

THE LAW REFORM COMMISSION OF HONG KONG
ADVERSE POSSESSION SUB-COMMITTEE

CONSULTATION PAPER

ADVERSE POSSESSION

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December 2012

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The Sub-committee would be grateful for comments on this Consultation Paper by 15 March 2013. All correspondence should be addressed to:

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THE LAW REFORM COMMISSION OF HONG KONG

ADVERSE POSSESSION SUB-COMMITTEE

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Preface

Terms of reference

1. In August 2006, the Secretary for Justice and the Chief Justice made the following reference to the Law Reform Commission:

"To review the existing rule of adverse possession in Hong Kong and to make such recommendations for reform as the Commission considers appropriate."

The Sub-committee

2. The Sub-committee on Adverse Possession was appointed in September 2006 to consider the above terms of reference and to make proposals to the Commission for reform. The members of the Sub-committee are:

Mr Edward Chan, SC <i>(Chairman)</i>	Senior Counsel
Ms Wendy Chow <i>(until January 2010)</i>	Partner Slaughter and May
Dr Patrick Hase	Historian
Professor Leung Shou Chun	Director Leung Shou Chun Land Surveying Consultants Ltd
Mr Louis Loong	Secretary General Real Estate Developers Association of Hong Kong
Ms Dorothy Silkstone <i>(from October 2011)</i>	Assistant Director/Legal PARD & NTE (Legal Advisory and Conveyancing Office) Lands Department (until April 2012)
Professor Michael Wilkinson	Department of Professional Legal Education University of Hong Kong

Mr David P H Wong	Partner Wong, Hui & Co
Ms Teresa Wong (<i>until June 2011</i>)	Deputy Director/Legal Lands Department
Mr Michael Yin	Barrister
Ms Cathy Wan (<i>Secretary from June 2010</i>)	Senior Government Counsel Law Reform Commission

Meetings

3. The Sub-committee commenced the study of its reference in October 2006 and has held a total of 15 meetings. Views were exchanged also by correspondence. Former officers in charge of the Sub-committee were Senior Government Counsel, Mr Byron Leung and Mr Lee Tin Yan, and Deputy Secretary of Law Reform Commission, Ms Michelle Ainsworth.

Overview of the problem of adverse possession in Hong Kong

4. Adverse possession is the process by which a person can acquire title to someone else's land by continuously occupying it in a way inconsistent with the right of its owner. If the person in adverse possession (also referred to as a "squatter") continues to occupy the land, and the owner does not exercise his right to recover it by the end of a prescribed period, the owner's remedy as well as his title to the land are extinguished and the squatter becomes the new owner. The squatter's new possessory title cannot normally exceed, in extent or duration, that of the former owner.

5. As pointed out by the English Law Commission,¹ the "*ability of a squatter to acquire title by adverse possession is a sensitive issue, and is, from time to time, the subject of hostile public criticism.*"² The public's general impression of adverse possession is that of an aggressive squatter whose wrongful possession is eventually validated by the passage of time. However, adverse possession is applicable to other situations. The more typical case in practice (at least in the United Kingdom) is the landowner who encroaches on a neighbour's land.³ Adverse possession can be invoked also to resolve a defect in title caused by failure to execute a formal conveyance.⁴

¹ English Law Commission, *Land Registration for the Twenty-first Century: A Consultative Document* (Sep 1998, Law Com No 254, Cm 4027).

² Same as above, at para 2.44.

³ English Law Commission, *Land Registration Bill and Commentary* (2001, Law Com No 271), at para 2.70.

⁴ *Bridges v Mees* [1957] Ch 475.

6. The English Law Commission has stated that in England, "adverse possession is also very common".⁵ It was reported during the passage of the Land Registration Bill 2002 through Parliament that:

*"Each year the Land Registry receives over 20,000 applications for registration based in whole or in part on adverse possession. In about three-quarters – 15,000 – of those cases, the applicant is successful in supplanting the previous owner. Many cases are disputed and are the subject of court proceedings or hearings before the Solicitor to the Land Registry or one of his deputies. Around three-quarters of Land Registry hearings involve squatting, and in around 60 per cent of cases, the squatter succeeds in whole or in part."*⁶

7. Locally, an article has stated that the law on adverse possession is difficult, full of vagaries, can be enormously profitable, and very topical.⁷ Cases on adverse possession have reached the Court of Final Appeal on a number of occasions, and some of these cases will be discussed in detail in this paper. We will also discuss how the case law on adverse possession in Hong Kong differs from that in England, as well as the assistance found in authorities from other jurisdictions. We will also consider problems with the existing case law in this area.⁸

8. The statistics shown in the table below is a rough indication of the volume of adverse possession disputes in Hong Kong.⁹

⁵ English Law Commission, "Land Registration Bill and Commentary" 2001, Law Com No 271, at para 2.70.

⁶ Baroness Scotland of Asthal, quoted by S Jourdan, *Adverse Possession* (Butterworths), at Preface. This referred to the position before the change from an un-registered title system to a registered title system.

⁷ Frederick HF Chan, "Adverse Possession: Recent Twists and Turns", *Hong Kong Lawyer*, Oct 2006.

⁸ See Chapters 5 and 6 of this paper.

⁹ The search was conducted in the "All Hong Kong cases" library of www.lexisnexis.com for the relevant period. For cases which were heard by more than one level of court, for example in the Court of First Instance and then by the Court of Appeal, these are counted as two decisions. Decisions made in Chambers (eg. Application for summary judgment, striking out of defence, and entering of partial judgment) are included. The column "Not applicable" includes, for example, cases in which the paper owner was unable to prove good title and had to rely on adverse possession to gain a possessory title. So he was both squatter and the paper owner. Also included are cases in which no final decision on adverse possession was made; for example, where a retrial was ordered. There was one case in 2010 which it is uncertain from the judgment whether the land was urban or New Territories. It was assumed to be urban land. The volume of adverse possession disputes in Hong Kong that reaches the court is not large. This can be explained in part by the fact that multi-storey buildings are predominant in Hong Kong, and hence it is generally more difficult for a flat owner to establish adverse possession against another owner in the building. See also Chapter 6.

	Urban land			New Territories land		
	<i>in favour of the squatters</i>	<i>in favour of the paper owners</i>	<i>Not applicable</i>	<i>in favour of the squatters</i>	<i>in favour of the paper owners</i>	<i>Not applicable</i>
2011 (15 cases)	4	2		4	5	
2010 (16 cases)	2	3	1	5	4	1
2009 (18 cases)	1	3		2	10	2
2008 (15 cases)	2	2		3	8	
2007 (10 cases)		3		3	4	
2006 (11 cases)	1	2		5	3	
2005 (9 cases)					9	
2004 (11 cases)		1		4	6	
2003 (8 cases)	2	1		2	3	
2002 (13 cases)	2	1		4	6	

9. The law on adverse possession also touches upon human rights issues. In the English case of *JA Pye (Oxford) Ltd v Graham*,¹⁰ the judge held at first instance, that a squatter had established a possessory title to Pye's land, but the decision was reversed by the Court of Appeal. The

¹⁰ See discussion in Chapter 2.

Judicial Committee of the then House of Lords considered the law on adverse possession and found in favour of the squatter. The freehold landowner, *JA Pye (Oxford) Ltd* took the case to the European Court of Human Rights and claimed against the Government of the United Kingdom on the ground that the statute on the limitation period was in contravention of the European Convention on Human Rights. The Chamber of the former Fourth Section of the European Court of Human Rights decided that the English law on adverse possession had violated the Convention. The decision was subsequently reversed, however, by the Grand Chamber of the European Court of Human Rights by a majority of the ten to seven.¹¹

Format of the Consultation paper

10. Chapter 1 of this consultation paper examines briefly the existing law on adverse possession and the requirements for proving adverse possession in Hong Kong. Chapter 2 considers the justifications for adverse possession, including within the context of relevant human rights principles. Chapter 3 reviews the law on adverse possession in other jurisdictions. Chapter 4 sets out the surveying and land boundaries problem in the New Territories of Hong Kong. Chapter 5 explains the un-registered and registered land title system, and the Land Titles Ordinance (Cap 585). Chapter 6 discusses some legal issues relating to adverse possession and Chapter 7 sets out the tentative recommendations of the Sub-committee. Chapter 8 is a summary of the recommendations.

11. We emphasise that this is a consultation paper and the recommendations presented here are put forward to facilitate discussion. We welcome views, comments and suggestions on any issues discussed in this paper. The Sub-committee and the Commission will carefully consider all responses in drawing up final recommendations in due course.

¹¹ See discussion in Chapter 2.

Chapter 1

The existing law on adverse possession

1.1 This chapter will discuss in detail various aspects of adverse possession, including the importance of possession, proving adverse possession, and the relevant provisions of the Limitation Ordinance (Cap 347).

The relevant law

1.2 The basic rules relating to acquisition of land through adverse possession are found in the Limitation Ordinance (Cap 347) and relevant case law.

Limitation Ordinance (Cap 347)

1.3 Relevant provisions in the Limitation Ordinance are set out below:

"Limitation of actions to recover land

Section 7 (1) No action shall be brought by the Crown to recover any land after the expiration of 60 years from the date on which the right of action accrued to the Crown or, if it first accrued to some person through whom the Crown claims, to that person.

(2) No action shall be brought by any other person to recover any land after the expiration of 12 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person:

Provided that, if the right of action first accrued to the Crown through whom the person bringing the action claims, the action may be brought at any time before the expiration of the period during which the action could have been brought by the Crown, or of 12 years from the date on which the right of action accrued to some person other than the Crown, whichever period first expires.

Accrual of right of action in case of present interest in land

Section 8 (1) Where the person bringing an action to recover land, or some person through whom he claims, has been in possession thereof, and has while entitled thereto been dispossessed or discontinued his possession, the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance.

Right of action not to accrue or continue unless there is adverse possession

Section 13(1) No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (hereafter in this section referred to as adverse possession) and where under the foregoing provisions of this Ordinance any such right of action is deemed to accrue on a certain date and no person is in adverse possession on that date, the right of action shall not be deemed to accrue unless and until adverse possession is taken of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action shall no longer be deemed to have accrued and no fresh right of action shall be deemed to accrue unless and until the land is again taken in adverse possession."

1.4 In other words, except in the case of Government land, for which the limitation period is 60 years, no action to recover land is allowed after twelve years from the date upon which the right of action accrued. Time does not run simply because the land is unoccupied. Time only starts to run when the landowner has been dispossessed of his land or where he has discontinued use of his land, and the adverse possessor has taken possession of the land. The provisions allow the limitation period to be accumulated by a series of periods of adverse possession by different possessors, provided at no time during the twelve years there has been a break in adverse possession.¹ The effect of a successful claim to adverse possession is that the paper owner's title (ie, the owner of the property "on paper") is completely extinguished.

¹ *Wong Kar Shue & Others v Sun Hung Kai Properties Ltd & Anor* [2006] 2 HKC 600.

1.5 The provisions in the Limitation Ordinance (Cap 347) can cause hardship to land owners in some circumstances. There was judicial comment that:

*"A frequent justification for limitation periods generally is that people should not be able to sit on their rights indefinitely, ... However if as in the present case the owner of land has no immediate use of it and is content to let another person trespass on the land for the time being, it is hard to see what principle of justice entitles the trespasser to acquire the land for nothing. ... I believe the result is disproportionate, because ... it does seem draconian to the owner, and a windfall for the squatter"*²

1.6 On the other hand, in *Sze To Chun Keung v Kung Kwok Wai David*³ it was also observed that: "... the Limitation Ordinance is not concerned with whether the defendant has acquired a title but with whether the plaintiffs' right of action has been barred."⁴

1.7 The purpose of statutes of limitation, as explained in *Adnam v Earl of Sandwich*⁵ was:

*"The legitimate object of all Statutes of Limitation is no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principle that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for so long a time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties"*⁶

Possession

1.8 The rationale behind adverse possession of land is that "a person who takes possession of land, albeit wrongfully to begin with, acquires a possessory title to the land which, after the expiration of twelve years, is good against the whole world." In the early law, the concepts of ownership and possession were not clearly separated, and possession was explained through the concept of "seisin" which was a question of fact, rather than a question of right.⁷ From the fifteenth century onwards, "seisin" "became

² Per Neuberger J, *JA Pye (Oxford) Holdings Ltd v Graham* [2000] Ch 676. This case was then considered by the House of Lords and also in the European Court of Human Rights. See Chapter 5 for a further discussion of this case.

³ [1997] 1 WLR 1232.

⁴ Per Lord Hoffmann at 1236.

⁵ (1877) 2 QBD 485.

⁶ Per Field J at 489.

⁷ S Panesar, "The importance of possession in the common law tradition", *Coventry Law Journal*, Cov LJ 2003, 8(1), 1-13.

*confined to persons who held an estate in freehold, and 'seisin' gave a presumption of ownership of land."*⁸

1.9 Given that possession raises a presumption of ownership, and that the common law tradition regards ownership as a relative concept as opposed to an absolute one, a possessory title is one that is good against everyone except the true owner.⁹

Proving adverse possession

1.10 In *Shine Empire Ltd v Incorporated Owners of San Po Kong Mansion*, Yuen JA said:

*"The House of Lords in Pye has said that whilst the term 'adverse possession' should be avoided as no intention of hostility to the paper title owner is required (paras. 36, 69), it is still necessary for the party ('the squatter') claiming that it has dispossessed the paper title owner to prove two separate elements: (1) a sufficient degree of factual possession in the sense of physical control, and (2) an intention to possess. To establish factual possession, the squatter has to show absence of the paper title owner's consent, a single and exclusive possession and such acts as demonstrated that in the circumstances, in particular, the nature of the land and the way it was commonly used, it had dealt with it as an occupying owner might normally be expected to do and that no other person had done so (para. 41). To establish an intention to possess, the squatter has to show that he intended to occupy and use the land as his own (para. 71), to exclude the world at large, including the paper title owner, so far as was reasonably possible."*¹⁰

Factual possession

1.11 To prove adverse possession, a squatter must establish that he has both the physical possession of the land and the required intention to possess it (*animus possidendi*).¹¹ As an owner is presumed to be in possession of the land,¹² a squatter must establish that he has taken a sufficient degree of exclusive physical control of the land.¹³ In *Powell v McFarlane*, Slade LJ said:

⁸ Same as above.

⁹ Same as above.

¹⁰ *Shine Empire Ltd v Incorporated Owners of San Po Kong Mansion* [2006] 4 HKLRD 1, at para 28.

¹¹ *Buckinghamshire County Council v Moran* [1990] Ch 623, at 636.

¹² *Powell v McFarlane* (1977) 38 P & CR 452, at 452 and 470.

¹³ *Powell v McFarlane* (1977) 38 P & CR 452, at 471.

*"Factual possession signifies an appropriate degree of physical control. It must be a single and conclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time."*¹⁴

This is a question of fact, hinging on all circumstances, especially the nature of the land and the manner in which it is usually enjoyed.¹⁵

1.12 The core concept is that the possession must be wrongful, and adverse possession has been described as "*possession as of wrong*".¹⁶ It is, however, not required that the possession be hostile.¹⁷ Lord Hope of Craighead explained the word "*adverse*" in the *Pye* case as follows:

*"It is plainly of some importance, both now and for the future, to understand what the use of the word 'adverse' in the context of section 15 of the Limitation Act 1980 was intended to convey. At first sight, it might be thought that the word 'adverse' describes the nature of the possession that the squatter needs to demonstrate. It suggests that an element of aggression, hostility or subterfuge is required. But an examination of the context makes it clear that this is not so. It is used as a convenient label only, in recognition simply of the fact that the possession is adverse to the interests of the paper owner or, in the case of registered land, of the registered proprietor. The context is that of a person bringing an action to recover land who has been in possession of land but has been dispossessed or has discontinued his possession: paragraph 8 of Schedule 1 to the 1980 Act. His right of action is treated as accruing as soon as the land is in the possession of some other person in whose favour the limitation period can run. In that sense, and for that purpose, the other person's possession is adverse to his. But the question whether that other person is in fact in possession of the land is a separate question on which the word 'adverse' casts no light."*¹⁸

¹⁴ *Powell v McFarlane* (1977) 38 P & CR 452, at 470.

¹⁵ *Powell v McFarlane* (1977) 38 P & CR 452, at 452 and 471.

¹⁶ *Buckinghamshire County Council v Moran* [1990] Ch 623, at 644D, per Nourse LJ.

¹⁷ It has been suggested that adverse possession "*must be peaceable and open*" (*Browne v Perry* [1991] 1 WLR 1297, at 1302, per Lord Templeman). See also "*open, not secret; peaceful, not by force; and adverse, not by consent of the true owner*" in *Mulcahy v Curramore PEY Ltd* [1974] 2 NSW LR 464, at 475.

This is regarded as incorrect in principle. "*Although such requirements must be satisfied in relation to claim to an incorporeal hereditament founded on prescription, such a claim rests upon a presumption that the enjoyment has been as of right. Adverse possession is, by contrast, 'possession as of wrong' and there seems no reason to restrict its operation to instances where possession was taken without force and was apparent.*" C Harpum (ed), *Megarry & Wade: The Law of Real Property* (Sweet & Maxwell, 6th ed, 2000), at para 21-018.

¹⁸ *JA Pye (Oxford) Holdings Ltd v Graham* [2000] Ch 676, at para 69.

Similarly, Lord Browne-Wilkinson also clarified the concept in that case:

"It is sometimes said that ouster by the squatter is necessary to constitute dispossession: see for example Rains v Buxton (1880) 14 Ch D 537, 539 per Fry J. The word 'ouster' is derived from the old law of adverse possession and has overtones of confrontational, knowing removal of the true owner from possession. Such an approach is quite incorrect. There will be a 'dispossession' of the paper owner in any case where (there being no discontinuance of possession by the paper owner) a squatter assumes possession in the ordinary sense of the word."¹⁹

1.13 The kind of conduct that suggests possession varies with the type of land in question.²⁰ Enclosure is "*the strongest possible evidence of adverse possession*",²¹ but is not necessarily conclusive.²² Trivial acts will not be sufficient, since exclusive control is essential to establish adverse possession and also because of the presumption that the paper owner remains in possession of the land.²³ In addition, a squatter himself has no need to be in physical possession of the land; it suffices if a squatter grants a tenancy or licence and his tenant or licensee possesses the land on his behalf.²⁴ Where a squatter has proved factual possession, the mere fact that the true owner asks the squatter to leave does not terminate the squatter's possession.²⁵ Time will continue to run against the owner until the squatter vacates the land or acknowledges the owner's title or a writ for possession is issued.²⁶

1.14 The need for acts to be unequivocal was set out in *Powell v McFarlane* as quoted in the *Pye* case:

"76. ... It is in cases where the acts in relation to the land of a person claiming title by adverse possession are equivocal and are open to more than one interpretation that those acts will be insufficient to establish the intention to possess. ...

77. The conclusion to be drawn from such acts by an occupier is recognised by Slade J in Powell v MacFarlane, at p.472:

'If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the

¹⁹ Same as above, at para 38.

²⁰ *Wuta-Ofei v Danquah* [1961] 1 WLR 1238, at 1243, per Lord Guest.

²¹ *Seddon v Smith* (1877) 35 LT 168, at 169.

²² *George Wimpey & Co Ltd v Sohn* [1967] Ch 487.

²³ *Boosey v Davis* (1987) 55 P & CR 83.

²⁴ *Wong Kar Sue & Ors v Sun Hung Kai Properties Ltd & Anor* [2006] 2 HKC 600.

²⁵ C Harpum (ed), *Megarry & Wade: The Law of Real Property* (Sweet & Maxwell, 6th ed, 2000), at 21-018.

²⁶ *Mount Carmel Investments Ltd v Peter Thurlow Ltd* [1988] 1 WLR 1078.

courts will treat him as not having had the requisite animus possidendi and consequently as not having dispossessed the owner'.²⁷

Animus possidendi (intention to possess)

1.15 Apart from showing factual possession, a squatter must establish the requisite intention, ie, "*an intention for the time being to possess the land to the exclusion of all other persons, including the owner*".²⁸ He is not required to intend to own or acquire the ownership of the land.²⁹ Even if both an owner and the squatter mistakenly believe that the land belongs to the latter, or the squatter does not realise that he is trespassing on another person's land, the required intention can still be established.³⁰ The required intention must be determined objectively: "*intent has to be inferred from the acts themselves*", and evidence of the squatter's past or present declarations as to his intention is regarded as self-serving.³¹

1.16 A squatter must manifest the required intention unequivocally, so that it is clear that the squatter is not just a persistent trespasser.³² Unequivocal acts are acts that show an intention to exclude the owner:

"They are likely to be acts of exclusive physical possession rather than acts which, while associated with ownership, are of a more marginal character and might be equally consistent with an intention to profit or derive some enjoyment from the land."³³

1.17 If the squatter's acts are equivocal, he will not be treated as having the requisite *animus possidendi*.³⁴ Whether an act is equivocal or unequivocal depends on the circumstances of the case, while some acts are more likely to be regarded as unequivocal:

"but such acts as fencing, the building of permanent structures, or full-scale farming or cultivation of the land by way of ploughing and harvesting are more likely to be regarded as unequivocal than grazing, the harvesting of the natural produce of the land, or the erection of temporary structures."³⁵

²⁷ *JA Pye (Oxford Holdings Ltd v Graham* [2000] Ch 676, at paras 76 to 77.

²⁸ *Buckinghamshire County Council v Moran* [1990] Ch 623, at 643.

²⁹ *Buckinghamshire County Council v Moran* [1990] Ch 623, at 643.

³⁰ *Hughes v Cork* [1994] EGCS 25; *Prudential Assurance Co Ltd v Waterloo Real Estate Inc* [1997] 17 EG 131.

³¹ *Powell v McFarlane* (1977) 38 P & CR 452, at 476 to 477.

³² *Powell v McFarlane* (1977) 38 P & CR 452, at 480.

³³ S Nield, *Hong Kong Land Law* (Longman, 2nd ed, 1998), at 169.

