to do was to refer to R
S the whole of the basement being an illegal structure and that the purpose of S
T the Agreement was to prevent the Plaintiff from effectively exercising any T
U rights in relation to this. U
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V 42. I have dealt in this judgment with the remaining matters V
involving Mrs Xie. This is the fact that she paid the balance of the deposit
and visited the premises with Ms Ng when it became evident that there
was definitely a problem with the basement. Mrs Xie said that prior to this
her efforts to view the property and inspect it with a surveyor had been

B refused. She resisted any suggestion that her conduct had been such as to B
C adopt the contract after she became aware of the Defendants C
D misrepresentation. D

E 43. Mr Xie also gave evidence. He has fairly recently come from E
F the Mainland. It was for this reason that he had largely left any question of F
G investment in property to his wife as she was much more experienced in G
H this field. H

I 44. He had however attended at the property on 20 April 2001 I
J with his wife and the representatives of Midland. He had gone inside the J
K house. He had not noticed anything amiss. He had had discussions with K
L his wife concerning the purchase of the House and his evidence was L
M generally in conformity with his wife's. M

N 45. Mr WM Lam, a property broker also gave evidence. He said N
O that he had known Mrs Xie for some time and had assisted her in various O
P matters. She had informed him of her intention to purchase a house and P
Q requested his assistance. He had arranged for the inspection tour on 20 Q
R April. R

S 46. As he had been in a small way of business on his own he had S
T thought that a transaction as large as the one Mrs Xie had in mind was T
U beyond the scope of the work he normally undertook. This being the case U
V he had contacted friends of his who were working in Midland where he V
had worked for a number of years. What had been contemplated was that
if and when any commission was received it would be divided amongst
themselves.

47. Mr Ian Cullen, a Surveyor, gave expert evidence for the Plaintiff. He said that the purchase price of \$82.2 million was at the top end of the range of prices for a detached house in Repulse Bay of 6,301 square feet in April 2001. He expressed an opinion that having regard to the illegal structures on the land it was worth much less than this. After considering a number of comparables in the vicinity he valued the property at \$51.7 million. He also expressed the opinion that it was highly unlikely that the Government would agree to issue a letter of no objection for the balance of the basement even if the owner was prepared to pay an additional premium.

48. I accepted Mr Cullen as a truthful and reliable witness.

49. Mr Danual Heung an Architect was the final witness to give evidence for the Plaintiff. His evidence mainly related to the other unauthorised structures on the premises and so far as the main issues in this trial are concerned, it does not add greatly to the evidence already before the Court.

50. The other unauthorised structures which would not be manifest to a lay person were the extra entrance, the platform and the internal layout. These matters are all more relevant to the claim which is being made in relation to material non disclosure.

51. The only witness to give evidence for the Defendant was Mr Tommy Ho a Director of the Company.

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52. He said that the Defendant had hoped to receive \$90 million for Block A.

53. They had instructed Midland to attempt to sell the property by Private Tender.

54. Although the relevant documentation had been prepared by Midland, it had been submitted to him for approval. He had approved the Brochure and in particular had agreed that 6,301 square feet should be the figure to be inserted in the Brochure giving the size of the property.

55. He had been well aware of the fact that an Architect Mr Thomas Hui who had been instructed by the Defendant had in a letter dated 17 May 2000 pointed out that only approximately 4,100 square feet of Block A constituted an authorised structure and that 2,000 odd square feet constituting the basement was an illegal structure.

56. The reason he gave for not referring to this fact in the Brochure was that it was in his opinion only “marketing material”.

57. He said that in his opinion prospective purchasers would make their own inquiries before tendering for the property and they could readily ascertain the true position.

58. Also he thought that representatives of Midland would explain the position to prospective purchasers and take whatever action may be

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necessary to ensure that any contractual document was drafted in such a manner as to draw the purchasers attention to the illegal structures. It would provide that they were purchasing the property with full knowledge of the illegal structures that they were precluded from raising any requisition on title in relation to this.

59. It has to be said immediately that this was a thoroughly unsatisfactory and irresponsible approach to this situation.