³⁴ C Harpum (ed), *Megarry & Wade: The Law of Real Property* (Sweet & Maxwell, 6th ed, 2000), at para 21-019. *Tecbild Ltd v Chamberlain* (1969) 20 P & CR 633 at 642 (grazing ponies and allowing children to play on the land: insufficient); *Powell v McFarlane* (1977) 38 P & CR 452, at 472 (grazing a cow, shooting, and taking pasturage by a 14-year-old boy regarded as a taking of profits from the land rather than as evidence of an intention to dispossess); *Buckinghamshire County Council v Moran* [1990] Ch 623, at 642.

³⁵ S Nield, *Hong Kong Land Law* (Longman, 2nd ed, 1998), at 169.

Effect of adverse possession

1.18 If a squatter can prove adverse possession for a period of at least twelve years, both the owner's right of action to recover the land and his title to it are extinguished.³⁶ According to section 17 of the Limitation Ordinance (Cap 347):

"(s)ubject to the provisions of section 10, at the expiration of the period prescribed by this Ordinance for any person to bring an action to recover land (including a redemption action), the title of that person to the land shall be extinguished."

Nature of the title acquired by a squatter by way of adverse possession

1.19 Because of the principle of the relativity of title, on the basis of his adverse possession and the lack of a better title, a squatter will hold a new estate which is subject to any third party rights which run with the land and have not been extinguished, such as easements and restrictive covenants.³⁷ Even before extinguishing the paper owner's title, a squatter acquires an inchoate or incipient title which is good against the world, except against those who can prove a better title.³⁸ The squatter can even sue a trespasser for trespassing and strangers in nuisance.³⁹

Adverse possession considered in the Court of Final Appeal

1.20 The Court of Final Appeal has further explained "*the intention to possess*" in adverse possession cases. In *Wong Tak Yue v Kung Kwok Wai & Another*,⁴⁰ it was held that, after the termination of the lease, a squatter's intention to pay rent to the owner would destroy the necessary intention to possess.⁴¹ Li CJ dismissed the squatter's claims and held that:

³⁶ Sections 7 and 17 of the Limitation Ordinance (Cap 347). This follows the amendment made to Cap 347 in 1991 by section 5 of the Limitation (Amendment) Ordinance 1991. Prior to that point, the limitation period for recovery of land was 20 years. The 12 year limitation period applies to rights of action which accrued after 1 July 1991: S Nield, *Hong Kong Land Law* (Longman, 2nd ed, 1998), at 169. Section 7(1) of the Ordinance stipulates that no action shall be brought by the Government to recover land after the expiration of 60 years from the date on which the right of action accrued to the Government.

³⁷ C Harpum (ed), *Megarry & Wade: The Law of Real Property* (Sweet & Maxwell, 6th ed, 2000), at para 21-057 and 21-67. *Re Nisbet & Potts' Contract* [1906] 1 Ch 386. After extinguishing the title of the lessee paper owner, a squatter will not replace the paper owner as the new lessee. If the squatter, however, takes advantage of the lease, he may "estop" from denying that he holds under it and will be bound by the covenants: S Jourdan, *Adverse Possession* (Butterworths, LexisNexis, 2003), at paras 24-46 and 24-57.

³⁸ Gray and Gray, *Elements of Land Law* (Butterworths, 3rd ed, 2000), at 278. *Hunter v Canary Wharf Ltd* [1997] AC 655, at 703E.

³⁹ Gray and Gray, *Elements of Land Law* (Butterworths, 3rd ed, 2000), at 278. *Hunter v Canary Wharf Ltd* [1997] AC 655, at 688E to 689D.

⁴⁰ [1998] 1 HKLRD 241.

⁴¹ Note however that the position in England on this issue is different. See discussion below on *JA Pye (Oxford) Ltd v Graham* [2002] 3 WLR 221.

"A person claiming to be in adverse possession must be shown to have both possession and the requisite intention to possess. ... [the squatter's] affirmation and that of his daughter established as a matter of fact that since the expiry of the seven-year tenancy in April 1964, his intention had been that he was willing to pay rent to the owners if they had requested payment and that he was ready and able to do so. The statements on affirmation were against interest and the Court would give them considerable weight. In my judgment, such an intention is plainly and completely inconsistent with the intention to possession That being so, he has no arguable case on limitation."

1.21 The position, however, is different for a squatter who received rent through a tenancy. In *Cheung Yat Fuk v Tang Tak Hong & Others*,⁴² the Court of Final Appeal ruled that a squatter could successfully establish adverse possession through a tenancy by receipt of rent. Bokhary PJ held that:

"When a squatter grants a tenancy and receives rent, he is acting inconsistently with the title of the paper owner, and that puts the squatter in adverse possession of the land through his tenant. The squatter can in that way acquire a possessory title to the land through his tenant's occupation of the land."⁴³

Adverse possession considered by the House of Lords in JA Pye (Oxford) Ltd v Graham⁴⁴

1.22 The decision of the House of Lords in this case highlighted the importance of possession as the basis of a successful claim of adverse possession. The House of Lords decision was further considered by the European Court on Human Rights. The decision of the European Court on Human Rights will be discussed together with other human rights issues in the next chapter. In this chapter, we will set out the facts, and the clarifications given by the House of Lords on the requirements to claim adverse possession.

JA Pye (Oxford) Ltd v Graham – the facts

1.23 The Grahams were a farming family and they claimed a possessory title to 25 hectares of agricultural land owned by *JA Pye (Oxford) Ltd* as part of its land bank. The Grahams based their claim on section 15 of the Limitation Act 1980 which stipulated a limitation period of twelve years from the date on which the right of action accrued to the owner. For £2,000 the Grahams were granted a grazing agreement by *Pye*, and the agreement expired on 31 December 1983. Despite the requests to vacate, the Grahams

⁴² (2004) 7 HKCFAR 70.

⁴³ Same as above, at 78.

⁴⁴ [2000] Ch 676 (Ch D); [2002] UKHL 30; [2003] 1 AC 419 (HL).

remained on the land without further payment. However, the Grahams offered orally to take a fresh licence and to pay, though no further agreement was concluded. After 1986, *Pye* did very little in relation to the land, until 1998, when *Pye* brought proceedings to recover the land.

1.24 The Grahams argued that they had taken possession of the land since 1984. *Pye's* contention was that the Grahams had at no time dispossessed them: first, because the use of the land was under a grazing agreement until 31 December 1983; second, after the expiry of the agreement the Grahams were willing to pay for the use of land, so as such the Grahams were not acting as owners of the land.

The court decisions

1.25 *Pye* brought possession proceedings and at first instance, the judge held that time had begun to run against *Pye* since 1984, after the expiration of the licence agreement, so the Grahams had dispossessed *Pye* for 12 years. The Court of Appeal reversed this finding and held that there could be no finding of dispossession for the period between 1984 and 1986, because the Grahams were using the land in the hope that a new licence agreement might be forthcoming. The Court of Appeal held that *Pye* was still within the limitation period to claim the land back.

1.26 The House of Lords reversed the decision of the Court of Appeal and held that, on the facts, the Grahams had established both factual possession and the intention to possess for the requisite period. Lord Browne-Wilkinson explained that two elements are required of the acts needed for possession: first, a sufficient degree of physical custody and control ("factual possession"); secondly, an intention to exercise such custody and control for his own benefit ("intention to possess"). What was required was not an intention to own or even an intention to acquire ownership, but an intention to possess. It was also held that the Grahams' willingness to pay for the occupation of the land did not matter provided they had the necessary possession at all times.

Encroachment

1.27 Closely relating to the law on adverse possession is the law on encroachment by tenants. In broad terms a tenant encroaching on land is presumed to have done so for the benefit of his landlord and as such unless the presumption is rebutted, at the end of the limitation period, the encroached land is deemed in law to form part of the land demised under the original tenancy such that at the end of the tenancy he would have to surrender back to his landlord both the land originally demised and also the encroached land. The number of encroachment cases in Hong Kong is small and we do not propose to make any review or proposal in relation to the law on encroachment.

Divergence between Hong Kong and English Law

Wong Tak Yue

1.28 The law in Hong Kong now diverges with this. In Hong Kong, if a squatter in possession of land had the intention to pay rent if the owners had requested it, then the squatter was not intending to exclude the paper owner.⁴⁵ In *Wong Tak Yue*, the Court of Final Appeal held that willingness to pay rent is completely inconsistent with the intention to possess. In *Pye*, as noted above, Lord Browne-Wilkinson held otherwise.

1.29 Some authors have raised the question of whether the Court of Final Appeal will in future follow its own decision in *Wong Tak Yue* or apply the *Pye* principles.⁴⁶ It would seem that the lower courts in Hong Kong are bound not to follow *Pye* to the extent it conflicts with *Wong Tak Yue*. However, in all other respects *Pye* has been accepted as a correct statement of the law and has since been applied by the Courts in Hong Kong on numerous occasions.

1.30 It should be noted that despite the *Pye* decision, which represents the high watermark of adverse possession cases,⁴⁷ the application of adverse possession is being substantially undermined in England by the Land Registration Act 2002, as it has become much more difficult for squatters to obtain registered land by adverse possession.⁴⁸

Common Luck

1.31 In *Common Luck Investment Ltd v Cheung Kam Chuen*⁴⁹ the question was: At what point is the mortgagee's right to recover possession of the property time-barred under section 7(2) of the Limitation Ordinance (where a mortgagor remains in possession of mortgaged property, but fails to make any repayment of capital or interest)?

1.32 The facts briefly are: A mortgagor owned a piece of land in Yuen Long in 1964 and a mortgage (in Form B to the Schedule of the New Territories Ordinance (Cap 97)) was executed. In consideration of a loan, the property was assigned to the bank as security for repayment of the loan in one year. The mortgagor defaulted in repayment on the due date, and the bank went into liquidation. No steps were taken to take possession of the property. In 1977, the Official Receiver as liquidator of the bank sold the property to *Common Luck*, and the mortgagor continued to live on the property. In 1991, the Government resumed the land and paid \$517,492.80 as compensation. At first instance it was held that the mortgagor was in

⁴⁵ The principle is applied in *Hong Kong Kam Lan Koon Ltd v Realray Investment Ltd* (No 5) [2007] 5 HKC 122.

⁴⁶ The Court of Appeal in *Yu Kit Chiu v Chan Shek Woo* [2011] HKEC 244 mentioned that they were bound by *Wong Tak Yue*.

⁴⁷ M Dray, "Whose land is it any way? – Title by adverse possession" L & T Review 2003, 7(3), 40-42.

⁴⁸ England's Land Registration Act 2002 is discussed in Chapter 3 below.

⁴⁹ [1999] 2 HKC 719.

adverse possession of the land after the expiry of the due date for repayment of the loan. In the circumstances, upon the expiration of 20 years (which was the limitation period applicable at that time), namely in 1985, the mortgagor acquired a good possessory title to the property, and was therefore entitled to the compensation. The decision was affirmed by the Court of Appeal. The matter then went to the Court of Final Appeal.

1.33 As pointed out by Harpum,⁵⁰ given that a mortgage is simply a security for moneys owed, and once a mortgagee's personal remedies against the mortgagor are barred, his rights of enforcement against the land should also be extinguished. Harpum's analysis is that:

- The limitation period would run from the date on which the cause of action accrued. As the action was one for possession, the cause of action would necessarily have accrued on the date from which the mortgagee first had a right to possession.
- Normally, a mortgagee has a right to possession from the date of the mortgage,⁵¹ but a mortgagee may agree that he will not take possession for a specified period.⁵²
- Under section 23(1) of the Limitation Ordinance,⁵³ in the usual case, where the mortgagor makes regular payments of interest and / or capital, for the purposes of the Ordinance, time starts to run afresh from the date of each payment.
- In the *Common Luck* case, since no payments of interest or capital having ever been made, the mortgagee's rights would have been barred and extinguished under sections 7(2) and 17 of the Limitation Ordinance in 1984 – 20 years after the mortgage had been executed.
- The mortgagor would therefore have been entitled to the compensation payable by the government on resumption of possession in 1991.

1.34 The English position is set out in *National Westminster Bank PLC v Ashe*.⁵⁴ The main point in contention was whether the mortgagors,

⁵⁰ "Limitation and the Defaulting Mortgagor in Possession" (2001) HKLJ 5.

⁵¹ "The mortgagee may go into possession before the ink is dry on the mortgage unless there is something in the contract, express or by implication, whereby he has contracted himself out of that right": *Four-Maids Ltd v Dudley Marshall (Properties) Ltd* [1957] Ch 317, 320, per Harman J. In practice, mortgagees do not take possession in the absence of default because on doing so, they become accountable to the mortgagor not only for the rents and profits that they receive, but for those which they ought to have received.

⁵² That operates as a re-demise to the mortgagor for the period in question, and time will not run against the mortgagee until the expiry of the term. *Wilkinson v Hall* (1837) 3 Bing NC 508.

⁵³ "Where there has accrued any right of action (including a foreclosure action) to recover land ... and ... in the case of a foreclosure or other action by a mortgagee, the person in possession as aforesaid or the person liable for the mortgage debt makes any payment in respect thereof, whether of principal or interest, the right shall be deemed to have accrued on and not before the date of the acknowledgement or payment."

⁵⁴ [2008] 1 WLR 710.

who were in exclusive possession of their mortgaged house, were in "adverse possession" of it for the purposes of the Limitation Act 1980. Mummery LJ held that the meaning given to "adverse possession" in *Pye*⁵⁵ is of general application to actions for the recovery of land. Possession is to be given its ordinary meaning. The Bank's right of action and its tolerance of the mortgagor's possession did not prevent the mortgagor from being in ordinary possession of the property. The nature of this possession did not prevent time running against the Bank once its cause of action had accrued, or had accrued afresh by reason of a part payment. Mummery LJ also quoted the views of the Law Commission in their report which led to the enactment of the Land Registration Act 2002.⁵⁶ It was stated that the mortgagor is in adverse possession for the purposes of the Limitation Act 1980 "because the land subject to the charge is in the possession of some person in whose favour the period of limitation can run The mortgagor does not in any sense have to be a 'trespasser' for these purposes".⁵⁷

1.35 In the Court of Final Appeal, the decision of the Court of Appeal was reversed. The Court of Final Appeal took the view that until foreclosure by order of the court, or sale by the mortgagee in realizing his security, the Mortgagor in default has an equitable right to redeem. The mere act of default does not convert the Mortgagor into a trespasser. The Mortgagor's right of possession flows from the mortgage itself and he remains on the property upon default with an implied licence. He cannot be regarded as "a squatter of his own home".

1.36 In relation to the Court of Final Appeal's decision, Harpum commented that:

"The Court unfortunately assumed that for the mortgagor's possession to be adverse to the mortgagee, he had to be a trespasser. It considered that the mortgagor's right to possession was lawful until the mortgagee exercised its rights under section 25(1)(c) of the New Territories Ordinance to enter into possession. On this basis, the mortgagor's possession having never been adverse, the rights of the mortgagee to recover possession remained intact. With great respect, this cannot be correct. ... all that is required for there to be adverse possession for the purposes of the Ordinance, is that a cause of action should have accrued against someone who is in possession of the land. That was the case in Common Luck. The mortgagor's possession was adverse from the date of the mortgage because, as has been explained, that is when the mortgagee's right of action first accrued. As no payments of interest or capital were ever made, time was never made to run afresh.⁵⁸ This is wholly different from the situation where a stranger commences adverse possession of another's land.

⁵⁵ *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419.

⁵⁶ Report No. 271 of 2001.

⁵⁷ At footnote 51 in Chapter XIV in Report No. 271 of 2001.

⁵⁸ See s 23 of the Limitation Ordinance explained above.

*The owner has no cause of action against that stranger in such a case unless he is a trespasser. This is why there is an equation of trespass and adverse possession in that situation, but it is not a general requirement of adverse possession. ... it must follow that a mortgage is no longer merely a security for a loan. The mortgagee's proprietary right to recover possession survives the extinction of his contractual rights to recover the moneys secured.*⁵⁹

1.37 The Sub-committee noted that in Hong Kong, unlike the position in UK, a mortgagee (subject to contrary provision in the mortgage deed) does not have the right to enter into possession of the mortgaged land until the default of payment of the mortgagor.⁶⁰ Harpum has therefore overlooked the fact that in Hong Kong, a mortgagee under a mortgage by legal charge would normally have a right to possession only upon the mortgagor's default. Since the Conveyancing & Property Ordinance, a mortgage of a legal estate could only be effected by legal charge. As for existing mortgages by way of assignment of the legal estate (which was the prevailing method for mortgage of the legal estate before the Ordinance), these are deemed to be reassigned, discharged and replaced by a legal charge in the same terms and having the same validity and priority, subject to the Conveyancing and Property Ordinance, as the mortgages which they replace.⁶¹

1.38 However, what Harpum overlooked does not affect the main point made by him. All that is required for there to be adverse possession under the Limitation Ordinance is that a cause of action should have accrued against someone who is in possession of the land. There is no general requirement of trespass.

⁵⁹ At p 9 – 10.

⁶⁰ Section 44(2) of the Conveyancing and Property Ordinance, Cap 219.

⁶¹ Section 44(3) of the Conveyancing and Property Ordinance, Cap 219.

Chapter 2

Justifications for adverse possession: adverse possession and human rights principles

2.1 The concept of adverse possession has been criticised by some as being unjust, in the sense of facilitating "land theft". This chapter will examine the justifications for the concept, and whether it contravenes relevant human rights principles and the Basic Law.

The nature of title to land

2.2 Title to land is not absolute, but only relative to the framework within which the law operates.¹ The concept of "owner" can mean no more than "the person with the best ascertained right of possession."² The English Law Commission has observed that title to unregistered land is relative and it is based upon possession.³ Nield elaborates on this point:

"Title to land has historically been based upon possession. If there was a dispute over the ownership of land the court would decide in favour of the person who could show that he had the better, ie the earlier, right to possession. The titles to land are thus relative rather than absolute. If the owner of land, A, is dispossessed by B whose occupation is in turn disturbed by C, then B does not have to prove that he is the owner of the land in order to take action against C. He merely has to prove that he has a better right to possession than C. Likewise C cannot argue in his defence to an action by B that A is the true owner of the land. ... Thus, although a squatter has no documentary title to the land, he does have a right to protect his possession against all those who do not have a better right to possession."⁴

Nield continues to explain the origin of the emphasis on possession:

"This concept of relativity of title is derived from the fact that historically the actions developed for the recovery of land that

¹ J G Riddall, *Land Law* (LexisNexis UK, 7th ed, 2003), at 581.

² J G Riddall, *Land Law* (LexisNexis UK, 7th ed, 2003), at 581; C Harpum (ed), *Megarry & Wade: the Law of Real Property* (Stevens and Sons Ltd, 4th ed, 1975), at p 1009.

³ English Law Commission, *Land Registration for the Twenty-first Century, A Consultative Document* (1998, Law Com No 254), at para 10.21.

⁴ S Nield, *Hong Kong Land Law* (Longman, 2nd ed, 1998), at para 7.2.1.

were based upon possession were far more efficient, and thus more popular, than those actions based upon ownership. Even an owner of land preferred to base his claim for repossession of his land upon his better right to possession rather than his ownership. As a result, actions based upon ownership fell into disuse and title to land became inextricably linked with possession."

2.3 The fact of possession of land entitles a person to retain the land against the whole world, apart from someone who has a better title. Hence, even a squatter on land, who does not have documentary title to it, can still protect his possession of the land against those who do not have a better right to possession. Lord Macnaghten stated in *Perry v Clissold*:

"[A] person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the Statute of Limitations applicable to the case, his right is for ever extinguished, and the possessory owner acquires an absolute title."⁵

Justifications for the concept

2.4 As Dockray explains, the rule of adverse possession prompts a number of questions:

"At first sight, the law of adverse possession has the appearance of an unprincipled and neglected backwater; an area of law in need of reform but which is not perhaps of great importance. How, it might be asked, could there be any rational explanation for depriving an owner of property, simply because of the long continued possession of another? And why should the law seem to ignore the demerits of a trespasser? Why should it protect a wrongdoer - a person whose conduct might be tantamount to theft - but whom the law may nevertheless aid even against an innocent owner, that is, a person who did not know and could not have discovered that time had begun to run? Why should the long suffering of injury bar the remedy? ... Why, then, do we need adverse possession?"⁶

2.5 Dockray sets out the various accepted justifications for the rule. He notes that there are three general aims, which are traditionally attributed to the Statute of Limitations, as well as a fourth policy objective. These are discussed below. Dockray's statement of the justifications for the rule was

⁵ [1907] AC 73, at 79.

⁶ M Dockray, "Why do we need adverse possession?" [1985] *Conv* 272, at 272.

endorsed by the English Law Commission in its 1998 consultation paper.⁷ The Commission pointed out that since the effects of the rule are sweeping, strong justifications would be required.

First justification: To protect against stale claims

2.6 Adverse possession is one aspect of the law of limitations. The policy of limitation statutes applies to protect defendants from stale claims and to encourage plaintiffs not to sleep on their rights. This is because with the passage of time, it will become more and more difficult to investigate the circumstances in which a possession commenced and continued. Therefore, the policy is that a fixed period should be prescribed for the sake of certainty. However, as pointed out by the English Law Commission,⁸ adverse possession does not merely bar claims; a squatter can get a title to land by his possession and this can only be justified by factors over and above those which explain the law on limitations.

Second justification: To avoid land becoming undeveloped and neglected

2.7 If land ownership and the reality of possession are not working well in tandem, the particular land in question would become unmarketable. This situation can happen:

- (a) where the true owner has disappeared and the squatter has assumed the rights of ownership for a long time; or
- (b) where there have been dealings with the land "*off the register*" so that the register no longer reflects the "*true*" ownership of land.

It is in the public interest to encourage the proper maintenance, improvement and development of land which might otherwise be left under-utilised for a long time.

Third justification: To prevent hardship in cases of mistake

2.8 The English Commission has noted that the law of adverse possession can prevent hardship in cases of mistake. The example given is that of a squatter who incurs expenditure to improve the land under mistake of ownership or boundary. Although the squatter may have a claim based on "*proprietary estoppel*" if the true owner knew of and acquiesced in the squatter's mistake, that may not always be the case.

⁷ English Law Commission, *Land Registration for the Twenty-first Century, A Consultative Document* (1998, Law Com No 254), at paras 10.5 to 10.10.

⁸ English Law Commission, above, at para 10.6.

Counter arguments

2.9 Some counter arguments to these first three justifications for the rule on adverse possession are set out below.

2.10 In relation to the first justification, it is assumed that the owner was aware that a cause of action had accrued in his favour. In reality, the adverse possession may be clandestine or not readily apparent and an owner may not realise that a person is encroaching on his land.⁹ The owner is hence not in any true sense sleeping on his rights. Knowledge (actual or constructive) of the accrual of a cause of action is not a pre-condition for the operation of the limitation period.¹⁰ In addition, the rule of adverse possession operates even if a squatter admits that his possession is wrongful throughout the limitation period.¹¹

2.11 As to encouraging the development and maintenance of land under the second justification, Dockray believes that this objective is only relevant in limited circumstances and could not justify the universal application of the rule which is not confined to cases of long and peaceful possession of neglected property.¹² The rule applies indiscriminately, as much to ancient and innocent encroachment as it does to forcible ejection.

2.12 As to avoidance of hardship to defendants under the third justification, the rule of adverse possession has not attempted to balance the possible hardship to a plaintiff who is unaware that time is running against him, and the hardship to a defendant, even though the length of the limitation period is fixed with this balancing act in mind.¹³ The time bar in respect of a plaintiff's action is automatic and not discretionary. Dockray has asked:

"might not such a rule be better framed if it provided a judicial discretion to determine on the facts of each case where the balance of hardship was to be found?"¹⁴

He asks further: *"need that [limitation] period be as short as 12 years?"¹⁵*

Fourth justification: To facilitate conveyancing in unregistered land

2.13 Dockray has commented that the three most commonly advanced reasons for the rule of adverse possession discussed above do not fully explain the policy of the modern law of limitation of actions to recover land. He suggests that another *"elusive additional factor"* seems to be at

⁹ English Law Commission, *Report on Land Registration for the Twenty-first Century* (2001, Law Com No 271), at para 2.71.

¹⁰ M Dockray, "Why do we need adverse possession?" [1985] *Conv* 272, at 274.

¹¹ M Dockray, "Why do we need adverse possession?" [1985] *Conv* 272, at 273.

¹² M Dockray, "Why do we need adverse possession?" [1985] *Conv* 272, at 277.

¹³ M Dockray, "Why do we need adverse possession?" [1985] *Conv* 272, at 275.

¹⁴ M Dockray, "Why do we need adverse possession?" [1985] *Conv* 272, at 275.

¹⁵ M Dockray, "Why do we need adverse possession?" [1985] *Conv* 272, at 276.

work. He goes on to suggest that a more fundamental aim of the law of limitation was to facilitate the investigation of title to unregistered land.¹⁶

2.14 By way of background, a seller of unregistered land is required to prove his title over a period of at least fifteen years, beginning with a good root of title.¹⁷ As an example and justification, Dockray cited:

"The Law of Property Act 1969, which reduced the statutory period for proof of title under an open contract from 30 to 15 years. This followed the recommendation of the Law Commission which in 1967 published 'Transfer of Land: Interim Report on Root of Title to Freehold Land.' ...

[T]he report first traced the outline history of the relationship between the two periods. It then dealt with the standard of protection enjoyed by purchasers under the then existing 30 year rule and considered how that would be affected by reducing the minimum period for proof of title to a period of not less than 12 years 'since it would, in our opinion, be generally accepted that the period should not be shorter than the normal limitation period.' ...

... [T]he Commission went on to recommend that the 30 year period be reduced. They did so on the basis that the prevailing opinion amongst conveyancers in general practice (although not perhaps amongst conveyancers at the Bar), was that the risks discussed were small and acceptable in most transactions and that reduction would effect a useful simplification. They fixed on a reduction to 15 years because, amongst other things, 'This would allow a reasonable margin over the normal limitation period of 12 years ...'"¹⁸ (Emphasis added.)

2.15 Dockray, and the English Law Commission subsequently, concluded that the Statute of Limitations was designed to facilitate unregistered conveyancing by ensuring that any possible outstanding third parties' claims to ownership would be time-barred.¹⁹ This conclusion has also been endorsed by Megarry and Wade:

"It is in the public interest that a person who has long been in undisputed possession should be able to deal with the land as owner. It is more important that an established and peaceable possession should be protected than that the law should assist the agitation of old claims. A statute which effects this purpose

¹⁶ M Dockray, "Why do we need adverse possession?" [1985] *Conv* 272, at 277.

¹⁷ Section 23, Law of Property Act 1969 (UK) (both at the time of Professor Dockray's writing of his article and at present).

¹⁸ M Dockray, "Why do we need adverse possession?" [1985] *Conv* 272, at 283 to 284.

¹⁹ M Dockray, "Why do we need adverse possession?" [1985] *Conv* 272, at 284. English Law Commission, *Land Registration for the Twenty-first Century, A Consultative Document* (1998, Law Com No 254), at para 10.9.

is 'an act of peace. Long dormant claims have often more cruelty than justice in them'

Limitation also fulfils another important function. It facilitates the investigation of title to unregistered land. The period of title which a purchaser of land must investigate (at present 15 years) is directly related to the limitation period and this has long been the case. The statutes of limitation have therefore provided 'a kind of qualified guarantee that any possible outstanding claims to ownership by third parties are time-barred'.²⁰

2.16 The Law Commission has stated explicitly that this fourth reason was "*undoubtedly the strongest justification for adverse possession.*"²¹ Smith has agreed, stating that this "*provided a cogent justification for adverse possession,*" as otherwise, "*the purchase of land could not avoid being considerably more complex, unsafe and expensive.*"²² However, this fourth justification has no application to registered land.

2.17 As it will still take some time for the Land Titles Ordinance (Cap 585) (discussed later in this paper) to come into operation, Hong Kong does not yet have a registration of title system. A vendor in Hong Kong is required to prove his title over a period of at least fifteen years beginning with a good root of title.²³ Although there is currently a system of registration of instruments under the Land Registration Ordinance (Cap 128) which facilitates the tracing of title, this system, unlike a title registration system, does not give or guarantee title. Unwritten equities, which are not registrable, may affect a person's title deriving from registered instruments. For the time being, our land law system is still possession-based, therefore the rule of adverse possession applies here.

2.18 Since in Hong Kong the sale of land would in effect mean sale and purchase of government leases, it is doubtful whether a purchaser is obliged to accept title where his vendor has agreed to give good title but could only have a squatter title in respect of part of the land agreed to be sold. This is because the part of the land subject to squatter title may be at risk of forfeiture by the landlord (often the Government). However in cases where the land subject to squatter title would only form a minor part of the land to be sold and the risk of re-entry by the landlord of that part of the land is minimal, often one may say that a good marketable title is made out.

2.19 Thus in Hong Kong the value of the doctrine of adverse possession in assisting conveyancing is probably less than in England because in Hong Kong we are invariably dealing with leasehold land. However, as discussed in Chapter 4 below, because of the prevalence of the discrepancies between the boundaries as shown on the DD sheet or New

²⁰ C Harpum (ed), *Megarry & Wade: The Law of Real Property* (Sweet & Maxwell, 6th ed, 2000), at para 21-001.

²¹ English Law Commission, *Land Registration for the Twenty-first Century, A Consultative Document* (1998, Law Com No 254), at para 10.10.

²² R J Smith, *Property Law* (Longman, 4th ed, 2002), at 66.

²³ Section 13, Conveyancing and Property Ordinance (Cap 219).

Grant Plans and the physical boundaries on the ground in the New Territories, often adverse possession is the only practical solution to the land title problem.

Judicial comment regarding justifications for adverse possession

2.20 The law on adverse possession is recognised as difficult and there is judicial comment both supporting and criticising the working of the principle. Some of these comments are set out below.

Supporting comments

- 2.21 ● *"Limitation statutes are a common feature of many legal systems. A limitation statute has been aptly called 'a statute of repose' and 'an act of peace' ... it is in the interest of society that there should be some end to litigation"*²⁴
- *"[The applicant company] lost their land as a result of the foreseeable operation of legislation on limitation of actions which had recently been consolidated by the legislator, and the applicant companies could have stopped time running against them by taking minimal steps to look after their interest Possession (ownership) carries not only rights but also and always some duties. The purpose of the relevant legislation was to behove a landowner to be vigilant to protect the possession and not to 'sleep on his or her rights' The duty in this particular case – to do no more than begin an action for repossession within 12 years – cannot be regarded as excessive or unreasonable."*²⁵

Critical comments

- 2.22 ● *"The unfairness in the old regime"²⁶ which this case has demonstrated lies not in the absence of compensation, although that is an important factor, but in the lack of safeguards against oversight or inadvertence on the part of the registered proprietor."*²⁷
- *"But as the present case, the Pye case and other cases show, the acts of trespass may not be obvious, or may be trivial and entirely harmless. Further, the owner may not know the law, and may not realise that the failure to take steps to put an end to a situation which is doing him no harm may be prejudicing his*

²⁴ *Wong Tak Yue v Kung Kwok Wai & Another* [1998] 1 HKLRD 241, per Li CJ.

²⁵ The minority dissenting judgment of the European Court of Human Rights in *JA Pye (Oxford) Ltd v United Kingdom* (2005) 19 BHRC 705, at 725.

²⁶ Ie, before implementation of the Land Registration Act 2002 in England.

²⁷ Lord Hope in *JA Pye (Oxford) v Graham* (2003) 1 CA 419, at 446.

*position. There may be little or no fault involved. On the other side, the trespasser will usually know that he is trespassing, will already have benefited from the acts of trespass, and will have done nothing whatsoever to deserve the windfall of being given the property in return for having illegitimately used it for a long time. There is no justification for what is essentially a transfer of property without compensation from the deserving to the undeserving ...*²⁸

Human rights and adverse possession

2.23 In the previous chapter we discussed the adverse possession principles in a much-publicised series of judgments in *JA Pye (Oxford) Ltd and JA Pye (Oxford) Land Ltd v Graham*²⁹ and *JA Pye (Oxford) Ltd and JA Pye (Oxford) Land Ltd v the United Kingdom*.³⁰ The *Pye* case also expounded on the relevant human rights issues. The facts are set out in the previous chapter. The *Grahams* were squatters on the land owned by the plaintiffs. The plaintiffs issued proceedings in 1999 seeking possession of the land. Mr Justice Neuberger, as he then was, in the English High Court held that since the *Grahams'* adverse possession took effect from 1984, the plaintiffs' title was extinguished according to the Limitation Act 1980.

2.24 The plaintiffs appealed, and the Court of Appeal allowed the appeal on the basis that the *Grahams* had not had the necessary intention to possess the land, and thus did not have adverse possession of it. Lord Justice Mummery and Lord Justice Keene went on to address the plaintiffs' arguments that their right to peaceably enjoy property under the Human Rights Act 1998 and Article 1 of Protocol No 1 to the European Convention on Human Rights had been breached. The Court of Appeal determined that the statutory limitation period was not incompatible with the Convention, nor was it disproportionate, discriminatory, impossible or difficult to comply with. Article 1 of Protocol No 1 to the European Convention on Human Rights (formally, the European Convention for the Protection of Human Rights and Fundamental Freedoms) provides:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general

²⁸ *Beaulane Properties Ltd v Palmer* [2005] 4 All ER 461, at 512, per Deputy High Court Judge Strauss QC.

²⁹ [2000] Ch 676 (HCt), [2001] Ch 804 (CA) and [2002] 3 All ER 865 (HL).

³⁰ Application No 44302/02, 15 Nov 2005 and 30 Aug 2007 (European Court of Human Rights).

interest or to secure the payment of taxes or other contributions or penalties."

2.25 The Grahams appealed to the House of Lords which allowed their appeal and restored the order of the High Court, since the Grahams had adverse possession of the land.

European Court of Human Rights

2.26 The plaintiffs made an application to the European Court of Human Rights³¹ against the United Kingdom Government, alleging that the English law on adverse possession, by virtue of which they had lost their land to the Grahams, violated Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

2.27 The case was heard by the Chamber of the former Fourth Section of the European Court of Human Rights before seven judges. By a 4 to 3 majority, the Court decided that the English law on adverse possession (the Limitation Act 1980 and the Land Registration Act 1925) deprived the plaintiffs of their title to the land, imposed on them an excessive burden and upset the fair balance between public interest and the plaintiffs' rights to peaceful enjoyment of their possession. Hence, there had been a violation of Article 1 of the First Protocol to the Convention.

2.28 The United Kingdom Government requested a re-hearing of the case before the Grand Chamber of the European Court of Human Rights (the Court) comprising 17 judges. In a judgment handed down on 30 August 2007,³² it was held by a majority of ten to seven that there had been no violation of Article 1 of the Protocol No 1 to the Convention. The Court was of the view that the legislative provisions did not fall within the meaning of "*deprivation of possessions*" in Article 1 of the Protocol No 1 to the Convention. It was held by the Court that:

"66. The statutory provisions which resulted in the applicant companies' loss of beneficial ownership were thus not intended to deprive paper owners of their ownership, but rather to regulate questions of title in a system in which, historically, 12 years' adverse possession was sufficient to extinguish the former owner's right to re-enter or to recover possession, and the new title depended on the principle that unchallenged lengthy possession gave a title. The provisions of the 1925 and 1980 Acts which were applied to the applicant companies were part of the general land law, and were concerned to regulate, amongst other things, limitation periods in the context of the use and ownership of land as between individuals. The applicant companies were therefore affected, not by a 'deprivation of possessions' within the meaning of the second sentence of the

³¹ JA Pye (Oxford) Ltd v United Kingdom (2005) 19 BHRC 705.
³² Application No 44302/02, 30 Aug 2007.

*first paragraph of Article 1, but rather by a 'control of use' of land within the meaning of the second paragraph of the provision.*³³

2.29 The European Court of Human Rights endorsed the view of the United Kingdom Government that there was a general public interest in both the limitation period itself and the extinguishment of title at the end of the period. The Court observed:

"72. It is plain from the comparative material submitted by the parties that a large number of member States possesses (sic) some form of mechanism for transferring title in accordance with principles similar to adverse possession in the common law systems, and that such transfer is effected without the payment of compensation to the original owner.

73. The Court further notes, as did the Chamber, that the amendments to the system of adverse possession contained in the Land Registration Act 2002 did not abolish the relevant provisions of the 1925 and the 1980 Acts. Parliament thus confirmed the domestic view that the traditional general interest remained valid.

74. It is a characteristic of property that different countries regulate its use and transfer in a variety of ways. The relevant rules reflect social policies against the background of the local conception of the importance and role of property. Even where title to real property is registered, it must be open to the legislature to attach more weight to lengthy, unchallenged possession than to the formal fact of registration. The Court accepts that to extinguish title where the former owner is prevented, as a consequence of the application of the law, from recovering possession of land cannot be said to be manifestly without reasonable foundation. There existed therefore a general interest in both the limitation period itself and the extinguishment of title at the end of the period."³⁴ (Emphasis added.)

2.30 The land in question before the courts was registered land the title to which was recorded in the Land Register. The record in the Register is conclusive as to who is the owner. The Court did not draw a distinction between the rule of adverse possession in respect of registered land before the Land Registration Act 2002 and the rule in relation to registered land after the 2002 Act or unregistered land. It was also decided that the "fair balance" between the demands of the general interest and the interest of the individual squatters concerned (that was required by Article 1 of Protocol No 1 to the Convention) was not upset in the present case. The Court stated that:

³³ Same as above, at 17.

³⁴ Same as above, at 19.

"81. It is true that since the entry into force of the Land Registration Act 2002, the paper owner of registered land against whom time has been running is in a better position than were the applicant companies at the relevant time. ... The provisions of the 2002 Act do not, however, apply to the present case, and the Court must consider the facts of the case as they are. In any event, legislative changes in complex areas such as land law take time to bring about, and judicial criticism of legislation cannot of itself affect the conformity of the earlier provisions with the Convention."³⁵ (Emphasis added.)

The joint dissenting opinion

2.31 The decision of the Grand Chamber of the European Court of Human Rights is final, but it is noteworthy that the dissenting opinions of the seven judges in the minority placed considerable importance on the distinction between unregistered land and registered land. In the joint dissenting opinion of five of these judges, it is stated that:

"7. ... The present case concerns the law of adverse possession as it applies to registered land in which ... the reasons traditionally advanced to justify the transfer of beneficial title to the adverse possessor at the end of the limitation period have much less cogency than in the case of unregistered land. We find much force in the view of Lord Bingham in the present case, endorsed by Judge Loucaides in his dissenting opinion, that where land is registered, it is difficult to see any justification for a legal rule which compels such as apparently unjust result as to deprive the owner of his beneficial title in favour of an adverse possessor. ...

11. In the case of registered land, however, title depends not on possession, but on registration as the proprietor. A potential purchaser of land can ascertain the owner of the land by searching the register, and there is no need for a potential vendor to establish title by proving possession. As pointed out by the Law Commission, the traditional reasons advanced to justify a law of adverse possession which resulted in the extinguishment of title on expiry of the limitation period had lost much of their cogency. This view was shared in the circumstances of the present case both by Lord Bingham [in the House of Lords] and by Neuberger J. [in the English High Court], who found that the uncertainties which sometimes arose in relation to the ownership of land were very unlikely to arise in the context of a system of land ownership where the owner of the land was readily identifiable by inspecting the proprietorship register."³⁶ (Emphasis added.)

³⁵ Same as above, at 22.

³⁶ Same as above, at 27 and 28.

Adverse possession and registered title

2.32 The views of the English Law Commission referred to by the European Court of Human Rights can be found in the Commission's consultation paper and report on land registration.³⁷ After referring to the justifications identified by Professor Dockray, the Commission stated in its consultative document:

"10.2 ... We conclude that while the present law can be justified as regards unregistered land, it cannot in relation to registered title. ...

*10.3 ... the policy considerations which justify the present system of adverse possession in relation to unregistered land have far less weight in relation to registered title ..."*³⁸

2.33 The English Law Commission further stated in its report:

"2.70 ... [I]t is difficult to justify the continuation of the present principles [of adverse possession] in relation to registered land. ...

2.73 In relation to land with unregistered title, there are cogent legal reasons for the doctrine. The principles of adverse possession do in fact presuppose unregistered title and make sense in relation to it. This is because the basis of title to unregistered land is ultimately possession. ... [T]he investigation of title to unregistered land is facilitated (and therefore costs less) because earlier rights to possess can be extinguished by adverse possession. However, where title is registered, the basis of title is primarily the fact of registration rather than possession."³⁹ (Emphasis added.)

2.34 Indeed, in respect of unregistered land, Mr Justice Neuberger in the English High Court and Lord Bingham of Cornhill in the House of Lords agreed with the justifications, especially the fourth one, for the rule of adverse possession identified by Professor Dockray. Mr Justice Neuberger said:

"[T]he right to acquire title to land by adverse possession is often explained by reference to the uncertainties which sometimes arise in relation to the ownership of land, but it appears to me that with one or two exceptions those uncertainties are very unlikely to arise in the context of a system of land ownership involving compulsory registration; the owner of the land is readily

³⁷ English Law Commission, *Land Registration for the Twenty-first Century, A Consultative Document* (1998, Law Com No 254) and *Land Registration for the Twenty-first Century, A Conveyancing Revolution* (2001, Law Com No 271).

³⁸ English Law Commission (1998), above, at paras 10.2 to 10.3.

³⁹ English Law Commission (2001), above, at paras 2.70 and 2.73.

identifiable by inspecting the proprietorship register of the relevant title at the Land Registry. In the days when land was unregistered one can well understand that uncertainties could arise where the owner was seeking to rely upon an old conveyance; the person in possession might claim to have lost the documents which established his title, and the legislature may have concluded that arguments about what happened long ago should be avoided, and that this should be achieved by depriving the person with apparently good if somewhat ancient paper title of his ownership if the squatter could establish more than 12 years uninterrupted possession of the land."⁴⁰ (Emphasis added.)

2.35 Lord Bingham of Cornhill expressed the view that in the case of unregistered land, and in the days before registration became the norm, the rule of adverse possession could no doubt be justified as avoiding protracted uncertainty as to where the title to land lay. He noted that where land was registered, however, it was difficult to see any justification for a legal rule which compelled such an apparently unjust result.⁴¹

2.36 The judges in the minority of the Grand Chamber of the European Court of Human Rights also attached considerable importance to the amendments made by the Land Registration Act 2002. Five of them commented in their dissenting opinion as follows:

"19. ... [The amendments] represented more than a natural evolution in the law of adverse possession as it affected registered land; they marked a major change in the existing system which had been recognised, both by the Law Commission and judicially, as leading to unfairness and as having a disproportionate effect on the rights of the registered owner. ...

21. In sum, we are unable to agree with the majority of the Court that the provisions of the 1925 and 1980 Acts, as they applied to registered owners of land and whose application in the present case was variously described by the national judges as 'draconian', 'unjust', 'illogical' and 'disproportionate', struck a fair balance between the rights of the owners and any general interest served. In being deprived of their beneficial ownership of the land of which they were the registered owners, the applicant companies were in our view required to bear an individual and excessive burden such that their rights under Article 1 of Protocol No. 1 were violated."⁴² (Emphasis added.)

⁴⁰ [2000] Ch 676, at 709.

⁴¹ [2000] 3 All ER 865, at 867.

⁴² Application No 44302/02, 30 Aug 2007, at 31.