60. The next matter which has to be considered is the nature of the relevant documentation.

61. The most important document is the Supplemental Agreement which was intended to provide for the situation pertaining to the unauthorised structures.

62. The English translation is in the following form.

“(Translation)”

Supplemental Agreement for Building with Unauthorised Alteration

Annexure

Date : 23 April 2001

Property: BLOCK A INCLUDING THE GARDENS
FORECOURT AND CAR PARKING SPACES
THERETO AMERSHAM ESTATE NOS. 4-10
BELLEVIEW DRIVE, HONG KONG (“THE
PROPERTY”)

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The Purchaser and Vendor hereby agree to the following supplementary clauses to the Provisional Agreement executed on 23 April 2001 in respect of the Property.

The Purchaser and Vendor hereby agree to the followings:

1. The Purchaser is aware that there exists an unauthorised addition or alternation to the structure:

i.e. In the "BASEMENT" of the Property and as disclosed in the No Objection Letter which has been registered in the Land Registry under M/N. 8050161. ("the Unauthorised Alteration") (Underlining added)
2. The Purchaser is aware that the Government departments, management authority or other relevant organisations may have an action regarding the Unauthorised Alteration. Therefore the Unauthorised Alteration constitutes a defect in the title of the Property.
3. The Purchaser agrees that notwithstanding there is an unauthorised alteration to the Property, the Purchaser is still willing to take the Property. The Purchaser agrees that it will not raise requisitions or objections on the title of the Property as far as the Unauthorised Alteration is concerned.
4. Both parties agree that notwithstanding there are discrepancies between the clauses set out herein and those set out in the formal sale and purchase agreement which will be executed later, both parties are willing to abide by the clauses as set out herein. Both parties warrant that the clauses set out in this supplemental agreement will not be superceded by the formal sale and purchase agreement or other documents. Further, this supplemental agreement will have effect until the formal completion of the sale and purchase of the Property.

For and on behalf of
TOP TALENT
DEVELOPMENT LIMITED

For and on behalf of
HONG KONG SHUI FUNG
(HOLIDNGS) LTD.

(signature illegible)

(signature illegible)

Authorised Signature(s)

Authorised Signature(s)

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Signed by Vendor

Signed by Purchaser

(signature illegible)

Witness (Signed by Agent)”

63. Although this was a court certified translation it was challenged at the hearing. The Chinese version is in this form:

“未經授權改建樓宇私人附加協議

附件

日期： 二零零零年 月廿十三日

有關物業：BLOCK A INCLUDING THE GARDENS FORECOURT AND CAR PARKING SPACES THERETO AMERSHAM ESTATE NOS. 4-10 BELLEVIEW DRIVE, HONG KONG (“該物業”)

買賣雙方就該物業於二零零零年 月廿十三日簽署的一份臨時買賣合約內的條款作以下的補充。

買賣雙方同意如下：

1. 買方知悉該物業有存未經授權的增建物或改建物：

即於物業 “BASEMENT” 及於田土廳登記文件 8050161 No Objection Letter 中所披露。

（ “該等未經授權改建部分” ）。

2. 買方明白政府部門、管理機構或其也有關人等可對該等未經授權改建部分作出追究，因此該等未經授權改建部分會構成該物業的業權瑕疵。

3. 買方同意儘管該物業存有該等未經授權改建部分，買方仍願意接受該物業，並將不會就該等未經授權改建部分作出業權上的質詢或反對。

4. 雙方同意儘管隨後雙方再行簽署的正式合約與此附件內條文有所抵觸，雙方仍願意遵守此附件內的條文。雙方聲明此附件將不會被隨後簽署的正式合約或其他文件所取代，同時此附件的效力將維持至有關該物業的交易正式完成為止。

For and on behalf of 百才發展有限公司 TOP TALENT DEVELOPMENT LIMITED	For and on behalf of 香港瑞豐（集團）有限公司 HONG KONG SHUI FUNG (HOLIDINGS) LTD.
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----- 賣方簽署	----- 買方簽署
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見証人（代理簽署）”

64. I requested the Court Interpreter who was present in Court for his view of the matter and he said that the English description of the property coming within the ambit of the agreement was incorrect.