Basic Law implications

2.37 The constitutionality of provisions on adverse possession was considered in *Harvest Good Development Ltd v Secretary for Justice and others*.⁴³ In *Harvest Good* the paper owner who lost in the *Chan Tin Shi*⁴⁴ case requested the Secretary for Justice to take steps to repeal sections 7(2) and 17 of the Limitation Ordinance (Cap 347) or otherwise to bring them into line with Articles 6 and 105 of the Basic Law, and to reinstate its property rights or provide adequate compensation for the deprivation of its property because of the operation of those provisions in Cap 347.

2.38 Articles 6 and 105 of the Basic Law provide as follows:

"Article 6. The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law.

Article 105. The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property. Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay."

2.39 The Secretary of Justice did not accede to these requests. *Harvest Good Development Ltd* instigated an application for judicial review against the decision of the Secretary for Justice, submitting that as a result of the provisions on adverse possession in the Limitation Ordinance (Cap 347), it had been deprived of its property without compensation, contrary to Articles 6 and 105 of the Basic Law.

2.40 Mr Justice Hartmann held that since the title of the applicant's predecessor-in-title was extinguished in 1982, all the events as to the acquisition and loss of possessory title took place before the commencement of the Basic Law. Thus, the Basic Law, which does not have retrospective effect, did not apply to this case, and the application for judicial review must be dismissed.⁴⁵ He went on to consider and decide other issues in case he was wrong on the retrospectivity of the Basic Law. He then held that since the applicant's argument on the Basic Law could have and should have been raised in the already concluded land recovery proceedings, it was an abuse of process for the applicant to bring a separate action in order to raise the argument. Even though the parties were not the same in the land recovery proceedings and the judicial review, it could still be an abuse of process.⁴⁶

⁴³ [2006] HKEC 2318.

⁴⁴ Court of Final Appeal decision, (2006) 9 HKCFAR 29.

⁴⁵ *Harvest Good Development Ltd v Secretary for Justice*, HCAL 32/2006, at paras 63, 66, 87, 91 and 92.

⁴⁶ *Harvest Good Development Ltd v Secretary for Justice*, HCAL 32/2006, at paras 110, 114, 115, 116, 120, and 121.

Mr Justice Hartmann also said that it was the applicant's predecessor-in-title who was deprived of possessory estate, while the applicant was not deprived of such title because it had never acquired it. The applicant only acquired the paper title and no more.⁴⁷

2.41 Mr Justice Hartmann went on to consider whether sections 7(2) and 17 of Cap 347 engaged the Basic Law. He agreed with the counsel for the respondent that there was a clear difference in meaning between the English text ("*deprivation*") of Article 105, and its Chinese text ("徵用") which entailed a more specific and limited interpretation. In view of the decision of the Standing Committee of National People's Congress on 28 June 1990, the Chinese text must prevail.⁴⁸ In his opinion, Mr Justice Hartmann was bound to read the English text of Article 105 to mean that the Hong Kong Special Administrative Region will in accordance with law, protect the right of individuals to compensation for the expropriation of their property by the Government or a Government agency. He said that the same result could be achieved on "*a true construction*" of Article 105 ("as buttressed by Article 6").⁴⁹ He concluded that a loss of possessory title pursuant to sections 7(2) and 17 did not constitute an expropriation, *de facto* or otherwise.⁵⁰

2.42 Mr Justice Hartmann then turned to the issue as to whether sections 7(2) and 17 were inconsistent with the Basic Law. Being obliged to give a wide margin of appreciation on the basis that the policy of adverse possession was founded on economic and social imperatives, he was satisfied that if Articles 6 and 105 were engaged, the statutory scheme of adverse possession was consistent with those articles.⁵¹ His reasons were as follows:

"183. As I understood Mr Yu [counsel for the respondent], his submissions went instead to the contention that, since the mid-1800s, the mechanism of adverse possession has been integral to Hong Kong land law. While there has been an improvement in the sophistication of our system of land law, making it more workable, the mechanism of adverse possession nevertheless remains integral. It not only encourages the utilisation of land in Hong Kong by encouraging leaseholders to assert possession but also, because title to all land still ultimately rests on possession, ensures that, when problems do arise, there is a system of resolution.

184. Bearing in mind that Hong Kong does not have a system of registration of title, I think it must be accepted that the scheme of adverse possession contained in sections 7(2) and 17 of the Limitation Ordinance clearly pursues a legitimate aim. In this regard, I note that Deputy Judge Saunders, in his judgment in

⁴⁷ *Harvest Good Development Ltd v Secretary for Justice*, HCAL 32/2006, at para 128.

⁴⁸ *Harvest Good Development Ltd v Secretary for Justice*, HCAL 32/2006, at para 137.

⁴⁹ *Harvest Good Development Ltd v Secretary for Justice*, HCAL 32/2006, at paras 138 and 152.

⁵⁰ *Harvest Good Development Ltd v Secretary for Justice*, HCAL 32/2006, at para 152.

⁵¹ *Harvest Good Development Ltd v Secretary for Justice*, HCAL 32/2006, at para 191.

The Hong Kong Buddhist Association v. The Occupiers was of the same view.

185. The real issue, it seems to me, is whether a fair balance has been struck between the aims of the statutory scheme and the hardship visited upon those whose possessory title is extinguished.

186. In my judgment, the mechanism of adverse possession is clumsy. In the result, there can be occasions when it works inequitably. Parliament in England has devised a more equitable system and perhaps in due course the same will be done in Hong Kong. But the question is not whether a better system may be created. It is whether the present statutory scheme is inconsistent with the protection of property rights in the Basic Law.

187. In the course of his submissions, Mr Yu said that, in a system of law which is possession-based, it is a matter of policy for the legislature, and not for the courts, to decide whether the law should favour the one who has continuously been in possession of the land or the one who has a paper title but has slept on his rights for an extended period of years. In my judgment, he makes a telling point.

188. It cannot be disputed that land – a scarce resource in Hong Kong – should be utilised. Article 7 of the Basic Law provides for 'use development' of land. Being granted leasehold rights over land brings with it duties as well as rights. As I said earlier, if title is ultimately based on possession then it would seem that there is a duty to possess, not to leave land effectively abandoned for an extended period of years. Certainly, as I see it, the legislature and the administration is entitled to conclude that there are good reasons, social and economic, why land should at least be occupied rather than left abandoned and to put all leasehold owners on notice of this.

189. The Hong Kong legislature and the Government have considered it to be contrary to the public interest to allow land to lie effectively abandoned for an extended period of years. The required period of adverse possession has not been extended; it has been decreased. While the Basic Law may provide protection for property rights, such rights have always been heavily qualified by regulation in the public interest. As to how land, a fundamental resource is to be best regulated is pre-eminently a matter for democratic decision: see, for example, *Grape Bay Ltd v. Attorney General of Bermuda*, page 585.

190. As Mr Yu emphasised, the law as to limitation and adverse possession has been part of Hong Kong's system of

land law since 1843. The law has operated on numerous occasions in the past to serve the social needs of protecting individuals from stale claims, avoiding hardship in cases where boundaries or paper titles are uncertain, preventing land from falling into disuse and facilitating conveyancing. Today, the need to employ the mechanism of adverse possession may have been reduced by legislative enactments and regulations. But, in my judgment, it cannot be denied that it is still integral to our system of land law and, as such, can, and does, play a constructive role, not simply a destructive one." (Emphasis added.)

2.43 The applicant lodged an appeal to the Court of Appeal which dismissed the appeal and confirmed the judgment in Court of First Instance.⁵² The applicant applied for leave to appeal to the Court of Final Appeal, and the application was also dismissed.

Summary of this chapter

2.44 We have in this chapter examined justifications for the concept of adverse possession, as well as the counter arguments to the justifications. As for judicial comments, some supported adverse possession, while others are critical of the working of adverse possession. We examined the compatibility of adverse possession with human rights principles through discussion of *JA Pye (Oxford) Land Ltd v Graham* which was considered by the English High Court, Court of Appeal and House of Lords before it reached the European Court of Human Rights.

2.45 In Hong Kong, the court had the opportunity to examine the compatibility of adverse possession with our Basic Law. In *Harvest Good Development Ltd v Secretary for Justice*,⁵³ the Court held that the statutory scheme of adverse possession was consistent with Articles 6 and 105 of the Basic Law. We shall in the next chapter look at adverse possession in other jurisdictions.

⁵² Civil Appeal No 10 of 2007.
⁵³ [2006] HKEC 2318.

Chapter 3

Relevant law in other jurisdictions

3.1 In this chapter, we set out the relevant law in a number of jurisdictions. It is noteworthy that many of the Commonwealth states which adopt a title registration system have modified their law on adverse possession. In some states, adverse possession was abolished, whilst in others, it was modified.

Australia

Unregistered land

3.2 In Australia, as far as unregistered land is concerned, a dispossessed owner's right to recover his land is limited by statute (except in the Australian Capital Territory and the Northern Territory where title to land cannot be lost by adverse possession).¹ The limitation period is generally 12 years from the date on which the right of action first accrues to the plaintiff (except in South Australia and Victoria where it is 15 years).² The effect of the limitation period is to allow a squatter to acquire title to the land in question, and the original owner's title is extinguished.³ A squatter must satisfy the common law requirements of adverse possession: actual possession and the requisite intention.⁴ The requisite intention is the intention to possess against the whole world, including the land's true owner.⁵

Registered land

3.3 It is also possible to gain title through adverse possession of land registered under the Torrens system⁶ in some jurisdictions in Australia

¹ Eg, Limitation Act 1985 (ACT), section 5(a). See A Bradbrook, S MacCallum and A Moore, *Australian Real Property Law* (Lawbook Co, 3rd ed, 2002), at para 16.01, and also *Halsbury's Laws of Australia* (LexisNexis Butterworths) vol 16, at para 255-235. However, boundary disputes are treated differently. Adverse possession of boundary strips (or "part parcel" adverse possession) is expressly or effectively prohibited in all Australian jurisdictions except Western Australia and Victoria. Instead, boundary disputes are typically resolved through mistaken improver or building encroachment legislation. See U Woods, "Adverse Possession of Boundary Land" Conference Paper of the Royal Institution of Chartered Surveyors, September 2010.

² Limitation Act 1969 (NSW), section 27(2); Limitation of Actions Act 1974 (QLD), section 13; Limitation Act 1974 (Tas), section 10(2); Limitation Act 1935 (WA), section 4; Limitation of Actions Act 1936 (SA), section 4; Limitation of Actions Act 1958 (Vic), section 8.

³ *Re Jolly, Gathercole v Norfolk* [1900] 2 Ch 616.

⁴ *Mulcahy v Curramore Pty Ltd* [1974] 2 NSWLR 464, at 475, per Bowen CJ.

⁵ *Powell v McFarlane* (1977) 38 P & CR 452, at 471 to 472.

⁶ The system of land registration adopted in Australia.

(except the Australian Capital Territory and the Northern Territory).⁷ There are broadly two approaches. South Australia, Queensland, New South Wales, Victoria and Western Australia adopt the first approach: when the limitation period expires, a squatter will replace the dispossessed registered proprietor as the new registered proprietor. In other words, a squatter, in successfully claiming adverse possession, extinguishes the title of the dispossessed registered proprietor. The regime in South Australia is set out below for discussion purposes:

- (a) A squatter may apply to the Registrar-General for the issue to him of a certificate of title to the land.⁸
- (b) The Registrar-General will cause a notice of the application to be published once at least in a newspaper, to be given to any person who in the Registrar-General's opinion has or may have any estate or interest in the land, and to be published in any other way or given to any other persons.⁹
- (c) The notice will impose a deadline of not less than 21 days nor more than 12 months from the first publication of the notice. At or after the expiration of the deadline, the Registrar-General may, unless a caveat is lodged, grant the application for the issue the certificate of title altogether or in part.
- (d) A person claiming an estate or interest in the land, including the registered proprietor, may at any time before the application is granted lodge a caveat with the Registrar-General forbidding the granting of the application.¹⁰
- (e) If the Registrar-General is satisfied with the caveat, the squatter's application will be refused.¹¹ If the Registrar-General is not satisfied with the caveat, he will give notice to the caveator that the latter is required to take proceedings in the Court to establish his title, within a time specified in the notice to the caveator (not less than six months after the notice).¹²
- (f) If the caveat has lapsed, or the caveator has failed to establish his title in the proceedings, the Registrar-General would cancel the current certificate of title and issue a new one to the squatter,

⁷ See section 198, Land Title Act (NT), Land Titles Act 1925 (ACT), section 69 and Limitation Act 1985 (ACT), section 5(a).

⁸ Real Property Act 1886 (SA), section 80A. In practice, the Registrar usually requires proof of 30 years' of adverse possession. Where the period is less than 30 years, there must be evidence to prove that the disability or other extension of time provisions do not apply to the land in question. See A Bradbrook, S MacCallum and A Moore, *Australian Real Property Law* (Lawbook Co, 3rd ed, 2002), at 673, footnote 327.

⁹ Real Property Act 1886 (SA), section 80E.

¹⁰ Real Property Act 1886 (SA), section 80F(1).

¹¹ Real Property Act 1886 (SA), section 80F(3).

¹² Real Property Act 1886 (SA), section 80F(4).

provided the squatter has satisfied the common law requirements of adverse possession.¹³

3.4 The South Australian regime for a squatter to apply to be registered as the new registered proprietor is similar to that in Queensland.¹⁴ New South Wales,¹⁵ Victoria¹⁶ and Western Australia.¹⁷ Some, such as those in New South Wales, are rather elaborate. The mechanism is basically the same: notification, registered proprietor's caveat, the determination of the Registrar or the court, and updating the land register so as to reflect the determination.

3.5 Tasmania adopts the second approach; when the limitation period expires, a registered proprietor is taken to hold the land on trust for the squatter:¹⁸

- (a) The squatter may then apply, in an approved form, to the Recorder for an order vesting the legal title in him, with the support of a plan or survey, with field notes, of the land certified as correct by a surveyor.¹⁹
- (b) Before making such an application, the squatter must:
 - (i) give notice in an approved form in a newspaper published in Tasmania and circulating in the locality in which the land is situated, stating that the squatter intends to make the application;
 - (ii) give notice of the application in an approved form to any person who, as endorsed on the folio of the Register relating to that land, has an interest in the land or in any mortgage or encumbrance recorded on that folio;
 - (iii) give notice in writing of the application to any person who has an unregistered interest in the land which may have been lodged with the Recorder; and
 - (iv) cause a copy of the notice to be posted in a conspicuous place on the land and to be kept so posted for not less than one month before making the application.²⁰

¹³ Real Property Act 1886 (SA), sections 80G and 80H.

¹⁴ Land Title Act 1994 (QLD), section 185(1)(d) and sections 99–108B.

¹⁵ Real Property Act 1900 (NSW), section 45D(1). See also sections 45D to 45G, and 74F to 74R of the Act. An application can only be made with respect to a "whole parcel of land" so as to prevent applications with respect of small areas of land (section 45B(1)). See A Bradbrook, S MacCallum and A Moore, *Australian Real Property Law* (Lawbook Co, 3rd ed, 2002), at 674 to 675.

¹⁶ Transfer of Land Act 1958 (Vic), sections 42(2)(b), 60 to 62.

¹⁷ Transfer of Land Act 1893 (WA), sections 68, 222 to 223(A).

¹⁸ Land Titles Act 1980 (Tas), section 138W(2).

¹⁹ Land Titles Act 1980 (Tas), section 138W(4) and (7).

²⁰ Land Titles Act 1980 (Tas), section 138W(8).

- (c) A person claiming an estate or interest in the land may, before the Recorder makes a vesting order in respect of the application, lodge a caveat with the Recorder in an approved form forbidding the granting of the application.²¹
- (d) In determining an application, the Recorder must consider all the circumstances of the claim, the conduct of the parties and other factors.²²
- (e) The Recorder may:
 - (i) reject an application wholly or in part, or make such requisitions as to the estate claimed to be held in trust or as to any other matter relating to the application;²³
 - (ii) make an order vesting in the squatter the legal estate.²⁴

Canada

3.6 Canada has 13 common law jurisdictions (including the Federal level) and one civil law jurisdiction. The following paragraphs discuss five major common law jurisdictions: Alberta, British Columbia, Manitoba, Ontario and Saskatchewan.

²¹ Land Titles Act 1980 (Tas), section 138Z(1).

²² Land Titles Act 1980 (Tas), section 138V: "*in particular –*

- (a) *whether, during the relevant period, the applicant enjoyed possession of the land as of right; and*
- (b) *whether there is any reason to suppose that during the relevant period that enjoyment was by force or secretly or that that enjoyment was by virtue of a written or oral agreement made before or during that period unless the applicant can show that any such agreement terminated before that period; and*
- (c) *the nature and period of the possession; and*
- (d) *the improvements on the land and in particular –*
 - (i) *when they were made; and*
 - (ii) *by whom they were made; and*
- (e) *whether or not the land has been enclosed by the applicant; and*
- (f) *whether during the relevant period the applicant acknowledged ownership, paid rent or made any other payment in respect of the land and the applicant must produce evidence from at least one other person in support of the application."*

²³ Land Titles Act 1980 (Tas), section 138W(11). See also section 138W(12) of the Act: "*At any time before making the vesting order, the Recorder may reject the application, wholly or in part, if the applicant fails to comply to his or her satisfaction within a reasonable time with any requisition made.*"

²⁴ Land Titles Act 1980 (Tas), section 138X(1). See also section 138X(3) of the Act: "*On making a vesting order under this section, the Recorder –*

- (a) *must make such recordings, cancellations and corrections in the Register as he or she considers necessary to give effect to the vesting order and to register the person in whom the order vests the land as proprietor of the land; and*
- (b) *may call in any certificates of title and grants for making those recordings, cancellations and corrections."*

Unregistered land

3.7 In Alberta, Manitoba and Ontario, the limitation period for a person to bring an action to recover unregistered land is ten years from the date when the right accrues.²⁵ That person's title to the land will be extinguished at the end of the limitation period and the person in adverse possession must take an action "to quiet²⁶ the title" acquired by his possession.²⁷ An adverse possessor must prove both actual possession and an intention to possess the land to the exclusion of others.²⁸

3.8 In British Columbia, no right or title to land may be acquired by adverse possession, except as specifically provided by the Limitation Act 1996 or any other Act.²⁹ If the person entitled to possession of land has been dispossessed in circumstances amounting to trespass or by a life tenant or person entitled to the remainder of an estate, an action for possession of land is not governed by a limitation period and may be brought at any time.³⁰ A six-year limitation period applies to an action for possession of land by a person who has a right to enter for breach of a condition subsequent, or a right to possession arising under possibility of reverter of a determinable estate.³¹ On the expiration of the limitation period, the title to the land is extinguished.³²

3.9 In Saskatchewan, the Limitations Act 2004 (which repealed the Limitation of Actions Act 1978), introduced a regime of a generally applicable limitation period. Section 5 of the Act provides a basic limitation period of "*two years from the day on which the claim is discovered*" which is subject, however, to an ultimate limitation period of "*15 years from the day on which the act or omission on which the claim is based took place*", as set out in section 7(1).

Registered land

3.10 With the exception of Alberta, all Canadian provinces with registered land title do not allow adverse possession per se. In Alberta, a squatter may file in the Land Titles Office a certified copy of the judgment declaring that he is entitled to the exclusive right to use the land or that he is

²⁵ Limitation Act, RSA 2000, c L-12 section 3(1) and (4); Limitation of Actions Act, RSM, 1987, c L150, section 25; Real Property Limitation Act, RSO, c L15, section 4.

²⁶ Black's Law Dictionary (7th edition 1999): An action to quiet title refers to a proceeding to establish a plaintiff's title to land by compelling the adverse claimant to establish a claim, or be forever estopped from asserting it.

²⁷ *Gray v Richford* (1878) 2 SCR 431 (SCC). *Canadian Encyclopedic Digest (Ontario)* (Thomson, Carswell, 3rd Edition) Vol 19, at para 192.

²⁸ *Gorman v Gorman* (1998), 16 RPR (3d) 173 (Ont CA). *Canadian Encyclopedic Digest (Ontario)* (Thomson, Carswell, 3rd Edition) Vol 19, at para 208.

²⁹ Limitation Act, RSBC 1996, c 266, section 12. According to section 14(5), nothing in the Act interferes with any right or title to land acquired by adverse possession before 1 July 1975.

³⁰ Limitation Act, RSBC 1996, c 266, section 3(4)(a) and (b). An action for the title to property or for a declaration about the title to property by any person in possession of that property is also not governed by a limitation period and may be brought at any time (section 3(4)(j) of the Act).

³¹ Limitation Act, RSBC 1996, c 266, section 3(6)(f).

³² Limitation Act, RSBC 1996, c 266, section 9(2).

"quieted" in the exclusive possession of the land, pursuant to the Limitation of Actions Act, RSA 1980, or pursuant to an immunity from liability established under the Limitations Act.³³ The Registrar will enter on the certificate of title a memorandum cancelling the certificate of title, in whole or in part, according to the judgment, and issue a new certificate of title to the squatter.³⁴

3.11 After an indefeasible title is registered in British Columbia, a title adverse to or in derogation of the title of the registered owner is not acquired by any length of possession.³⁵ An application founded in whole or in part on adverse possession must not be accepted by the Registrar unless permitted by the Land Title Act and supported by a declaration of title under the Land Title Inquiry Act.³⁶

3.12 In Manitoba, after land has been brought under the Real Property Act 1988, no title adverse to, or in derogation of, the title of the registered owner can be acquired merely by any length of possession.³⁷ However, a certificate of title is void as against the title of a person adversely in actual occupation of, and rightly entitled to, the land at the time the land was brought under the new system, and who continues in such occupation.³⁸ The position in Saskatchewan is similar to that in Manitoba. After the issuance of the first registered title, no person acquires by way of possession any right, title or interest adverse to or in derogation of the registered owner's title or right to possess the land; and the registered owner's right to enter or bring an action to recover the land is not impaired or affected by any other person's possession of the land.³⁹

3.13 In Ontario, similarly, no title to land registered under the Land Titles Act 1990 that is adverse to or in derogation of the registered owner's title can be acquired thereafter by any length of possession.⁴⁰ Nonetheless, the Act allows an adverse claim in respect of length of possession of a person who was in possession of the land at the time when the registration of the first owner took place.⁴¹ In other words, the Act only recognises possessory title in existence at the date of first registration and expressly prevents subsequent acquisitions of possessory title.⁴²

England and Wales

3.14 The position regarding adverse possession in England and Wales depends on whether or not the land occupied by the squatter is registered.