65. The property referred to was not “In the basement ...” but “At the basement ...”.

66. As I understand it both counsel who are literate in Chinese accepted the Court Interpreter in Court’s translation of the passage.

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B 67. This was a matter of some significance as it is more difficult B
C to argue that the whole basement was being referred to if the Chinese C
D version is the correct one which I find it is. D

E 68. Mr Ho agreed that it had been the Defendant who had supplied E
F this wording to Midland for incorporation in the Agreement. F

G 69. It is difficult not to come to a conclusion that the wording was G
H deliberately drafted in a diffuse manner with the intention of deceiving H
I prospective Purchasers. I

J 70. It would have been a simple matter to refer to the whole J
K basement area of 2,000 odd square feet and state it was an illegal structure. K

L 71. Mr Ho was unable to provide any assistance concerning any of L
M the discussions or negotiations which had taken place between Mrs Xie or M
N Mr Harry Lam of the one part and Midland of the other part. N

O 72. As no one from Midland was called as a witness it was not O
P open to Mr Ho to attempt to make good the denial in paragraph 17 of the P
Q Re amended Defence that Midland had ever orally made any Q
R representations to the Plaintiff. R

S 73. It is perhaps convenient at this juncture to deal with the S
T application which was made by Mr Warren Chan during the course of Mr T
U Ho's cross examination for leave to call two witnesses from Midland Mr U
V Dicky Tsoi and Mr Garry Yeung to give evidence. V

B 74. The reason given for this late application was that the Defence B
C had been taken by surprise by the evidence of Mrs Xie when she claimed C
D that it was her impression that the whole of the basement had not been the D
E subject of the Supplementary Agreement. E

F 75. In particular he placed reliance upon a passage at paragraph 11 F
G of Mrs Xie's original witness statement: G

H "11. On 23 April 2001, my solicitor, Mr Cheung of Messrs H
I Chan & Kong waited for me at my office. He explained to me a I
J letter expressing no objection to illegal structures (Memorial No. J
K 8050161) and a private supplement agreement regarding K
L unauthorized alteration of building ("the Supplementary L
M Agreement"). The contents (of those documents) were that the M
N basement and a small portion of the Property (occupying) with N
O an area of several hundred square feet were structures of O
P unauthorized alteration, and I had to sign (those documents) to P
Q confirm that I had no objection to those structures of Q
R unauthorized alteration. Not until that moment did I know that R
S part of the Property, i.e. the basement and the place of several S
T hundred square feet, were structures of unauthorized alteration. T
U Nonetheless, I thought that those structures of unauthorized U
V alteration were additional usable area which were not included in V
the saleable area of 6,000 odd square feet. Therefore, after
discussion, I confirmed the Provisional Agreement and the
Supplementary Agreement, and said that the purchaser would be
in the name of "Hong Kong Shui Fung (Holdings) Ltd". (i.e.
Plaintiff). Thereafter, I went past that property on numerous
accessions, requested to enter to view the properly, but to no
avian."

P 76. In the light of this evidence he had felt justified in advising his P
Q client that it would not be necessary to call any representatives of Midland Q
R to give evidence. Now having regard to Mrs Xie's change of position he R
S considered that it was necessary to call evidence from Mr Tsoi and Mr S
T Yeung. T
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77. Mr Warren Chan went on to say that it was not the practice of employees of Midland to provide witness statements. Accordingly he did not know whether the evidence given by these gentlemen would assist his client.

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78. Mr Y L Wong opposed this application on two grounds. The first was that Mr Chan had not been taken by surprise. He referred to paragraphs 15 and 16 of Mrs Xie’s supplemental witness statement.