³³ Land Titles Act 2000, RSA, c L-4, section 74(1).
³⁴ Land Titles Act 2000, RSA, c L-4, section 74(2).
³⁵ Land Title Act 1996, RSBC, c 250, section 23(3).
³⁶ Land Title Act 1996, RSBC, c 250, section 171.
³⁷ Real Property Act 1988, RSM, c R30, section 61(2).
³⁸ Real Property Act 1988, RSM, c R30, section 61(1).
³⁹ Land Titles Act 2000, SS, c L-5.1, section 21(1).
⁴⁰ Land Titles Act, RSO 1990, c L5, section 51(1).
⁴¹ Land Titles Act, RSO 1990, c L5, section 51(2).
⁴² *Canadian Encyclopedic Digest (Ontario)* (Thomson, Carswell, 3rd Edition) Vol 28, at para 488.

Unregistered land

3.15 As at July 2012, about 20% of the land mass of England and Wales remain as unregistered land.⁴³ Where the land is unregistered, the limitation period for an action to recover the land is 12 years from the date on which the right of action accrues.⁴⁴ The right of action is treated as having accrued on the date of the paper owner being dispossessed or of his discontinuance of possession.⁴⁵ At the end of the limitation period, both an owner's right of action to recover the land and his title are extinguished.⁴⁶

Registered land

3.16 As to registered land, even though the Law Commission decided against proposing outright abolition of the rule of adverse possession, it recommended adjusting the balance between landowners and squatters in order to address the concerns about the rule, while maintaining the advantages the rule has to offer.⁴⁷ The Commission devised a modified scheme of adverse possession, attempting to strike that balance in respect of registered land.

3.17 The Land Registration Act 2002 implements the Commission's recommendations and confers greater protection on registered owners against the acquisition of title by means of adverse possession. Lord Hope in *JA Pye (Oxford) Ltd v Graham*⁴⁸ observed that the effect of the 2002 Act would "*make it harder for a squatter who is in possession of registered land to obtain a title to it against the wishes of the proprietor.*"⁴⁹ By virtue of section 96 of the 2002 Act, the periods of limitation in sections 15 and 16 of the Limitation Act 1980 (which enable a squatter to obtain title to land after twelve years' adverse possession) are disapplied in relation to registered land. Instead, registered land is subject to the new regime set out in Schedule 6 of the 2002 Act.⁵⁰ Under the new regime, a squatter can apply to be registered as proprietor after ten years' adverse possession. The registered proprietor will be then given time to serve a counter notice. Under the new regime, it is more likely that a registered proprietor will be able to prevent a squatter's application for adverse possession being completed.⁵¹

⁴³ Land Registry website. Registration of property is compulsory when a property is bought or sold, or when a mortgage is taken out. However, some properties have remained in the same family or organisation for generations, and have therefore never been registered.

⁴⁴ Limitation Act 1980 (UK), section 15.

⁴⁵ Limitation Act 1980 (UK), Schedule 1, Part 1, para 1.

⁴⁶ Limitation Act 1980 (UK), section 17.

⁴⁷ English Law Commission, *Report on Land Registration for the Twenty-First Century, A Conveyancing Revolution* (Law Com No 271, 2001), at para 2.73.

⁴⁸ (2003) 1 AC 419.

⁴⁹ Same as above, at 446.

⁵⁰ See also the Land Registration Rules 2003, as amended. The Department for Environment, Food and Rural Affairs also published a Guidance Note on adverse possession of common land and town or village greens website: www.defra.gov.uk.

⁵¹ Practice Guide 4 issued by The Land Registry as at October 2011, p. 2.

3.18 The main features of this new scheme in Schedule 6 of the 2002 Act are as follows:

- (i) A person may apply to the Registrar to be registered as the proprietor of a registered estate in land if he has been in adverse possession of the estate for ten years⁵² ending on the date of application.
- (ii) However, applications under the new regime are not allowed where:
 - The registered proprietor is an enemy or detained in enemy territory.⁵³
 - The registered proprietor is unable to make the required decisions because of mental disability, or is unable to communicate such decisions because of mental disability or physical impairment.⁵⁴
 - The estate in land involved was held on trust unless the interest of each of the beneficiaries was an interest in possession.⁵⁵
 - The squatter is a defendant in proceedings which involve asserting a right to possession of the land, or judgment for possession has been given against them in the last two years.⁵⁶
 - If the application is in fact a boundary dispute, it is not possible for the Land Registry to define the precise position of the boundary in question. The squatter should consider making an application to alter either his title plan and / or his neighbour's title plans.⁵⁷
- (iii) Applications for registration on the basis of adverse possession should be accompanied by statutory declaration containing the necessary information and evidence. The Land Registry would usually arrange for its surveyor to inspect the land after receipt of the application and parties concerned will be informed of the inspection before it takes place. If the Land Registry believes it to be more likely than not that the squatter is entitled to apply to be registered, then notice will be given under paragraph 2 of schedule 6 to –

⁵² Or at least 60 years for Crown foreshore. LRA 2002, Sch 6, para 13.

⁵³ Limitation (Enemies and War Prisoners) Act 1945. LRA 2002, Sch 6, para 8(1).

⁵⁴ LRA 2002, Sch 6, para 8(2).

⁵⁵ LRA 2002, Sch 6, para 12.

⁵⁶ LRA 2002, Sch 6, para 1(3).

⁵⁷ Under Public Guide 19. See Practice Guide 4 of the Land Registry.

- the registered proprietor of the estate affected
 - the registered proprietor of any registered charge on that estate
 - the registered proprietor of any superior registered estate where the estate is leasehold
 - the Treasury Solicitor where the registered proprietor is, or may be, a company which is dissolved
 - any person who has been registered as a person to be notified.⁵⁸
- (iv) The registered proprietor may, within 65 business days, object to the application and/or require the application to be dealt with under paragraph 5 of Schedule 6 of the Act.
- (v) If a counter notice is not received from the registered proprietor or relevant person(s) within 65 business days, the squatter will be registered as proprietor.⁵⁹ According to the Practice Guide, as a general principle, the registration of a squatter does not affect the priority of any interest affecting the estate.⁶⁰ Hence the squatter will still take subject to the same estates, rights and interests that bound the previous proprietor.

Objection

- (vi) If the registered proprietor (or relevant person) wishes to object the squatter's application, he must state his objection based on, for example, the absence of factual possession, requisite intention or period of time. If the registrar decides that the objection is not groundless, the registrar will notify the squatter of the objection. If the two sides are unable to reach an agreement, the matter must be referred to the adjudicator.⁶¹

Counter-notice

- (vii) In addition to issuing a notice of objection, the registered proprietor (or relevant person) may also give a "counter notice" to the Registrar requiring the application to be dealt with under paragraph 5 of Schedule 6, Land Registration Act 2002. If the squatter has not stated in its papers that he is relying on one of the three conditions in paragraph 5, the squatter's application will be rejected when the Registrar received the counter notice.⁶²

⁵⁸ LRA 2002, Schedule 6, para 2.

⁵⁹ LRA 2002, Schedule 6, para 4.

⁶⁰ LRA 2002, Schedule 6, para 9(2). In the case of a charge affecting additional property, there are provisions for apportionment of the amount secured.

⁶¹ LRA 2002, s.73.

⁶² Practice Guide 4, the Land Registry, at p.11.

The three conditions in paragraph 5 of Schedule 6

- (viii) If the registered proprietor serves a counter-notice stating he wishes the application to be dealt with under paragraph 5 of schedule 6 of the Act, a squatter needs to prove one of the following three conditions in order to be registered as proprietor:
- (1)
 - (a) it would be unconscionable, because of an equity by estoppel, for the registered proprietor to seek to dispossess him; and
 - (b) the circumstances are such that the squatter ought to be registered as the proprietor;⁶³
 - (2) the squatter is for some other reason entitled to be registered as the proprietor of the estate;⁶⁴ or
 - (3)
 - (a) the land in question is adjacent to other land that the squatter owns;
 - (b) the exact boundary between the two has not been determined according to the Land Registration Act 2002;
 - (c) he has reasonably believed that the land in question belongs to him for at least ten years of adverse possession ending on the date of his application; and
 - (d) the estate to which the application relates was registered more than one year prior to the date of the application.⁶⁵
- (ix) On rejection of the squatter's application, the registered proprietor has a period of two years to obtain possession of the land from the squatter, either by judgment or eviction following a judgment, or to begin possession proceedings against him.
- (x) If the proprietor fails to act in one of the ways stated above, the squatter may then make a second application to be registered, but only if he has been in adverse possession of the land from the date of the first application until the last day of the two year period.

⁶³ This condition is intended to embody the equitable principles of proprietary estoppel.

⁶⁴ An example is where the squatter is entitled to the land under the will or intestacy of the deceased proprietor.

⁶⁵ The Practice Guide gave the example of dividing walls or fences being erected in the wrong place.

- (xi) The Law Commission proposed that if the second application could be made, registration of the squatter as the new proprietor is then automatic. However, the existing arrangement is that objection can still be made to the squatter's further application. Unless the objection is groundless, the matter will be referred to the adjudicator for resolution.

Leasehold matters

3.19 As for adverse possession of registered leasehold land, the Land Registry explains in its Practice Guide that time starts to run against the tenant as soon as the squatter takes possession of the leasehold land. However, time does not run against the landlord until the lease expires – unless the adverse possession started before the lease, in which case time will continue to run against the landlord during the term of the lease.

3.20 Further, there is a legal presumption that a tenant who encroaches onto other land does so for the benefit of their landlord.⁶⁶ At least on one view, this presumption means that there is no adverse possession by a tenant and that any application under Schedule 6 to the Act should be by the tenant's landlord.⁶⁷

3.21 However, the presumption can be rebutted by evidence that the tenant actually intended the encroachment to be for their own benefit. The Land Registry explained that they are prepared to treat the fact that the application has been made as sufficient evidence of this intention to proceed with the application. There is another view, that the presumption is only concerned with who might have acquired title at common law to the estate, and does not alter the fact that the tenant is in adverse possession, and so is irrelevant where the application is one under Schedule 6.

3.22 If an objection is received, then the application cannot be determined until the objection is disposed of, unless the registrar is satisfied that the objection is groundless. If not groundless, the registrar must give notice of the objection to the squatter. If the matter cannot be settled by agreement between the two parties, the registrar will refer the matter to the adjudicator for resolution.

Transition

3.23 Schedule 12 of the Land Registration Act 2002 specifies that adverse possession rights (a former overriding interests) acquired under the Limitation Act 1980 or under section 75 of the Land Registration Act 1925 had

⁶⁶ *Smirk v Lyndale Developments Ltd* [1974] 3 WLR 91. The Court of Appeal approved what was said by Pennycuik V-C on the encroachment by a tenant point: [1975] Ch 317, 337. See also *Tower Hamlets v Barrett* [2005] EWCA Civ 923.

⁶⁷ See the decision of the deputy Adjudicator in *Dickenson v Longhurst Homes Ltd* (REF/2007/1276).

overriding status for three years. Practice Guide 15⁶⁸ explains that from 13 October 2006, such rights will only be protected if the claimant is in actual occupation of the land, or, on first registration, if the proprietor has notice of them. Hence, persons who acquired possessory title but is only in receipt of rents or profits will need to apply for registration.⁶⁹

Baxter v Mannion⁷⁰

3.24 In this recent case, the squatter, Mr Baxter, applied under paragraph 1 of Schedule 6 to the Land Registration Act 2002 to be registered as the proprietor of a field which he claimed to have been in adverse possession for ten years. Several aspects of the new scheme were clarified by the court in this case.

3.25 The field was bought by Mr Mannion at an auction in August 1996 for GBP 15,000. The field was in a neglected state and Mr Mannion bought it for its development potential. Mr Baxter lived nearby the field and claimed that the field had been used as a pasture for his horses without payment since 1985. Mr Mannion failed to return the prescribed form within the prescribed 65 business days and Mr Baxter was registered as owner. Mr Mannion then applied under paragraph 5(a) of Schedule 4 to the 2002 Act which provides that the Registrar may alter the register to "*correct a mistake*". There is, however, no definition or statutory guidance on what constitutes a "*mistake*". Mr Mannion contended that as Mr Baxter had never in fact been in adverse possession for the required ten years, the registration of Mr Baxter as owner was a mistake. The Deputy Adjudicator held that the ten year adverse possession was not established, and rectified the "*mistake*" in favour of Mr Mannion.

3.26 Mr Baxter appealed to the court and argued that "*mistakes*" under paragraph 5(a) of Schedule 4 are confined to mistakes of a procedural nature; and that since the required notices were duly served on Mr Mannion, Mr Mannion's failure to respond was tantamount to consent. Henderson J, however, held that the Registrar's power to rectify mistakes extended to substantive matters as well as procedural. He further pointed out that:

"42. First, the general policy of the 2002 Act was severely to limit the circumstances in which a squatter could acquire title to registered land, and to offer greater security of title for a registered proprietor than existed under the previous law In the light of this policy, it would be very strange if a registered proprietor could, for the first time, be at risk of irrevocably losing his land to a squatter who had never in fact been in adverse possession. It would also be a wholly disproportionate penalty for failure to serve a counter notice, especially where (as in the present case)

⁶⁸ As at April 2012; "Overriding interests and their disclosure".

⁶⁹ At para 5.7.

⁷⁰ [2010] 1 WLR 1965, [2010] All ER 173.

*there are extenuating circumstances, which help to explain, even if they do not fully excuse, the failure.*⁷¹

43. *Secondly, Mr Baxter's interpretation of the 2002 Act would be an invitation for fraud. It would potentially reward a dishonest applicant who succeeded in persuading the registrar that he had been in adverse possession by telling lies about the nature and extent of his use of the land*
44. *Thirdly, if the registration under paragraph 4 of a squatter who is unable to satisfy the adverse possession test does not involve a mistake which can be rectified, it seems that the former proprietor would be precluded from claiming an indemnity for his loss pursuant to section 103 and Schedule 8 to the 2002 Act. So far as material, all of the circumstances set out in paragraph 1(1) of Schedule 8 in which a person is entitled to claim an indemnity depend on a mistake having been made. In the absence of a mistake, no right to an indemnity can arise. Such an interpretation of the 2002 Act would fail to strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the former owner's fundamental rights, and so would breach Article 1 of the First Protocol of the European Convention on Human Rights: see JA Pye (Oxford) Ltd v United Kingdom (2008) 46 EHRR 45 at paragraph 53. Accordingly, section 3 of the Human Rights Act 1998 would require the court, if possible, to adopt an interpretation of the 2002 Act which enabled the register to be rectified in such circumstances."*

3.27 Henderson J also clarified the position regarding the burden of proof, stating that the general principle would apply, that is, the burden of proof lies on the party who has to establish a proposition in order to succeed in his claim. Hence, for an application by a squatter for registration under paragraph 1(1) of Schedule 6, the burden of proof lies on the squatter. As for the application by Mr Mannion to "correct a mistake" under paragraph 5(a), the burden lay on Mr Mannion to prove that Mr Baxter had not been in adverse possession for the ten year period.

⁷¹ Mr Mannion gave evidence that he suffered two deaths within his family, that of his only brother and his grandson at three weeks old. Mr Mannion was then unwell for some considerable time.

Ireland⁷²

3.28 The relevant legislative provision is that of section 24 of the *Statute of Limitations 1957*, which provides that "at the expiration of the period fixed by this Act for any person to bring an action to recover land, the title of that person to the land shall be extinguished". The predecessor of this provision was section 34 of the *Real Property Limitation Act 1833*.⁷³

3.29 The effect of the Limitation Acts on a leasehold estate was considered for the first time in Ireland in the Court of Appeal decision of *Rankin v M'Murtry*.⁷⁴ The Irish Law Reform Commission⁷⁵ summarised that, in that case, Holmes and Gibson JJ were of the view that the leasehold estate had been vested in the person in possession,⁷⁶ while O'Brien J based his decision on estoppel.⁷⁷ Johnston J thought that the title gained by possession would be commensurate with the interests which the rightful owner had lost by operation of the statute, and would have the same legal character, though he, too, seems to have been satisfied that the landlord was estopped from denying that the squatter was tenant of the lands.⁷⁸

3.30 However, in 1892 the English Court of Appeal case of *Tichborne v Weir*⁷⁹ appeared to contradict the Irish Court of Appeal. The question before the Court was whether a landlord, having accepted rent from the defendant who had entered into possession of the demised premises, could sue the defendant on foot of the covenant to repair in the lease. The Court unanimously held that:

*"the effect of the statute is not only to bar the remedy, but also to extinguish the title of the person out of possession and in that sense the person in possession holds by virtue of the Act, but not by a fiction of a transfer of title."*⁸⁰

⁷² The law was summarised by Irish Law Reform Commission, Report on Title by Adverse Possession of Land, Dec 2002. Relevant information is abstracted in this part.

⁷³ 3 & 4 Will 4 (1833) c 27. Section 24 of the 1957 Act repeats the language used in section 34 of the 1833 Act which provided: "At the determination of the period limited by this Act to any person making an entry or distress, or bringing any writ of *quaere impedit* or other action or suit, the right and title of such person to the land, rent or advowson for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished."

⁷⁴ (1889) 24 LR Ir 290.

⁷⁵ Report on Title by Adverse Possession of Land, Dec 2002.

⁷⁶ See Holmes J *ibid* at 301 who stated that "the estate and interest, the right to which is extinguished, so far as the original owner is concerned, became vested in the person whose possession has caused such extinction," although he was unhappy with the term "parliamentary conveyance." Gibson J is more ambiguous in his reasoning, stating that "[t]he statute does not extinguish the term: it only extinguishes the right of the party dispossessed ... I think it must be taken that the defendants, assuming the statutory bar has arisen, have in some way, whether by statutory estoppel, transfer, or otherwise, become owners of the lease." (At 303-304.)

⁷⁷ The term "estoppel" is not used, but O'Brien J states that the plaintiff landlord had, by his own course of action, treated the defendant as his tenant as if she had taken out letters of administration to her deceased husband's estate, and that it was not open to him, when the lease expired, to object that the defendant did not have the character of tenant *ibid* at 296.

⁷⁸ *Ibid* 297-298.

⁷⁹ (1892) 67 LT (NS) 735.

⁸⁰ *Ibid* 737 *per* Bowen LJ.

3.31 The law remained in this unsatisfactory state until some years later, when the Irish Court of Appeal decided *O'Connor v Foley*.⁸¹ Fitzgibbon LJ stated:

*"I do not question the authority of Tichborne v Weir. It is the decision of three eminent Judges on (sic) Appeal; it appears never to have been questioned in any text-book or subsequent case, and I respectfully say that it appears to me to be right. But, in my opinion, its effect extends only to liability in contract, and it does not affect the case now before us. It appears to me to decide only this – that the Statute of Limitations operates by way of extinguishment, and not by way of assignment of the estate, which is barred; and that the person who becomes entitled to a leasehold interest by adverse possession for the prescribed period is not liable to be sued in covenant as assignee of the lease, unless he has estopped himself from denying that he is assignee."*⁸²

3.32 The above passage is only *obiter*. However, it is persuasive authority that the position of the squatter as against the landlord might not be as easily explained as his position as against the tenant. The precarious nature of a person holding leasehold land on foot of the Statute of Limitations was highlighted in *Ashe v Hogan*.⁸³ The Irish Court of Appeal held that the position of a squatter on leasehold land was doubtful enough for a possessory title not to be forced on a purchaser.

The decision in Perry v Woodfarm Homes Ltd

3.33 The status of a squatter on leasehold land was more fully explored in *Perry v Woodfarm Homes Ltd*.⁸⁴ The case was one of encroachment, and unlike *Rankin v M'Murtry* and *O'Connor v Foley* discussed above, no question of estoppels arose on the facts. Before discussing *Perry v Woodfarm Homes Ltd*, it is useful to note that the House of Lords had determined in 1962 in *St Marylebone Property Co Ltd v Fairweather*⁸⁵ that the effect of both section 34 of the *Real Property Limitation Act 1833* and section 16 of the *Limitation Act 1939*, which was in similar terms, was that a tenant who had been dispossessed still retained the leasehold estate which he could then surrender to his landlord, thereby allowing the landlord to recover possession. Lord Morris had dissented strongly on the basis that such a result would contravene the principle of *nemo dat quod non habet*.

3.34 In *Perry v Woodfarm Homes Ltd*, the title of the tenant had been barred by the acts of adverse possession of the plaintiff. The defendant,

⁸¹ [1906] 1 IR 20.

⁸² [1906] 1 IR 20 at 26.

⁸³ [1920] 1 IR 159.

⁸⁴ [1975] IR 104.