“15. Solicitor Chang told me that he had read the relevant documents and pointed out that the Property had alterations which were unauthorized, i.e. the existence of unauthorised structures. This was the first time that I learnt that the Property had unauthorised structure. Solicitor Chang then explained to me a No-objection Letter and its Supplementary Agreement. According to Solicitor Chang’s explanation, I understood that the basement and other areas of the Property with roughly several hundred feet in total were unauthorised structure, therefore I had to confirm and signed that letter and Supplemental Agreement. Solicitor Chang also said that most of the houses had unauthorized structures for if the alterations were not in accordance with the layout plan, no matter whether they are big or small, they were treated as unauthorized structures. Although I was not completely clear of the contents of the letter and its Supplementary Agreement, and I did not understand the exact condition of the sudden increase of the several hundred square feet area, but I believed that the Property and its saleable area was over 6,300 square feet, if several hundred square feet area were added to the it, it would be bigger than the original 6,300 square feet and had more space.

16. At the moment when I was considering, that two agents then took out the brochures to entice me. They showed me the pictures and description of the Property, and repeated that the Property was my kind of house, very rare in the market. They made every effort to persuade me, they waved the Property’s brochure in front of me and stressed that the area was over 6,300 square feet in size, average price per feet was reasonable, very spacious etc. With all the people talking at the same time to entice me. It was

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under this situation that I signed the Provisional Agreement and the Supplemental Agreement.”

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79. This evidence was basically in conformity with the evidence she gave at the trial.

80. It had thus been apparent to the Defence for a number of months that this would be the evidence which Mrs Xie would be giving.

81. The other point made by Mr Wong was that as Mr Chan had said that he did not know what evidence Mr Tsoi and Mr Yeung would be giving he was in effect seeking a licence to embark upon a fishing expedition.

82. Perhaps more important than all of this Mr Wong referred to the very considerable prejudice his client would suffer if I acceded to Mr Chan’s application.

83. He had run his case on the basis that representatives from Midland would not be giving evidence and he would have to reconsider the whole question of the presentation of his case if Midland representatives were to give evidence.

B 84. I accepted that Mr Chan had not provided sufficient grounds B
C to justify the indulgence he was seeking and that serious prejudice would C
D be occasioned to the Plaintiff. D

E 85. It was for these reasons that I refused to hear Mr Tsoi and Mr E
F Yeung as witnesses. F

G 86. My overall impression of Mr Ho as a witness was most G
H unfavourable. It definitely appeared to me that he was simply attempting H
I to say what he thought might be in the best interests of the Defendant I
rather than telling the truth.

J 87. His attitude towards the description of the property in the J
K Brochure was lamentable. He accepted that in all probability it would be K
L given by Midland to the Plaintiff and he totally failed to take any sensible L
M measures to ensure that they were apprised of the true position. M

N 88. I consider that I can place very little, if any, reliance upon Mr N
O Ho's evidence. O

P 89. There are numerous reasons for this. One example is the P
Q evidence he gave in relation to the value of the house. I do not for one Q
R moment accept his evidence that he thought the house was worth \$90 R
S million in April 2001. This value is far in excess of the value of the S
T property assessed by Mr Cullen. His report was well thought out and T
U referred to a number of relevant comparables. He put the value at \$51.7 U
V million. V

90. It must have been well known to Mr Ho that the value of the property would have been greatly reduced by the fact that the whole of the basement was an illegal structure. He would have known this from the letter he received from his Architect Mr David Hui dated 17 May 2000.

“**THOMAS K. K. HUI** B. ARCH. (H.K.) RIBA., HKIA., AP.
CHARTERED ARCHITECT

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香港大學建築學士
 英國皇家建築師會會員
 香港註冊建築師

Top Talent Development Ltd.,
 Unit 701, Tower 1, Admiralty Centre,
 No. 18 Harcourt Road,
 Hong Kong

17/5/00

Dear Sir,

RBL No. 877,
“Block A” (including the Gardens Forecourt and
Car Parking Spaces thereto) of Amersham Estate
No. 10, Belleview Drive, Hong Kong

I write to report to you that the illegal rectification work regarding the above has now been fully completed and accepted by the Building Authority of the Buildings Department and the Director of Lands Department, and I now repeat in the following the basic information again for you easy reference:

(I) Areas – Original and Increased

(1) The house area (original area)	G/F	1090 sq. ft.
	1/F	1090 sq. ft.
	2/F	1090 sq. ft.

	Tota	3270 sq. ft. (a)

Note

Area calculation based on information by Chartersince Surveyors Ltd.

(2) The increased area as a result of UBWs rectification and lease modification (83.899 m2)		903.09 sq. ft.
	Total	903.09 sq. ft. (b)

(II) Areas – Outstanding illegal portion further rectification work required

The basement floor level **2000** sq. ft. (c)
(next to swimming pool decking)

Total **6173.09** sq. ft. (a) +(b)+(c)

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Note

- The area of this outstanding illegal portion is variable.
- My site measurement makes me believe that it can be fully utilized up to some 249.5 sq. m. or 2685 sq. ft.
- When taking away areas of other elements, such as, part footings, structural walls, party walls, etc. the remaining reachable or usable area will be in the region of some 1800 to 2400 sq. ft., and that is why I make the assumption of 2000 sq. ft. for the above calculations.
- It is necessary to repeat the exercise of UBWs rectification and lease modification and premium payment of Government, before this portion can be considered as acceptable and, hence, “legalized”.

I have full confidence that I can ‘legalize’ the outstanding illegal part for you based on the following reasoning:

- The process of ‘legalization’ work will be the same kind of work for other adjoining houses that I have successfully done.
- Submission and carrying additional structural and adjustment work including slope work will be the same that I have done.

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- Payment of a premium to Government for lease modification for this ‘illegal’ basement will be the same process as the now accepted UBWs on other above floors.

Finally, I would like to point out that this should be a good chance, in fact, your only chance, to increase or ‘legalize’ your basement level area which will add much value or benefit to your house as a whole. Spending a little bit more for the increase of such comfortable and scenic area will, I think, be worth the whole effort. Please consider this proposal, and should you wish to discuss more about the above, please feel freely to contact me.

Yours truly,

Thomas K K Hui

TH/krs”

91. In cross-examination, he was pressed to agree that a Premium of at least \$10 million would be payable to the Government to obtain a modification of the conditions under which the property was held to legalise the unauthorised work on the basement. That is assuming that permission for this might be forthcoming.

92. Mr Ho repeated on a number of occasions that any prospective purchaser contemplating a purchase of this magnitude would make the necessary searches and inquiries before submitting a tender and it would be manifest at an early stage in such a process that the basement was an illegal structure.

93. The facts of this case would indicate that this belief was not well founded. There was evidence that besides the Plaintiff at least one

other party did not undertake the relevant enquiries. I refer to the evidence of the highest tender received on 20 April 2001 of \$78 million. It seems highly probable that this offer was made on the basis of all of the property being a legal structure.

94. What perhaps needs to be emphasised is the misconception of this approach. It is quite wrong for a party to make a misrepresentation and then say that it is up to the party to whom the representation is made to make relevant inquiries so that they might ascertain the true position.

95. This is putting the cart before the horse. There is a duty imposed upon a Vendor of property not to make misrepresentation and it lies ill in the mouth of the party making the representation to say – it does not matter because if the Purchaser is duly diligent he will find out that I have misrepresented the position.

96. At the end of the day the most important issue which has to be determined is whether Mrs Xie was ever informed that the basement of Block A was an unauthorised structure.

97. A convenient starting point in deciding what might be the correct answer to this question is to consider the contents of the Supplemental Agreement. This has been extracted earlier in this judgment.

98. I do not think that on any fair interpretation of this document it could be validly contended that the agreement extended to the whole of the basement of Block A. The simple answer is that it did not extend to the whole of the basement.