⁸⁵ [1963] AC 510.

presumably in reliance on the decision in *Fairweather*, took an assignment of the leasehold interest from the dispossessed tenant of lands. On subsequently acquiring the freehold title, the defendant alleged that it was entitled to re-enter as freeholder, claiming that its paper leasehold title had merged in the freehold so as to give it the right to immediate possession by virtue of its freehold estate. The Supreme Court, however, by majority preferred the reasoning of the dissenting judge in *Fairweather*, and held that the title of the lessee to the leasehold estate had been extinguished, and could not therefore be transferred to the freeholder.⁸⁶ The result of the decision was to affirm the view of the Irish Court of Appeal in *Ashe v Hogan*⁸⁷ to the effect that the squatter obtains not the leasehold estate itself but the right to hold possession of the lands during the residue of the term of the lease. Accordingly, this remained as an encumbrance upon the freehold and prevented the freeholder from repossessing the lands during the continuance of the lease.⁸⁸

3.35 The Irish Law Reform Commission explained that it is clear from the *Statute of Limitations 1957* itself that the rights of the landlord are not affected by the dispossession of his tenant. His rights during the currency of a fixed term lease, which include the right to enforce the covenants and to forfeit for any breach, do not fall within the ambit of an "action to recover land". Consequently, the landlord is not affected by expiry of the limitation period under section 13. In *Perry*, the Supreme Court confirmed this, ruling that the landlord is still in a position to enforce breaches of covenant against his tenant, and that he may forfeit for breaches of covenant.⁸⁹

3.36 As the Irish Law Reform Commission has pointed out, while the decision in *Perry* affords some security to a squatter in leasehold land, in that he is not subject to the sort of collusive action between landlord and ousted tenant which succeeded in *Fairweather*, his position remains precarious, and his title would not be forced on an unwilling purchaser. The reason is that he is liable for forfeiture at any time for breach of covenant on the part of the ousted tenant. He may seek to protect himself by offering to pay rent, or remedy other breaches, but, crucially, the landlord is not required to accept this offer. In addition, the squatter has no right to information about the terms of the lease. Thus, he can take no preventative steps, since he is probably not aware of the covenants in the lease, nor can he satisfy a purchaser that forfeiture is not imminent. Relief against forfeiture not being available,⁹⁰ the squatter's only defence against such action would be the possibility of an estoppel against his landlord.⁹¹

3.37 The conclusion of the Irish Law Reform Commission was that while the position of the squatter in Irish law is not as unsatisfactory as that in English law, in its present form it undermines a number of titles. Reform of the law in Ireland was thought to be justified for the following reasons. First,

⁸⁶ Walsh and Griffin JJ, Henchy J dissenting.

⁸⁷ [1920] 1 IR 159.

⁸⁸ Per Walsh J at 119.

⁸⁹ Per Walsh J at 119-120; per Griffin J at 130.

⁹⁰ *Tickner v Buzzacot* [1965] Ch 426.

⁹¹ *O'Connor v Foley* [1906] 1 IR 20.

a large part of urban land is held under long leases. Many of these leases are for a term as long as 999 years, and the discrepancy between a squatter on land held under such a lease and a squatter on freehold land could hardly be said to be a credit to the law. Secondly, many leases would be such as to entitle the tenant to acquire the fee simple under the provisions of the *Landlord and Tenant (Ground Rents) Acts 1967–1978*, but a squatter on leasehold land does not succeed to the rights of such a tenant, since he does not acquire the leasehold estate. The decision in *Perry v Woodfarm Homes Ltd* therefore has the effect that the legislative policy of enfranchisement has been, to some extent, frustrated. Thirdly, the decision renders the title unmarketable, thereby reducing the quantity of land available for development, as well as leaving present occupiers in a position of uncertainty.

New Zealand

Unregistered land

3.38 In New Zealand, the limitation period for an action to recover land is 12 years from the date on which the right accrues,⁹² except in relation to Maori customary land⁹³ and land registered under the Land Transfer Act 1952.⁹⁴ The right of action is not deemed to accrue until someone is in adverse possession of the land.⁹⁵ When the limitation period for anyone to bring an action to recover his land expires, his title to the land is extinguished.⁹⁶

Registered land

3.39 Where the land is registered under the Land Transfer Act 1952, no title can be acquired by possession of a user adversely to or in derogation of the title of the registered proprietor according to section 64 of the 1952 Act. Section 64 is, however, expressly subject to Part 1 of the Land Transfer Amendment Act 1963, which provides that adverse possession of at least 20 years will enable a squatter to apply to the Registrar for a certificate of title, despite the existence of the registered proprietor.⁹⁷ Possession of any land by one or more joint tenants or tenants in common can be capable of being adverse possession as against the other tenant or tenants.⁹⁸ Except where a squatter has been in adverse possession for a period of not less than 30 years, if a registered proprietor is under any disability at the expiration of the period of 20 years of the squatter's adverse possession, the squatter cannot be entitled to make an application until the registered proprietor has ceased to be under a disability or has died (whichever is the earlier).⁹⁹

⁹² Limitation Act 1950 (NZ), section 7(2).

⁹³ Limitation Act 1950 (NZ), section 6(1).

⁹⁴ Limitation Act 1950 (NZ), section 6(2).

⁹⁵ Limitation Act 1950 (NZ), section 13(1).

⁹⁶ Limitation Act 1950 (NZ), section 18.

⁹⁷ Land Transfer Amendment Act 1963 (NZ), section 3(1).

⁹⁸ Land Transfer Amendment Act 1963 (NZ), section 3(3).

⁹⁹ Land Transfer Amendment Act 1963 (NZ), section 4(1).

- (a) Where the Registrar is satisfied that a squatter has been in possession as required by the Land Transfer Amendment Act 1963, the Registrar will cause notice of the application in such form as he thinks fit:
 - (i) to be published at least twice on dates specified or approved by him in such one or more newspapers as he thinks fit, including at least one newspaper circulating in the locality in which the land is situated; and
 - (ii) to be given to any person who is shown by the register to have or who in the Registrar's opinion has or may have any estate or interest or any claim to any estate or interest in the land (and the notice warns that any such estate or interest will lapse unless a caveat is lodged); and
 - (iii) to be published in such other way or to be given to such other person as he thinks fit.¹⁰⁰

The notice fixes a date, after which the Registrar may proceed with the application, unless on or before that date a caveat has been lodged.¹⁰¹

- (b) The Registrar will refuse the application if:
 - (i) he is not satisfied on the evidence produced with any application or supplied pursuant to a requisition that the squatter has been in possession of the land in the manner and for the period specified; or
 - (ii) the squatter fails to comply with any requisition of the Registrar under the 1963 Act within the time specified.¹⁰²
- (c) Any person claiming any estate or interest in the land may, before the expiration of the time fixed, lodge a caveat in the prescribed form to forbid the granting of the application.¹⁰³
- (d) Where the Registrar is satisfied that the person executing a caveat is the registered proprietor, the Registrar will refuse the application.¹⁰⁴
- (e) Where the Registrar is satisfied with the squatter's application, he will issue a certificate of title to the squatter, and cancel the other certificate of title.¹⁰⁵

¹⁰⁰ Land Transfer Amendment Act 1963 (NZ), section 7(1).
¹⁰¹ Land Transfer Amendment Act 1963 (NZ), section 7(3).
¹⁰² Land Transfer Amendment Act 1963 (NZ), section 6.
¹⁰³ Land Transfer Amendment Act 1963 (NZ), section 8(1).
¹⁰⁴ Land Transfer Amendment Act 1963 (NZ), section 9(1).
¹⁰⁵ Land Transfer Amendment Act 1963 (NZ), sections 15 and 18.

Chapter 4

A related problem – surveying and land boundaries in the New Territories

4.1 This chapter will discuss the problems related to surveying and land boundaries in the New Territories. The issues covered will serve as background information for further discussions in this paper.

Background

4.2 The administration of land in the New Territories has its origins in the end of the 19th century when the New Territories was leased to the United Kingdom for 99 years under the Peking Convention in June 1898. Nissim gives an account of the history:

"The Peking Convention was signed on 9 June 1898, giving Great Britain a 99-years lease of what immediately became known as the New Territories (NT) to begin on 1 July 1898. Physical occupation in fact did not commence until April 1899 and survey work began in November of that year. It was recognized that the most important work to be accomplished after taking over the New Territories was the allocation and registration of all privately owned land. The survey work was carried out by trained staff lent by the Indian government,

The registration of claims was carried out administratively to start with until it was taken over by the Land Courts established under the New Territories (Land Court) Ordinance 1900. It was done hand in hand with the survey work which itself was not completed until June 1903, by which time nearly 41 000 acres of land with about 350 000 separate holdings had been demarcated. ...

The NT was divided into 477 Demarcation Districts (DD) for each of which there was a Block Crown Lease which was executed by the Governor. If a claimant established his title to the satisfaction of the Land Court, his particulars would be entered into the Schedule to the Block Crown Lease opposite the Lot Number allocated to his piece of land, together with description of the user of the land at that time, the area of the lot

and the amount of Crown rent payable. These lots are now referred to as Old Schedule lots."¹

4.3 Hase has described how the registration of owners was effected.² When the survey was completed, the actual occupier would be identified summarily (for every lot identified the occupier was asked to fill out a simple form if he claimed that the land was his, the village community was asked if anyone objected to the occupier's claim and, if no objections were forthcoming, the occupier was entered onto the Survey forms). This process was supervised by a Land Court formed for the purpose. In the event of dispute as to the occupier, a summary hearing by the Land Court would decide between the claims. The occupier thus identified was accepted as the most suitable person to be registered for the new Crown lease.

The Land Grant under the Block Crown Lease

4.4 A description of the form and effect of such a Block Crown Lease can be found in the speech of Chan CJHC in *Secretary for Justice v Wing Lung Wai Community*:

*"By [the Block Crown Lease], the Crown granted to the lessees whose names appear in the schedule the parcels of land which are set out in the schedule against the names of the respective lessees by reference to a lot number, the area in that lot, the description of the land, the Crown rent which is payable and the terms of the respective leases. This Block Crown Lease is to be relied upon by all the lessees appearing in the schedule who were granted the particular parcels of land referred to in the schedule."*³

4.5 An example of the usual form of the material part of a Block Crown Lease, which includes the operative words of the parcel clause and the plan, can be found in the same case as follows:

"Now, this indenture witnesseth that in consideration of the yearly rents and covenants and stipulations hereinafter reserved and contained by and on behalf of each Lessee respectively to be paid, done and performed, His said Majesty KING EDWARD VII doth hereby grant and demise unto each Lessee ALL that piece or parcel of ground situated, lying and being Survey as District No 109 in the New Territories in the Colony of Hong Kong set out and described in the Schedule hereto opposite to the name of such Lessee AND which said piece or parcel of ground is more particularly delineated and described on the plan or plans of Survey District No 109 attached hereto according to the lot

¹ R Nissim, *Land Administration and Practice in Hong Kong* (1998, HKU Press) at 17 to 18.

² Dr Hase, "The Origins of the New Territories Land Registration System", downloaded from www.hkis.org.hk/hkis/cms_lsd/upload/NewsConf/nwevtb19_0.pdf

³ [1999] 3 HKC 580, at 582G to H.

number set out in the Schedule hereto opposite to the name of such Lessee and marked on the said plan together with the ..."⁴ (Emphasis added.)

4.6 In other words, the Schedule sets out and contains the description of the parcel of land granted which is more particularly delineated and described in a plan annexed to the Block Crown Lease. The adoption of the formula of: "*more particularly delineated and described in a plan annexed*" has important implication on the issue of what is the property intended to be passed under the Block Crown Lease. The law was authoritatively stated by Buckley LJ in *Wigginton & Milner v Winster Engineering*,⁵ as follows:

"When a court is required to decide what property passed under a particular conveyance, it must have regard to the conveyance as a whole, including any plan which forms part of it. It is from the conveyance as a whole that the intention must be ascertained. To the extent that the conveyance stipulates that one part of it shall prevail over another part of it, in the event of there being any contradiction between them in the ascertainment of the parties' intention, the court must of course give effect to that stipulation."

4.7 The passage above was adopted by the Court of Appeal in the case of *Wing Lung Wai Community*. Chan CJHC stated in that case that: "*[i]f there is a dispute with regard to what is actually conveyed, that is a matter of construction of the whole conveyance, including the parcel clause and the plan, in the light of other relevant surrounding circumstances.*"⁶

4.8 In the case where the operative words of "*more particularly delineated on the plan*" are used, it was held that the property description in the plan shall prevail over the verbal description contained in the deed. In the English case of *Eastwood v Ashton*,⁷ the court had to determine whether a small strip of land had passed from vendor to purchaser in a deed of conveyance. The premises of the property were stated in the indenture to be "*more particularly described in the plan endorsed on these presents and are delineated and coloured red in such plan.*" Lord Wrenburn stated:

"My Lords, I find that the description by plan is couched in the words 'all which said premises are more particularly described'. The words 'more particularly' exclude, I conceive, that they have already been exhaustively described. These words seem to me to mean that the previous description may be insufficient for exact delimitation, and that the plan is to cover all deficiencies, if any."

⁴ Same as above, at 5821 to 583B.

⁵ [1978] 3 All ER 436, at 445g.

⁶ [1999] 3 HKC 580, at 588C to D.

⁷ [1915] AC 900 (HL).

4.9 In the case of *Wing Lung Wai*, the Hong Kong Court of Appeal referred to the line of authorities on similar expressions and endorsed the reasoning in the following terms:

*"In previous decided cases where phrases such as 'more particularly delineated', 'more particularly described', 'or more precisely delineated' were used in connection with plan annexed to the relevant conveyancing documents, they are cases in which the court held that upon the true construction of the conveyance in question and in the circumstances of these cases, the parties intended to and had agreed to give priority to the plans. In every case, it is still a matter of construction of the relevant document as a whole in order to ascertain the intention of the parties."*⁸

4.10 In the recent case of *Druce v Druce*,⁹ the English Court of Appeal succinctly set out the current state of the law as follows:

"It is well established that if a plan is attached to a conveyance for the purpose of identification only, the verbal description in the conveyance will prevail over any other indication in the plan. On the other hand, if the property is described by reference to the plan, the plan prevails – Eastwood v Ashton [1915] AC 900 which concerned a conveyance where the property was 'more particularly described in the plan'. If both phrases are used, that is to say if the plan is for the purpose of identification only and in addition the property is described as more particularly described or delineated on the plan, as I said, it is a question of interpretation of the conveyance whether the plan prevails over the verbal description in the conveyance itself. Thus, it seems to me that in most cases the likely construction is that the verbal description is to prevail. It is because the combination that I have given is absolutely clear by the inclusion of the word 'only' that the plan is for the sole purpose of enabling the parties or the court to identify the property." (Emphasis added.)

4.11 The problems associated with the boundaries of the Block Crown Lease arose because, as a matter of law, the Block Crown Lease was granted as set out in the Demarcation District ("DD") sheet and not based on the actual occupation of the lot. It may perhaps be suggested that each lessee under the Block Crown Lease was in reality in actual occupation (of the land demised to him under it) in accordance with the existing land boundaries, and arguably, the Block Crown Lease should be construed by reference to the actual circumstances prevailing at the time it was executed. However, instead of the adoption of the usual phrase "*for identification only*", the term of the Block Crown Lease was drafted as if the plans were accurate and intended to reflect the real location of the piece of land. Under the current

⁸ [1999] 3 HKC 580, at 588E to F.

⁹ [2004] 1 P&CR 26 424.

state of the law, the boundaries of the land grant under the Block Crown Lease were as set out in the DD sheets.

4.12 Cruden described the problems associated with the survey of Block Crown Lease in the New Territories as follows:

"The development of the New Territories also increasingly revealed the varying accuracy of the original survey on which the Block leases were based. There has never been a complete re-survey of the New Territories in relation to the boundaries shown in the Block leases. Initial errors have tended to remain uncorrected. ... Yet a further complicating factor is that for many years land transactions were often handled by the parties themselves, without legal advice or assistance. ...

*Rapid increases in land values and growing awareness by owners and other persons having interests in land has led to parties to land transactions increasingly seeking legal assistance. Old errors are now more likely to be found and steps taken to have them corrected. Difficulties can still occur and the time is overdue for a major resurvey of the New Territories."*¹⁰

The problems of the Demarcation District Sheet

4.13 The Block Crown Lease Demarcation Sheets were drawn up in great haste, to very small scales, and were never designed to demarcate the exact location of the lots, but merely to identify which lot went with which lot number.¹¹ There were initially some 300,000 such lots, and, even after so many have been resumed, there are still over 200,000 of them today. It is estimated that a significant number of them (estimated to be about two-thirds) are not exactly where they are shown on the DD Sheets, but from between five and 20 feet away. The accuracy of the DD Sheets is high, in fact, but they are not scientific surveys to modern standards.

4.14 However, some buildings situated in those Old Schedule lots are regarded as "*built off lot*", or "*extends over Government Land*", and in both cases, the DD Sheet is regarded as if it was drawn up after a scientifically demarcated survey. The anomaly is apparent where the building is in fact pre-1898, or is a new building but built on pre-1898 foundations. In these cases it is not that the building is "*built off lot*", but that the lot is "*depicted off building*". However, where an Old Schedule building is not exactly where the

¹⁰ Gordon N Cruden, *Land Compensation and Valuation Law in Hong Kong* (1999, Butterworths Asia), at 6.

¹¹ A member of the Sub-committee gave the following examples of poor depiction of boundaries in the DD sheet: (a) a row of ten pre-1898 village houses (around Sha Tau Kok area) was shown as only five houses; (b) a row of old village houses (in DD 296, Tap Mun) parallel to the coast was shown in a widely different orientation thus running into the water area; and (c) the party walls of a row of pre-1898 houses (in Cheung Chau) were shown as the diagonal lines joining opposite corners of pairs of walls.

DD Sheet shows it ought to be, the current law dictates that the Survey, not the building, should be accepted as correct.

The problems of New Grant Plans

4.15 New Grant (lots held on Crown leases granted post-1905) share much of the same problems with Old Schedule lots held on the Block Crown Leases. Such lots are carved out of undeveloped Government land. Positions on the proposed new land grant would be drawn up and in the application process the applicant would ask the Government to grant that piece of land to him. If the application is successful, the new plan would be annexed to the grant. Technically, the new grant is only an agreement to grant a lease for the land identified on the plan annexed, and it envisages that the actual occupation taken up on the ground may not be exactly as shown on the plan and there are provisions inserted into the contract which would enable any discrepancy to be corrected "upon the execution of the Crown lease".

4.16 Unfortunately, very few Crown Leases were ever formally executed pursuant to such new grants. The norm is for the Crown lease to be deemed to have been granted upon the lessee's fulfilment of his obligations under the new grant (i.e. performance of his building covenant) to the satisfaction of the Government. Hence, the discrepancies between the boundaries as shown on the plans annexed to the grant document and the actual state of occupation on the grant never get a chance to be corrected on the lease documents and there are often no official records of the same. An illustration of the boundary problem of the New Grant Lease can be found in a case involving the removal and resiting of an old village, being the new village of Yue Kok Tsuen in Tai Po (see Annex 1). In that case the individual lots were granted prematurely. The resite area was planned to be built on terraced land which had not yet been formed. The land to be granted were already drawn up on plans plot by plot. The plan was then annexed to the new grant. Subsequently the terraced area was formed but, due to physical and engineering constraints, it did not match the site plan annexed to the new grant.

4.17 In an area in Tuen Mun, the recorded positions of many New Grant lots are different from the actual occupation, as could be illustrated by the plan as Annex 2. In another case in Wong Chuk Wan, a house originally shown on record was shifted to a location more than 20 metres away through the "pointing out" action (see Annex 3a and 3b). There are indeed many more similar land grant cases which result in the lots being recorded different from the as-built situation although the as-built situation actually reflected the original intention of the applicants. A typical example can be seen from a plan of Mui Wo attached as Annex 4.

4.18 It seems there are problems with the drawing up of New Grant plans, and there is a lack of as-built check of the subsequent development. In the New Territories Administration's regime, a land lot was granted by firstly producing a grant plan as a paper exercise. The lot boundary was then

"pointed out" on site by a demarcator, with little measurements and no ground marking. The grantee might start his house construction according his interpretation of the lot position possibly under the influence of his own development interest and fung shui requirement. In this way, errors in the original plan drawing, in the subsequent pointing out and in the actual construction work were likely. As a result, the final occupation differing from the grant plan would be a norm rather than an exception. In future when these New Grant lots start to come up for rebuilding, the owners will (on current practice) find Government refusing permission on the grounds that the buildings are "off-lot".

4.19 A member of the Sub-committee suggested that it should be an assumption that it is the Survey which is at fault, except where there is good evidence for the building having been rebuilt at some date post-1898, and on that occasion having built larger than before and having encroached on the surrounding Government land. The owner of an Old Schedule Lot building may not be aware that his building (which was his father's or ancestor's building) is considered to be "off lot", at least until the owner intends to rebuild it, but then is informed by the Government that building permission is refused because the building is "off lot". So long as Government, or the court, insists on treating the Block Crown Lease DD sheet as proof of where a lot or the building on a lot ought to be, problems will continue to arise.

4.20 The fact is that the occupation situation at the time of DD survey had not been accurately reflected on the plan to meet the present day boundary requirement whereas Government and the court always refer to the DD sheet as the basis for dealing with land boundary matters. When applied to the subject issue, any existing occupation not conforming with the DD sheet boundary is treated as adverse possession and the boundary problem is resolved as an adverse possession case.¹²

The implications on the prospective registered land title system

4.21 In due course when the Land Titles Ordinance (Cap 585) becomes effective and the registered land title system comes into play, the paper title would not tally with the "enjoyed title" of the land. In view of the discrepancies between the boundaries as shown on the DD sheet (which will

¹² One member of the Sub-committee considered that this approach is fundamentally wrong. In his view, the problem is caused by a misrepresentation of the original occupation situation and should be resolved by correcting it at source, ie, to up-grade the DD sheet, rather than by any other alternative measures. It is suggested that for the following three reasons it is inappropriate to adopt the boundaries on the DD sheet as the only legal boundary record which can only be amended by way of rectification: (a) the DD survey was never intended as a proper boundary survey; (b) the landowners in claiming their ownership had not been represented by a surveyor in accepting their boundaries on the DD sheet; and (c) attempts to up-grade the DD sheet, at least in parts, and suggestions to up-date the DD sheet by eminent surveyors had been made thus indicating the inappropriateness of taking the DD sheet as the boundary record. The adoption of the DD sheet for record purpose was merely a matter of administrative convenience at the beginning and this practice unfortunately perpetuates to the present.

be the registered title deed) and the actual boundaries on the ground, the registered owners ran the risk of owning only part of their property. Therefore, the existing boundaries problems will be magnified.

4.22 In the present system one would take the title from the previous purchaser in the state as it was. It was through the conveyance that one got the interest in land which the person purchased. However, under a registered land title system, one would only get the title shown on the Register, which would not correspond with the actual state of affairs where there is adverse possession. Since the vendor's title will not be "*conveyed*" to the purchaser, questions may arise over whether the rights acquired by the vendor through adverse possession have passed to the purchaser.