- B** 99. The next matter to consider is all of the other available **B**
C evidence on this aspect of the matter. **C**
- D** 100. The evidence of Mrs Xie is crucial in this connection. I have **D**
E referred to it at some length in this judgment. **E**
- F** 101. Mr Warren Chan submitted that I should hold that Mrs Xie **F**
G clearly was aware of the fact that all of the basement was an unauthorised **G**
H structure. **H**
- I** 102. He placed heavy reliance upon the first witness statement **I**
J made by her. **J**
- K** 103. It will have been noted that in paragraph 11 of this Statement **K**
L she says that she had been told that “the basement and a small portion of **L**
M the property ... were structures of unauthorised alteration ...”. **M**
- N** 104. In her supplementary statement she resiled from this evidence **N**
O and claimed that there had been a misunderstanding. She said that what **O**
P she had intended to be referring to was only a small part of the basement. **P**
Q She maintained this position strongly in her evidence in court. **Q**
- R** 105. I believe that it is my duty to have regard to the overall **R**
S situation and not just to consider a single sentence in a statement. **S**
T **T**
- U** 106. I am aware of the fact that the witness statements are prepared **U**
V by solicitors or staff in their offices and often it is the case that the **V**
statement will take a rather different form to what it would have been if the

B client had prepared it himself or herself. I realise of course that the witness B
C does adopt the statement as their true evidence in the trial and that it is a C
D serious matter that any statement should reflect the true position. D

E 107. Mr Warren Chan also submitted that in considering all of the E
F relevant evidence it was apparent that even if a misrepresentation had been F
G made to her she had not placed reliance upon it. G

H 108. In support of this, he referred to the Plaintiff' delay in taking H
I relevant steps to avoid the contract. I

J 109. It was apparent that the Defendants solicitors had delivered the J
K Munimants of title to the Plaintiffs solicitors on 8 May 2001. K

L 110. Amongst the title deeds were the conditions of sale which L
M provided in special condition 16 that the area of the land which could M
N legally be developed was somewhere in the region of 3,000 square feet. N

O 111. Mr Chan argued that if this was a genuine situation the O
P Plaintiff would have immediately realised that all of the 6,301 square feet P
Q could not have been an authorised structure and that representations should Q
R have been made to the Defendants solicitors. R

S 112. I do not accept the validity of this submission. S

T 113. One has to ask oneself the question – why would the solicitors T
U immediately concern themselves with the area of the property? U
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114. It had been described in the Brochure as 6,301 square feet and when the physical inspection of the property had been undertaken there was no reason to doubt the accuracy of this statement.

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115. The basement was presented as part of the property and there would have been nothing obvious to a lay person to indicate that the basement was an illegal structure.

116. In his evidence, Mr Cullen had said that a qualified surveyor's suspicions may have been aroused on account of the low ceiling. However he went on to express the opinion that this would not be apparent to a lay person.

117. I do not think that there is any evidence that the Plaintiff condoned the position or that they had not placed reliance upon any misrepresentation that there may have been.

118. What it is now necessary to do is to weigh all of the relevant evidence in an endeavour to find the answer to the question as to whether Mrs Xie was told that all of the basement was an unauthorised structure.

119. On the one part we have her evidence that she was not told this. In support of this she states that the area of the property was of critical important particularly in the light of her plans to redevelop the property.

B 120. This needs to be considered in conjunction with the evidence B
C of Mr Cullen that the going rate for property in the Repulse Bay area in C
D April 2001 was somewhere in the region of \$9,000 per square foot. D

E 121. It would seem to be unlikely to say the least that Mrs Xie E
F would agree to purchase the house at something approaching double its F
G value if the total legal area being sold was only approximately 4,000 G
square feet. H

H 122. What needs to be balanced against this is the Defence case. H
I

I 123. Mr Ho agreed that he had given instructions to Midland to sell I
J the property. Indeed it was provided in the Provisional Sale and Purchase J
K Agreement that Midland were Agents for both parties. K

L 124. Clearly, he could himself give no evidence as to what L
M transpired other than to state that he left it to Midland to apprise the M
N Plaintiff of the situation. N

O 125. No witnesses from Midland gave evidence. O
P

P 126. It would however be surprising if Midland was very explicit in P
Q spelling out all the implications which might arise as a consequence of a Q
R large part of the property being an unauthorised structure. It is perhaps not R
S being unduly cynical to suggest that Midland's main concern was to ensure S
T that a contract was entered into by the parties thus enabling them to earn T
U the not inconsiderable commission which would be payable to them in U
V such an event. V

127. I think that on the balance of probabilities it is much more likely than not that Midland did not inform Mrs Xie of the fact that all of the basement was an unauthorised structure.

128. There is also the rather telling evidence of Mrs Xie that when she said that she thought she might be getting something over and above 6,301 square feet the Midland representatives laughed. I believe that this evidence rings true.

129. The conclusion I reach as a result of all of this is that I am satisfied that Mrs Xie was not informed that the basement was an illegal structure. Having regard to the contents of the Brochure which I am sure she was given by Midland representatives the Defendant was guilty of misrepresentation.

130. Although the question of fraud was not specifically put to Mr Ho, I am satisfied from all of the surrounding circumstances that he was well aware of the consequences of the course of action he was adopting. He was also fully aware that the basement was an illegal structure and that this had a dramatic negative impact upon the value of the property.

131. In these circumstances, I hold that he was guilty of fraudulent misrepresentation.

132. The finding that the Plaintiff had established misrepresentation on the part of the Defendant has considerable knock on consequences in this litigation.

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133. One consequence of this is to remove from the Defendants the right to place reliance upon the terms and conditions in the Provisional Sale and Purchase Agreement and the Formal Agreement to the effect that the property was being sold in a “as is” condition and that the Plaintiff must be deemed to have made all necessary inquiries in connection with the description of the property and the title to it. This also applies to the time limitation imposed on raising requisitions on title.

134. All of this was considered by Le Pichon J at p. 720 of *Welltech Investment Ltd v Easy Pair Industries Ltd* 1996 4 HKC 711.

“Other defences

Although the DMC and the sub-DMC were provided to the purchaser’s solicitors prior to 20 April 1994, the fact that the purchaser had an opportunity of discovering the falsity of the representations is no defence. It has long been the law that where a person induces another to enter into a contract with him by a material representation which is untrue, it is no defence to an action for rescission that the person to whom the representation was made had the means of discovering, and might, with reasonable diligence, have discovered, that it was untrue: *Redgrave v Hurd* (1881) 20 Ch D 1. I reject the submission that it was in any way incumbent on the purchaser to have asked for the perusal of the DMC and sub-MC or to have sought legal advice prior to signing the provisional agreement. It is not a defence that had he done so he would have discovered the falsity of the representations. Nor is it a defence to say that the misrepresentation was only one of several reasons as to why the purchaser entered into the agreement. See *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 481.”

135. As can be seen Le Pichon J followed the reasoning of Baggallay LJ at p. 22 of *Redgrave v Hurd* 1881 20 Ch D1.

“BAGGALLAY, L.J.:-

Upon the hearing of this action, Mr Justice Fry held, as a conclusion of fact, from the evidence before him, that a

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misrepresentation was made by the Plaintiff to the Defendant as to the amount of his professional business. The learned Judge had the opportunity of hearing and seeing the witnesses, and of observing the manner in which their evidence was given, and it must be a very strong case indeed in which the Court of Appeal, upon a question of fact, entirely depending upon oral testimony, will dissent from the finding of the Court below. Mr Justice Fry also held that the Defendant ought not to be considered as having been influenced by those misrepresentations to enter into the contract, but I am unable to concur in this conclusion. The facts from which that conclusion was drawn were partly proved by oral testimony and partly by written documents. As regards the oral testimony, according to the judgment of Mr Justice Fry, it amounted to this, that opportunities were afforded to the Defendant to ascertain the inaccuracy of the representation made to him, and that to some extent, at least, he had availed himself of those opportunities. The mere fact that a party has the opportunity of investigating and ascertaining whether a representation is true or false is not sufficient to deprive him of his right to rely on a misrepresentation as a defence to an action for specific performance. The person who has made the misrepresentation cannot be heard to say to the party to whom he has made that representation, "You chose to believe me when you might have doubted me, and gone further." The representation once made relieves the party from an investigation, even if the opportunity is afforded."