Possible solutions to the surveying problems

4.23 After considering the matter, it seems there are a number of possible remedies to the surveying problems, including:

- (a) a re-survey of the boundaries of the Old Schedule and New Grant lots;
- (b) variation by agreement between Government and owners by operation of law.

Resurveying of the boundaries

4.24 It has been suggested that a complete and accurate re-surveying by competent professionals of the land lots should be done and if possible to be done out of the present government surveying system.¹³ On the other hand, other members pointed out that the suggested re-surveying carries huge implications. Apart from the technical feasibility of the realignment of the boundaries of the New Territories lands on the survey plans, the administrative and financial implications of redefining the legal boundaries should also be considered. There will be serious ramifications of the resurvey if a general survey of all the lands is to be done. An appropriate authority will need to be appointed to conduct a systematic survey of all the lots in the New Territories which had not been accurately surveyed before. There is a need to introduce legislation which allows statutory rectification of the legal boundaries of the land lots. Mechanism on the adjudication of disputes arising from the new survey has to be established under the new legislation. As a matter of law, the owners would contend that as a result of the land survey their land has been taken away. A tribunal for the

¹³ Government recognised the problem with land boundaries and has taken the step to rectify the problem to a certain extent. There is a proposal to amend the Land Survey Ordinance (Cap 473) allowing land owners to apply to the Director of Lands to determine the boundaries of his lot. It is recognised that this proposal is unlikely to rectify all the boundaries issues but it does go some way to resolving some problematic lots, particularly where adjoining owners can agree to the newly drawn up plan.

determination of land boundary disputes would have to be established and compensation would have to be paid in appropriate cases.¹⁴

Variation by Agreement

4.25 It has been pointed out to the Sub-committee that the problem has arisen partly due to poor survey and partly due to the owners ignoring (whether intentionally or unintentionally) the inaccurate plans when transactions took place. There were transactions after the grant of the Block Crown Lease and there were incorrect descriptions in the assignments. Apart from the legal remedies that should be directed against the previous land owners for their failure to discharge their own duties in checking the positions before entering into the property transactions, the government lease on the lot may in fact have been varied by operation of law.

4.26 In general, Government's approval had to be obtained for building on Old Schedule lots under the Block Crown Lease as well as under New Grant (the words "*New Grant*" include various types of Government Leases, Conditions and other land grant documents relating to lots in New Territories other than new town lots). The types of documents issued will depend on the period in which the construction took place. They range from Building Licences, to Certificates of Compliance, No-objection to Occupy Letters and Tolerance Letters (collectively "*Approval Letters*").

4.27 If buildings had been erected on a piece of land ("*Affected Lot*") other than the lot ("*the False Lot*") as shown on the plan to the Block Crown Lease or the New Grant with the approval of Government as evidenced by the issue of the Approval Letters, it is arguable that the Government lease of the False Lot had been varied by agreement between Government and the owner and by operation of law, when the Government lease for the False Lot was surrendered and a grant made of a new lease for the Affected Lot.

4.28 Assuming that a portion of the Affected Lot overlaps with another person's lot on the plan attached to the Block Crown Lease or the New Grant, it seems that adverse possession will not come into play, if that person's lot as shown on the plan was also varied by subsequent dealings as in the case of the Affected Lot.

4.29 Nevertheless, adverse possession will come into play if the Affected Lot or a portion of it overlaps with and encroaches on the lot of another person and the boundaries of the lot being encroached upon had not

¹⁴ An example of the legislation which enables the Government to prepare plans to replace original plans of the leases that were demised under a Block Crown Lease can be found in the Crown Lease (Pok Fu Lam) Ordinance (Cap 118). Section 3 of the Ordinance provides that "[a]s soon as may be after the commencement of this Ordinance the [Chief Executive] may direct the Director of [Lands] to prepare a plan with the object of replacing for all purposes the original plan." The new boundary plan, which is approved by the Director of Lands or amended by court order, "shall be deemed for all purposes to be the original plan" (section 11). Any person who considers the approved plan to be incorrect may apply to the District Court to amend the plan in the manner as applied or in such manner as the court may think just (Section 8).

been changed or varied by Government's approval. If that is the case, it is possible that the Government is liable for having issued the Approval Letters relating to the Affected Lot with inaccurate plans.

- 4.30 There are other legal questions to consider too. For example:
- (i) If both the Affected Lot and "the encroached upon" lot were varied by Government's approval, which Government lease should prevail, the Government lease of the Affected Lot or that of the lot that was encroached upon?
 - (ii) The Government lease of the Affected lot could be granted before or after that of the lot encroached upon. How would this factor affect the question above?
 - (iii) As to whether there can be in adverse possession with regard to the encroached upon portion, the answer is not entirely certain.

4.31 For some old schedule lots, there may not be Approval Letters or perhaps the owners did not seek the Government's approval before change of user or construction and such action was condoned. There could be cases where no construction had taken place or the Government disclaims responsibility on the setting out of the lots or issues relating to boundaries in the Approval Letters. In these scenarios the boundary issues remain.¹⁵

The right approach

4.32 After considering possible solutions to the surveying and land boundary problems, the Sub-committee is of the view that a comprehensive resurvey of the boundaries alone could not solve the problem. Hardship would be caused to owners who based their investments on the "wrong" boundaries for a long time. It would appear that the land boundary problem in the New Territories is best dealt with together and in the context with the implementation of the Land Titles Ordinance.

¹⁵ A member pointed out that Government Departments have been extremely careful in approving land matters by restricting to specific items within its authority and invariably disclaiming any boundary inference. A typical example can be found from the Certificate of Compliance issued by the District Lands Office which includes a standard disclaimer as follows:

"No survey of the occupation boundaries of the said building has been made by Government. Confirmation of compliance hereinbefore mentioned is not to be taken as any indication that the said building or any projection therefrom is within the registered boundaries of the lot. In this regard, Government expressly denies any liability for any claims or damages whatsoever arising out of or in connection with your construction of the said building."

It is therefore not entirely without doubt that a Government lease for the False Lot is deemed to have been varied with the grant of a new lease in the form of the approval letter for the Affected Lot.

Chapter 5

Land Titles Ordinance (Cap 585) and the policy on adverse possession

Introduction

5.1 Hong Kong does not yet have a registration system for title to land. Although legislation to this effect has been enacted, it has not yet come into force.¹

Unregistered and registered land system

5.2 Until the new legislation on title registration comes into force, it is important to bear in mind that the system of land registration in Hong King is a deeds registration system under the Land Registration Ordinance (Cap 128) for recording instruments concerning interests in land. The purpose of it is to facilitate the tracing of title, not to confer title. As the register maintained under Cap 128 is merely an index of instruments, the Ordinance only accords priority to the instruments which have been registered. Whenever there is a property transaction, a purchaser's solicitor has to review the instruments in order to check title. This process needs to be repeated in every subsequent transaction. The regime is time-consuming, complicated and ineffective. There may be no certainty as to title since it can be just a matter of opinion of the solicitor checking the title. However, the existing register provides prima facie evidence of ownership.²

5.3 In jurisdictions with a registered land title system, the register takes the place of the title deeds and of the matters that would be recorded in the land charges register where the title was unregistered. It has been said that "*(t)he governing principle of the [Land Registration Act 1925] is that the title to land is to be regulated by and ascertainable from the register alone*",³ subject only to overriding interests which are not protected on the register, but would bind any purchaser of registered land.

5.4 The English Law Commission has set out three major differences between registered and unregistered land:

"(1) The investigation of title to registered land is very much simpler and quicker than it is where title is unregistered.

¹ Land Titles Ordinance (Cap 585), which was enacted in 2004.

² *Common Luck Investment Ltd v Cheung Siu Ming* [1998] HKLRD (Yrbk) 434.

³ *Abbey National Building Society v Cann* [1991] 1 Ac 56, 78 per Lord Oliver.

- (2) *The doctrine of notice has no application to registered land. A purchaser of registered land takes it subject to estates, rights and interests which are protected by an entry on the register and to overriding interests, but to nothing else.*
- (3) *Where a person is registered as the proprietor of an estate in registered land, HM Land Registry guarantees that title. This means that if it is necessary to rectify the register to correct some mistake that has occurred, any person suffering loss as a result is entitled to payment of an indemnity from the Registry."⁴*

Land Titles Ordinance (Cap 585)

5.5 In 1988, the then Registrar General established a working party to consider the introduction of a system of registered title so as to improve the efficiency and security of property ownership. A Bill, introduced to the Legislative Council in 1994, lapsed at the end of that session. A revised Bill was gazetted in December 2002, and the Land Titles Ordinance (Cap 585) ("the LTO") was subsequently enacted in July 2004. Commencement of the legislation was made conditional on the Administration's carrying out a comprehensive review and reporting back to the Legislative Council ("LegCo") before proposing a commencement date. In May 2007, by way of a panel paper,⁵ the Administration reported to the then Panel on Planning, Lands and Works that the review had found that substantial amendments to the LTO were needed to ensure efficient operation of the new system; and that an amendment bill would be required.

Progress with amendments to Land Titles Ordinance

5.6 A series of LegCo panel papers⁶ shows that there remain various substantial matters to be resolved before an amendment bill is ready for consideration. These matters include land boundary problems, the conversion mechanism from un-registered to registered land, and modifications to the rectification and indemnity provisions.

Land boundary problems

5.7 Under section 94 of the LTO, the owner of land to which the LTO applies may apply to the Director of Lands for a determination of the boundaries of the lot. If there is no existing plan of the lot or the existing plan of the lot is not acceptable to the Director of Lands, he can either conduct a land boundary

⁴ *Land Registration for the Twenty-first Century, A Consultative Document* (1998, Law Com No 254), at para 2.5.

⁵ CB(1)1643/06-07(07).

⁶ Dated from 2008 to 2011.

survey and prepare a new plan of the lot or advise the land owner to employ an authorized land surveyor to conduct a land boundary survey and deliver a new plan of the lot. If the existing plan or the new plan is acceptable to the Director of Lands, he shall with the consent of the owner of the lot cause the existing plan or new plan to be registered with the Land Registry.

5.8 As discussed in a Panel Paper dated 7 October 2009,⁷ there are problems with section 94 of the LTO:

- (a) Under section 94(4) of the LTO, the Director of Lands is not allowed to make a determination of the boundaries of a lot if the existing plan or new plan changes the boundaries or area or measurement of that lot as shown on a land boundary plan kept in the Land Registry or on any Government lease. The word "determination" is narrowly defined in section 94(6) to mean (in relation to a boundary) adding the bearings, boundary dimensions and coordinates wherever applicable in the process of updating the boundary. However, boundary determination is concerned with ascertaining the exact boundaries of a lot, not simply adding bearings, dimensions and coordinates or updating what is outdated.
- (b) The provisions in section 94(4) and 94(6) are inconsistent with the usual general condition on boundary determination contained in the older Conditions of Grant, which provides that –

"The boundaries of the lot shall be determined by the Director ... (whose decision shall be final) before the issue of the Crown Lease. In the event of any excess or deficiency in area being found to exist as compared with the area specified in the Particulars of the lot the amount to be paid by or refunded to the grantee in respect of such excess or deficiency will be calculated at a rate to be determined by the Director"
- (c) In determining the boundaries of a lot, the Director of Lands will use the latest survey technology and survey equipment to make measurements according to present day survey specifications and accuracy standard. It is highly probable that the distance between any two boundary points measured today is slightly different from that measured, say, 50 years ago when old survey technology, crude survey equipment and different coordinate systems were used. Given that many land boundary plans now kept in the Land Registry and registered under the Land Registration Ordinance (Cap 128) were prepared several decades ago based on the then existing maps, or even by persons other than professional land surveyors of the Government, it is evident that there would not be many lots for

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CB(1)2675/08-09(03).

which the Director of Lands can make a boundary determination if he is not allowed to make any minor changes to the land boundary plan in the process of determining the boundaries.

- (d) Section 94 of the LTO does not exempt the Director of Lands from making a boundary determination due to lack of information (e.g. missing lot cases). Furthermore, there is no provision in section 94 of the LTO stipulating how the existing plan or new plan is to be handled if the Director of Lands is unable to obtain the land owner's consent to cause the existing plan or new plan to be registered in the Land Registry.

Land Survey Ordinance (Cap 473)

5.9 The LTO applies to land that has been brought under the LTO. According to a Panel Paper,⁸ the Administration intends to introduce into the Land Survey Ordinance ("LSO") provisions for determination of land boundaries that would apply both to land governed by the Land Registration Ordinance (Cap 128) and to land brought under the LTO. In this connection, section 94 of the LTO will be repealed and replaced by proposed amendments to be made under the LSO through the enactment of the Land Titles (Amendment) Bill.

Proposed system of determination of land boundaries under LSO

5.10 The system of determination of land boundaries to be set up under the LSO will be developed on the basis of section 94 of the LTO and will be applicable to both land governed by the LRO and registered land under the LTO. The functions of the Land Survey Authority would be revised to include the determination of land boundaries. To maintain consistency and enhance effectiveness in the control of standard of land boundary surveys, section 30(4) of the LSO will be amended (which provides for the deposit of land boundary plans and survey record plans by an authorized land surveyor with the Land Survey Authority after the relevant instrument effecting a division of land has been delivered to the Land Registry for registration) to accord with the new provision modeled on section 94 of the LTO, so that an authorized land surveyor shall deliver the land boundary plan, survey record plan and the report in relation to the land boundary survey to the Land Survey Authority for checking before the relevant instrument together with the land boundary plan already checked and stamped with words indicating so is delivered to the Land Registry for registration.

5.11 As the "report in relation to a land boundary survey" described in the preceding paragraph (which is essentially the same document as that described in section 30(6)(d) of the LSO) is an important document containing information on the boundary evidence found and the rationale of how the land boundaries are determined in a particular land boundary survey, it would be included as an item within the meaning of "land boundary records" defined

⁸ Panel on Development and Panel on Administration of Justice and Legal Services CB(1)2675/08-09(03) dated 7 October 2009.

under section 2 of the LSO. Section 146 in Schedule 3 to the LTO may have to be revised accordingly.

5.12 There was also a proposal to revise section 31 of the LSO to the effect that the Land Survey Authority may allow any person (instead of just the authorized land surveyors or their employees) to inspect any land boundary record and supply any person with copies of any land boundary plan, survey record plan and report in relation to a land boundary survey subject to the payment of the prescribed fee. Section 33(1) of the LSO will be revised to ensure that no liability shall rest upon the Government or upon any officer by reason of his performance of the functions in respect of determination of land boundaries.

5.13 It was intended that amendments to the LSO would be included as consequential amendments to the Land Titles (Amendment) Bill. Applications for determination of land boundaries would be processed on a cost recovery basis. For cases where an existing plan is available and is acceptable to the Director of Lands, the land owner will be required to pay a fee to reimburse the cost incurred by the Director of Lands in searching for the plan, validating the plan and causing the plan to be registered with the Land Registry. For cases where the land owner is required to appoint an authorized land surveyor to conduct a land boundary survey, the Director of Lands will charge a fee, on a cost recovery basis, for checking the plan prepared by the authorized land surveyor, approving the plan and causing the plan to be registered with the Land Registry. For cases where the land boundary survey is conducted by the Director of Lands, the land owner will be required to pay a fee to reimburse the cost incurred by the Director of Lands in conducting the land boundary survey, preparing the plan and causing the plan to be registered with the Land Registry. In any event, the land owner will have to bear the fees in connection with registration of the land boundary plan in the Land Registry.

Rectification and Indemnity Arrangements⁹

5.14 The results of the 2009 public consultation on rectification and indemnity arrangements under the LTO revealed that respondents generally supported preserving the mandatory rectification rule under section 82(3) of the LTO, such that an innocent former owner who lost his title by or as a result of fraud could be restored as owner. On the other hand, respondents agreed that there might be circumstances in which it would be impracticable to return the affected properties to the former owners, and that the following exceptions to the mandatory rectification rule should be made –

- (a) where the property affected had been surrendered for public purpose or resumed prior to the discovery of the fraud; and

⁹ CB(1)2434/10-11(01) dated 16 June 2011.

- (b) where the property had been redeveloped and sold to multiple new purchasers and it would be inequitable to restore title to the former owner.

5.15 The Law Society of Hong Kong (the Law Society) has subsequently opposed the mandatory rectification rule under section 82(3) of the LTO. According to the Law Society, since an innocent former owner would, under the LTO, be restored as owner if (i) he lost his title by or as a result of fraud and (ii) the relevant entry in the Title Register was procured by a void instrument or a false entry, this might encourage a purchaser to go behind the Title Register to investigate previous transactions in order to obtain greater assurance that he would not be at risk. This would undermine the certainty of title and would work against the objective of simplifying conveyancing procedures. The Law Society has instead advocated the adoption of the principle of immediate indefeasibility, i.e. a bona fide purchaser in possession and for valuable consideration will enjoy indefeasible title. They have further suggested that the cap on indemnity (currently proposed at \$30 million) and the bar on indemnity for pre-conversion fraud be removed.

5.16 On the other hand, the Heung Yee Kuk (HYK) strongly opposes any changes to the mandatory rectification rule. The HYK is concerned that, without the mandatory rectification rule, an innocent former owner would not be able to recover his property lost as a result of fraud. An innocent former owner's position under the new system might therefore be worse off, particularly if the value of the property concerned could not be fully compensated by the indemnity payable under the LTO. Furthermore, the HYK considers that owners in the New Territories attach considerable importance to their ancestral land holdings, the loss of which could not be compensated financially. The HYK is adamant that the mandatory rectification rule should be retained.

5.17 In order to address and balance the divergent views and concerns of stakeholders, the Administration proposed a new option with two stages of automatic conversion and suitable modifications to the rectification and indemnity arrangements. Under the new option, on commencement of the LTO, the title registration system with immediate indefeasibility would forthwith apply to new land.¹⁰ For LRO land,¹¹ the conversion process would involve two stages of automatic conversion (Two-Stage Conversion Mechanism). After a lead-in period¹² from the date of operation of the LTO on new land, all LRO land except those subject to stopped deeds would undergo the first stage of conversion (primary conversion) and would be automatically brought under the LTO on a designated date. During the 12 years from the primary conversion (incubation period), land with primary title

¹⁰ "New land" means land granted under a Government lease or an agreement for a Government lease on or after the date of commencement of the LTO (s. 20 of the LTO).

¹¹ "LRO land" means land (as defined in s. 2(1) of the LTO) which is the subject of a Government lease for which a register has been kept under the Land Registration Ordinance (Cap. 128).

¹² A lead-in period is required for preparatory work including development of a computer system for the conversion and gaining experience from the operation of title registration system for new land.

would remain subject to subsisting interests,¹³ while new transactions and interests created after primary conversion would be effected in the manner and form prescribed under the LTO.

5.18 The mandatory rectification rule would apply to restore title to an innocent former owner who lost his property as a result of fraud, except where it was not possible to restore title to the innocent former owner. Indemnity with cap would be payable to a displaced owner in respect of fraud which occurred after primary conversion. A registered owner who wished to preserve the mandatory rectification rule might choose to register an opt-out caution against his own property during the incubation period. The effect of registering an opt-out caution would be to prevent the property from automatic full conversion of title, so that the mandatory rectification rule will continue to apply.

5.19 By the end of the incubation period, land with primary title would undergo the final stage of conversion (full conversion) and would automatically be fully converted to registered land, except where the land was subject to –

- (a) a warning notice registered by a claimant of an unregistrable subsisting interest;
- (b) a Land Registrar's Caution against full conversion for reason of indeterminate ownership;
- (c) an opt-out caution registered by the owner who does not want the title of his property to be fully converted to registered land status; or
- (d) a non-consent caution in respect of rectification proceedings.

5.20 Upon full conversion, bona fide purchasers of registered land who are in possession and for valuable consideration would enjoy indefeasible title. A subsisting interest which was not protected by a registered matter would be subject to other registered matters. Indemnity with cap would be payable to a former owner who cannot restore title in respect of fraud which occurred after primary conversion.

5.21 As compared to the existing conversion mechanism under the LTO, the proposed Two-Stage Conversion Mechanism would also have the advantage of significantly advancing the implementation of the title registration system for LRO land, as the relevant provisions of the LTO would be applicable immediately after primary conversion. Given the need to accommodate the divergent views of stakeholders, however, the pace of *full conversion* under the option might have to be compromised slightly.

¹³ In essence, a subsisting interest means an interest (whether registered or unregistered) that is subsisting as at the date of primary conversion and that would have been enforceable against the current registered owner had the land remained under the LRO system.

5.22 A meeting of the Land Titles Ordinance Steering Committee was convened on 26 May 2011 for stakeholders to provide their initial views on the proposed Two-Stage Conversion Mechanism. The meeting was attended by representatives of the Law Society, the HYK, the Consumer Council, the Hong Kong Association of Banks, the Real Estate Developers Association of Hong Kong and the Hong Kong Mortgage Corporation Limited. Stakeholders generally welcomed the Administration's efforts in addressing their divergent views and concerns, and considered that the proposed Two-Stage Conversion Mechanism appeared feasible in forming the basis for further discussion with a view to taking the land titles exercise forward.

The future of title registration

5.23 Although the details of the registered title regime for Hong Kong are not yet known, the effect of title registration is broadly similar under all systems around the world. The core value of a registered title is that the Title Register is conclusive evidence of ownership and registered rights and interests relating to the registered property, subject to certain exceptions such as overriding interests and the provisions on rectifying the register.¹⁴ It will no longer be necessary to check title by reviewing numerous instruments. Where a person suffers loss because of an entry in the Title Register arising from fraud, or from any mistake or omission of the Land Registrar, he is entitled to be indemnified by the Government.¹⁵ The indemnity is to be paid out of the Land Titles Indemnity Fund established under Cap 585.¹⁶

5.24 Cap 585, as it stands, preserves the concept of adverse possession. Any registered land in question is subject to overriding interests which, by their nature, are not required to be registered, and include, *inter alia*:

"any rights acquired, or in the course of being acquired, in the land where, by virtue of the Limitation Ordinance (Cap 347), the title of the registered owner has been extinguished or will after the expiry of the appropriate period be extinguished;"¹⁷

5.25 The future shape of Hong Kong's registered title regime is still very fluid. It is uncertain when the regime will be implemented, and how adverse possession will be accommodated into the regime. Unless provisions on adverse possession like those in England's Land Registration Act 2002 section 96 are implemented, whereby a new notice system within the registered title regime is created, the existing rules on adverse possession may be still applied in the registered title regime.