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136. A further submission which was made by Mr Warren Chan was that it had not been demonstrated that the representative of Midland who described the area of the property being 6,301 square feet was an Agent for the Vendor or the Purchaser.

137. The simple answer to this is that it does not matter. Mr Ho gave evidence of authorising Midland to represent the Vendor and this was sufficient. Authority for this proposition can be found at p. 719 of the judgment of Le Pichon J in *Welltech Investment*.

"Authority of agent

The vendor submitted that Ms Yeung was the purchaser's agent because on completion of the transaction, Ms Yeung's firm

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would be entitled to a commission from the purchaser. But as is clear from the evidence, the purchaser had never been a client either of Ms Yeung or her firm, that she had not agreed to be on their client list, and that Mr Lee had been identified as a potential client by Ms Yeung’s firm in that he was active in the property market and included in their mailing list because CS & Associates considered that he might be interested in acquiring properties. Rather, it was the vendor who had chosen to instruct Ms Yeung’s firm to offer the property for sale.

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In cross-examination, Ms Yeung said that whatever information she gave Mr Lee in the course of the meeting on 29 March and whatever assurances she gave him in the course of that meeting was done by her on the instructions of the vendor. This was not challenged and no evidence was adduced by the vendor to the contrary. Ms Yeung was thus the vendor’s agent.

In any event, as counsel for the purchaser submitted, on the evidence, Ms Yeung was clearly the agent of the vendor at least for the purpose of passing on the misrepresentation to the purchaser. See *Chitty Contracts* (27th Ed) Vol 1 at para 6-014.”

138. Over and above this, it was Mrs Xie’s evidence that all of the representatives who were present referred to the large area of the property and none of them drew her attention to the fact that the basement was an illegal structure.

139. This finding in relation to misrepresentation effectively disposes of this case.

140. As has been indicated earlier, the Plaintiff has also claimed that the Defendant is guilty of material non disclosure and failure to adduce good title to all of the property.

141. The non disclosure relates mainly to the unauthorised entrance and platform and the departures from the Authorised plans for the layout of

B the property. Mr Wong accepted that these claims were mainly made as a B
C make weight if the contentions being advanced on misrepresentation were C
D unavailing. D

E 142. Clearly these claims were well based and there can be no E
F doubt that they have been proved on the balance of probabilities. F

G 143. The same can be said concerning the failure to adduce good G
H title to all of the property. H

I 144. The result of all of this is that the Plaintiff succeeds in its I
J claim. J

K 145. It is entitled to the declaration sought that all of the K
L agreements have been rescinded and that it is absolved from any liability L
M thereunder. M

N 146. It is entitled to the return of deposit of \$8.22 million together N
O with interest at 1% above prime rate. It is also entitled to a Declaration O
P that it shall have a lien over the \$8.22 million held in court together with P
any interest which may have been earned on these moneys.

Q 147. What then remains outstanding is the Plaintiff's claim for Q
R damages. No such claim was proved at the hearing. Mr Wong requested R
S me to order that damages be assessed by a master as a separate exercise. S

T 148. Mr Warren Chan opposed this course being adopted. He cited T
U *Born Chief Co v Tsai George* 1996 2 HKC 282 as authority for the U
V

proposition that unless good cause is shown there should not be a split between a hearing on liability and that on damages. No such cause has been demonstrated in the present case.

149. As it happens this is not a major issue. Mr Wong in my view very sensibly conceded that this was not a case where a large amount of damages was likely to be ordered. The Plaintiffs had never been in possession of Block A and there was no question of their having suffered any other substantial damages over and above the question of the loss of the deposit. This has already been dealt with. The consequence of all of this is that I decline to make any award for damages. I do however make an order nisi that the Plaintiff will have its costs.

(Simon Mayo)
Deputy High Court Judge

Mr Wong Yan Lung, S.C., instructed by Messrs K.C. Ho & Fong, for the Plaintiff

Mr Warren Chan, S.C., leading Mr Liu Man Kin, instructed by Messrs Tai, Tang & Chong, for the Defendant

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