¹⁴ Sections 29(4), 28, 81 and 82.

¹⁵ Section 84.

¹⁶ Section 90.

¹⁷ Section 28(1)(k).

Policy on adverse possession

5.26 In response to questions raised in the Legislative Council on February 8, 2006, the then Secretary for Housing, Planning and Lands stated the Government's policy regarding adverse possession. The relevant questions and answers are extracted below for information:

Question (a)

"As the existing legislation provides that a piece of government land will become the occupant's property after it has been continuously occupied for 60 years, whether the authorities have assessed the number of Government land lots in the New Territories which have become the land of the relevant occupants as a result of the above provisions and rulings; of the sizes of the land involved and the amounts of revenue foregone in terms of land premium and Government rent etc, as well as the measures taken by the authorities to prevent government land in the New Territories from unauthorized occupation;"

Question (b)

"Whether it has any policies or measures to prevent and deal with legal proceedings on ambiguous or controversial New Territories land boundaries arising from the relevant rulings;" and

Question (c)

"Of the measures taken by the authorities to rectify the mistakes in the land boundary records, so as to avoid privately owned land lots being incorrectly shown as government land on the relevant records, thereby causing the land owners concerned to be regarded as having taken possession of government land while the private land as shown on the relevant records are (sic) left in disuse?"

Reply by the Secretary for Housing, Planning and Lands

"By way of background, I wish to outline briefly the judgment recently delivered by the Court of Final Appeal on a case involving adverse possession of private land in the New Territories.

At the outset, there is a time limit to bring legal action to recover land in adverse possession. The limitation period to bring action to recover Government land is 60 years from the date on which the right of action accrued, and that for private land is 12 years.¹⁸*

The judgment of the Court of Final Appeal (CFA) concerns cases involving the lot owners and squatters of private lots in the New

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***The Limitation Ordinance, Cap 347, was amended in 1991 which amended the limitation period to bring action to recover private land from 20 years to 12 years."*

Territories. The New Territories land leases expiring before June 30, 1997 was (sic) extended by the New Territories Leases (Extension) Ordinance, Cap 150, The CFA held that this did not give rise to any new lease and hence the time period after the return of sovereignty should continue to accrue towards the number of years of adverse possession. However, as Cap 150 does not apply to unleased Government land, the judgment of the CFA is not applicable to adverse possession cases over unleased Government land.

I wish to respond to individual parts of the question now:

(a) Under the Land (Miscellaneous Provisions) Ordinance (Cap 28), it is unlawful to occupy unleased Government land for private use without permission. Any person who, without reasonable excuse, does not cease to occupy unleased land as required by a notice issued by the authority shall be guilty of an offence and be liable on conviction to a fine of \$10,000 and to imprisonment for 6 months.

The total area of the Hong Kong Special Administrative Region (HKSAR) is 110,173¹⁹ hectares, leased and managed by the HKSAR Government. Of these, around 31,860²⁰ hectares of land are unleased,²¹ most of which are located in the New Territories and outlying islands. Due to the large-scale clearance exercises undertaken for the development of new towns and large-scale infrastructure projects in recent years, unlawful occupation of Government land has been significantly reduced.

Through different means and channels, the Government also strengthens land control to prevent unlawful occupation of unleased Government land. Legal actions will be taken against unlawful occupiers of Government land to deter them (from) doing so. If unlawful occupation is found by land control officers, appropriate action will be taken to rectify the situation, for instance by invoking the relevant provisions in Cap 28. If circumstances permit, the District Lands Offices may also issue short-term tenancies to occupiers, thereby bringing the uses associated with unlawful occupation of unleased Government land regularized (sic). This can generate revenue and reduce the possibility of unlawful occupation. If necessary, the District Lands Offices will fence off unleased Government land which are (sic) prone to unlawful occupation, and put up warnings at prominent locations to deter persons who wish to occupy such land unlawfully.

If a person wishes to apply to the Court claiming adverse possession over unleased Government land, the onus of proof is on the claimant, and he needs to satisfy the court that he has been occupying the relevant unleased Government land during the required period of time

¹⁹ The figure as at September 2012 is 110,441 hectares.

²⁰ The figure as at September 2012 is 32,276 hectares.

²¹ The figure reflects unleased as well as unallocated Government land.

without interference or being challenged. In view of the land control measures I mentioned just now, we believe it would be very difficult for the claimant to provide sufficient evidence to establish his case.

(b) & (c) I would answer parts (b) and (c) of the question jointly, as both of them concern land boundary records.

Over 210,000 private lots in the New Territories are held under Block Government Leases, and are known as old schedule lots. These old schedule lots were surveyed one hundred years ago using graphical survey method for the purpose of recording ownership and related taxation purposes.

The number of the lots involved is great, and to re-survey their boundaries according to the present survey standards will require huge resources and considerable amount of time. According to an estimate by the Hong Kong Institute of Surveyors, such a re-survey will cost about \$1.9 billion and require 10 years.

Under the resources constraints, it will not be possible for the Lands Department to re-survey the boundaries of all old schedule lots. Notwithstanding this, the Department will during the course of its work, such as land resumption for infrastructure projects, processing development of land and processing of small house applications, conduct surveys for lots with unclear boundaries and will update the land boundary records if and when the needs arise (sic). In the longer run, if resources permit, the Lands Department will consider undertaking more re-survey of old schedule lots.

If it is detected by the Lands Department during the course of its work that the boundary of a lot is inconsistent with the record, a deed of rectification can be entered into with the lot owner and the land boundary record updated.

However, if the lot owners concerned do not agree with the rectification, or if the lot owners concerned cannot be located, there will be difficulties in establishing the re-surveyed lot boundary."

Summary of this chapter

5.27 Despite the efforts made by the Administration and stakeholders in implementing a system of title registration, Hong Kong still embraces a deeds registration system under the Land Registration Ordinance (Cap 128) enacted in 1844. Given the problems that have to be resolved, including boundaries of New Territories Land, rectification and indemnity arrangements, it is still uncertain as to when Hong Kong can convert to a title registration system. Our recommendations to be set out in Chapter 7 will take into consideration Hong Kong's peculiar land registration position.

Chapter 6

Some legal issues relating to adverse possession

Introduction

6.1 The operation of the adverse possession principles has given rise to certain problems including:

- whether an Owners Incorporation can claim adverse possession;
- whether a co-owner in a multi-storey building can dispossess another co-owner;
- whether co-owners in a multi-storey building can claim adverse possession in respect of the common areas;
- whether adverse possession can be established by successive squatters;
- the consequences and applicability to Hong Kong of the decision in *Fairweather v St Marylebone Property Co Ltd*;
- the liability of squatters and dispossessed owners under Government leases; and
- the impact of adverse possession on "Tso" land.

These issues will be discussed in turn in this chapter.

Whether an Owners Incorporation can claim adverse possession

6.2 It seems that, according to the Court of Appeal in *Shine Empire Ltd v Incorporated Owners of San Po Kong Mansion & others*,¹ it is possible for incorporated owners to successfully claim adverse possession, but the court would not lightly find that an owners incorporation, whose statutory remit is to manage common parts and ensure compliance with the Deed of Mutual Covenant ("DMC"), would intend to occupy private property as its own, in breach of the DMC.

¹ [2006] 4 HKLRD 1.

6.3 The disputed land of this case was the roof of a large commercial and residential building erected in 1968. Sixteen shares of the 800 undivided shares were allocated to the roof of some 16,800 sq ft. The plaintiff (respondent on appeal) became the owner of those 16 shares in 1987. Under the DMC, the plaintiff was entitled to exclusive possession of the roof (which was bound by parapet walls of around 10 inches wide) and to build an additional floor on the roof, subject to a right of way for management to have access to some common facilities on the roof. Neither the plaintiff nor its predecessors had ever enclosed or restricted access to the roof. In 2001, the plaintiff brought proceedings for possession of the roof, and the defendant, incorporated owners of the building, raised 20 years of adverse possession as one of the defences.

6.4 In delivering the judgment, Yuen JA said:

"a court would not lightly find that an owners incorporation, whose statutory remit is to manage common parts and ensure compliance with the DMC, would intend to occupy private property as its own, in breach of the DMC. That is not within the statutory powers and duties of an owners incorporation, and it is unlikely that the IO would have intended to act outside its statutory remit. Certainly no resolution to that effect was produced or asserted. (Of course, dispossession of land may occur through mistake on the part of the squatter — ie even an IO — believing that the land was his — ie common parts —: see the discussion at Gray and Gray, Elements of Land Law (3rd Ed) p 267 and cases cited.) It was not however the IO's case that such a mistake had occurred and this issue was not argued before the judge." (at para 28)

Yuen JA continued:

"I accept however that the fact that an act is consistent with a normal activity of an owners incorporation does not necessarily mean that it cannot be an unequivocal act of dispossession. A simple example is the building of the management office on the roof. The issue remains: had the IO taken physical control with the intention of using and occupying the land as its own?" (at para 36)

6.5 The learned judge elaborated that it was therefore necessary to examine the alleged acts of dispossession which could be seen from the acts pleaded. She then analysed the acts alleged by the incorporated owners, and decided that the acts did not amount to adverse possession.

Whether a co-owner in a multi-storey building can dispossess another co-owner

6.6 Because of unity of possession, co-owners (joint tenants or tenants in common) are entitled to occupy the whole of the land or take the entire sum of the rents or profits. This does not, *per se*, amount to adverse possession. In order to trigger the running of the limitation period, an ouster is required.² An ouster is presumed where there is a long exclusive enjoyment by one co-owner.³

6.7 In *Lai Wai Kuen v Wong Shau Kwong*,⁴ the land in question was registered under the joint names of Lai Shau Yuen ("Lai") and the defendant, Wong Shau Kwong, as tenants in common on 25 August 1949. Lai passed away on 3 May 2000, and the plaintiff (Lai's niece) and Wong Kwai Mui were appointed as executrices of Lai's estate. By an assent and confirmation dated 4 May 2001, Wong Kwai Mui waived her interest in the property and assented to the interest of the estate in the property to the plaintiff. A house was built on the land and was occupied by Lai until 1982. Lai also paid all the outgoings in respect of the property. From 1982 Lai leased out the property to Chow. After Lai's death the plaintiff took over the management of the property and collected rent from Chow. The plaintiff paid all the outgoings arising from the property including Government rent and rates. The plaintiff intended to rebuild the house, and to this end, the consent of the defendant, the other co-owner, was required. The plaintiff could not locate the defendant. The plaintiff sought a declaration from the court as to the extinction of the defendant's interest in the property.

6.8 The court held that, given that the defendant and Lai were co-owners, there had to be an ouster before the possession of Lai could be treated as adverse. Lam J said at page 530,

"we have a very long period (from 1950's to today) during which the defendant did not have any occupation or access to the property. He did not make any demand for account and there had been no payment of rent or profits to him throughout the years. There was also no acknowledgment of title. Madam Lai and her tenant had a long undisturbed and quiet possession. The case is indistinguishable from Doe d Fishar & Taylor v Prosser (1774) 1 Cowp 217. The court can presume ouster in such circumstances and I will so presume."

6.9 *Lai Wai Kuen* of course only involved two tenants in common. In the context of a multi-storey building, possession by one tenant in common has to be adverse to all the co-owners to give rise to a possessory title.

² C Harpum (ed), *Megarry & Wade: The Law of Real Property* (Sweet & Maxwell, 6th ed, 2000), at 21-042.

³ *Doe d Fishar & Taylor v Prosser* (1774) 1 Cowp 217; *Doe d Hellings v Bird* (1809) 11 East 49.

⁴ [2004] 4 HKC 528.

Whether co-owners in a multi-storey building can claim adverse possession in respect of the common areas

6.10 In *Incorporated Owners of Chungking Mansions v Shamdasani*,⁵ the plaintiffs were the incorporated owners of Chungking Mansions. The defendant was the owner of 31 units, 16 of which (the "Problem Units") did not appear on the original plan of the building and had been erected on common parts in recesses or by encroachments in the corridors and lift lobbies. By way of an action for a declaration, an injunction restraining the defendant's possession of the Problem Units and a possession order, the plaintiffs sought to enforce their rights pursuant to covenants in a deed of covenant dated 1962 in relation to those parts of the common areas on which the Problem Units had been erected. The defendant contended, *inter alia*, that his predecessor-in-title, T, had already ousted the other co-tenants from the Problem Units for over 20 years prior to the commencement of the present proceedings on 8 February 1988. Hence, the plaintiff's right of action was statute barred under section 7(2) of the Limitation Ordinance (Cap 347), and the plaintiffs' title to the Problem Units had been extinguished by section 17.

6.11 In dismissing the defendant's defence of limitation, the court held that it was sufficient if adverse possession commenced against the co-tenants and continued after the incorporation of the plaintiffs for a total period of 20 years. It was not necessary to establish adverse possession independently against the plaintiffs, the incorporated owners, for 20 years after its incorporation. The plaintiffs did not have an independent right of action, and were merely vested with the exclusive right to exercise the rights of the co-tenants. The Building Management Ordinance (Cap 344) was only enacted in June 1970 and the plaintiffs were only incorporated thereunder in 1972. In other words, adverse possession against the plaintiffs, after their incorporation, was sufficient, without the need to prove adverse possession against each and every individual co-tenant.

6.12 At issue was the position prior to their incorporation: whether, for the period between 1968 and 1972, adverse possession had to be established against all the co-tenants individually. In addressing this question, Deputy Judge Jerome Chan said,

"Since the interests of tenants in common are separate and distinct, and the operation of limitation is to bar the right of action personally as against the one whose particular right has been infringed, it must necessarily follow that: (a) it is possible for time to run as from different dates as against different tenants in common, and (b) it is possible for possession to be adverse to some but not all of the tenants in common. ... [at page 353]

It follows, therefore, the time for commencement of adverse possession and the incidence of possession being adverse would not necessarily be the same as against all tenants in

⁵ [1991] 2 HKC 342.

common of land. Normally, this problem would rarely arise. But in the present case, it does. The defendant must, for the period prior to the incorporation of the plaintiffs, establish adverse possession against each and every holder of the other undivided shares in the land and building not assigned to him." [at page 355]

The defendants, however, failed to prove adverse possession against each and every holder of the other undivided shares in the building.

6.13 Therefore, it seems that co-owners in a multi-storey building can claim adverse possession in respect of the common areas. Academics, however, have a different opinion,

"Since each co-owner is entitled to use the common areas, it is generally accepted that one owner cannot sue another for trespass to those areas. For the same reason, it is assumed that one co-owner cannot acquire title to the common area by the operation of sections 7(2) and 17 of the Limitation Ordinance (Cap 347). ... The appropriate action against an owner who converts common parts to his own use or unreasonably interferes with the use of the common parts by other co-owners is an action for breach of an express or implied term in the DMC."⁶

6.14 In *Incorporated Owners of Homantin Mansion v Power Rich Investment Ltd*,⁷ a yard immediately outside a ground floor flat unit, originally delineated as part of the common areas, was enclosed for well over 20 years by that unit's owner. The incorporated owners of the building sought an injunction order requiring the enclosing structures to be demolished so that other unit owners could have access to the yard. The ground floor unit owner claimed adverse possession over the yard against the incorporated owners and other unit owners. The Lands Tribunal decided that adverse possession over common areas of a multi-storey building raised serious implications and complications which might not be within the original contemplation of section 7(2) of Cap 347. In view of doubtful jurisdiction and important policy and legal issues, the Tribunal transferred the application to the High Court.⁸ However, no decision of the High Court on this case can be found.

⁶ Paul Kent, Malcolm Merry and Megan Walters, *Building management in Hong Kong*, Hong Kong : LexisNexis, 2002, at 301.

⁷ LT Case No BM 41 of 1996.

⁸ *"The problem should not be resolved without careful consideration. I suppose section 7(2) of the Limitation Ordinance was not framed with the special case of adverse possession of common areas in multi-storey buildings in mind. I would like to see this major policy problem fixed by statute, amending the Limitation Ordinance if necessary, after extensive public consultation instead of by judicial justification. I am inclined to think that adverse possession over common areas subject to the Ordinance should not be permitted. But I may be wrong. The public and the executive arm of the government will definitely benefit from advice from older and wiser judges after they have had the opportunity to study this case."* LT Case No BM 41 of 1996, at para 6, per Judge Z E Li.

6.15 In *Incorporated Owners of Man Hong Apartments v Kwong Yuk Ching & Ors*,⁹ the appellant, incorporated owners of the building in question, commenced proceedings against the first and second respondents (husband and wife) and the third respondent (a company of which the first and second respondents were the directors and shareholders). The action was in relation to an alleged unauthorised structure on the common parts of the building, namely a portion of the passageway adjacent to a shop that was owned by the third respondent and previously occupied by the second respondent as tenant (the suit portion). The appellant claimed that the unauthorised structure and the occupation were in breach of the DMC and section 34I of Cap 344. The respondents stated in the defence that they and their predecessor in title had been in adverse possession of the suit portion and accordingly the title of the appellant had been extinguished, and hence the appellant's claim was time barred and it had lost all the rights to enforce the covenants under the DMC. The District Judge found that the respondents had successfully proved adverse possession and gave judgment in favour of the respondents. The appellant appealed to the Court of Appeal which reversed the decision on grounds other than adverse possession.¹⁰

Whether adverse possession can be established by successive squatters

6.16 Section 13(2) of Cap 347 provides:

"Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action shall no longer be deemed to have accrued and no fresh right of action shall be deemed to accrue unless and until the land is again taken in adverse possession."

This section requires that adverse possession must be continuous which seems to be straightforward enough. The position is more complicated where two or more persons are successively in possession of the land in question.

⁹ [2001] 3 HKC 116.

¹⁰ The Court of Appeal held that the covenants related to the shop and the benefit and burden of all of the provisions of DMC were expressed and intended to run with the land of all the co-owners. The shop and the suit portion were undoubtedly subject to the terms and conditions contained in the DMC and the plaintiff as the incorporated owners was able to enforce the covenants. Even if the defendants were able to establish adverse possession, the suit portion would still be subject to the DMC. Limitation statutes had no application to claims for breach of the terms of the DMC since they were not equivalent to any common law right of action. In equity, laches essentially consisted of a substantial lapse of time coupled with the existence of circumstances which made it inequitable to enforce the claim. While the defendants did not demonstrate that there were any circumstances which would render the delay fatal, there was no time bar to the action.

Dispositions by squatter

6.17 A squatter's title is based on his possession and is good against the world except the owner. A squatter can give his successor-in-title a right to the land as good as his own.¹¹ If S takes adverse possession of O's land, and S's possessory title is transferred to A by conveyance (with or without consideration), by will or on intestacy, the possession is regarded as continuous. O's right of action against A accrues on the date when S, his predecessor in title, took possession. In other words, time for O to sue A to recover the land runs from that date.¹² Hence, A can add S's period of possession to his own. For example, if S has adverse possession of O's land for seven years and then sells his right to A, O's right of action will be barred after A has another five years' of adverse possession of the land.

Squatter dispossessed by another squatter

6.18 If S1 takes adverse possession of O's land, and before the end of the limitation period, S2 dispossesses S1, S1 can sue S2 to recover the land within the limitation period running from the commencement date of S2's possession.¹³ In case O wants to recover the land, it is unsettled as to when his right of action to sue S2 accrues: either from the commencement date of S1's possession or S2's possession. Australian¹⁴ and Canadian¹⁵ authorities support the view that the successive possession of S1 and S2 can be regarded as one continuous adverse possession against O. Relying on *Willis v Earl Howe*,¹⁶ some academics in England also adopt this view. However, Jourdan observes that what the judge said in this case was only *obiter*, since one of the squatters remained in possession throughout, and therefore there was no need to decide the successive squatters' issue.¹⁷

6.19 In *Tsang Tsang Keung v Fung Wai Man*¹⁸ Deputy Judge Gill said that by the ordinary meaning of the words in section 13(2) of Cap 347, adverse possession had to be continuous, but it did not have to be the squatter's throughout, who might acquire that from his predecessor. He adopted what Cheung J said in *Ng Lai Sum v Lam Yip Shing & Anor*:

"... the law is clear that the second squatter can add the period of possession of the first squatter to her own period of possession in order to complete the period of possession: Megarry & Wade at page 1036. ..."

¹¹ C Harpum (ed), *Megarry & Wade: The Law of Real Property* (Sweet & Maxwell, 6th ed, 2000), at 21-021.

¹² *Mount Carmel Investments Ltd v Peter Thurlow Ltd* [1988] 1 WLR 1078.

¹³ *Asher v Whitlock* (1865) LR 1 QB 1. S Jourdan, *Adverse Possession* (Butterworths, 2003), at 6-40 and 20-31.

¹⁴ *Shelmerdine v Ringen Pty Ltd* [1993] 1 VLR 315, at 341.

¹⁵ *Afton Band of Indians v AG of Nova Scotia* (1978) 85 DLR (3d) 454, at 463.

¹⁶ [1893] 2 Ch 545. C Harpum (ed), *Megarry & Wade: The Law of Real Property* (Sweet & Maxwell, 6th ed, 2000), at 21-022.

¹⁷ S Jourdan, *Adverse Possession* (Butterworths, 2003), at 6-41.

¹⁸ HCA 11328/1996.

*It is clearly stated by Kay LJ in Willis v Earl Howe [1893] 2 Ch 545 at 553 'a continuous adverse possession for the statutory period, though by a succession of persons not claiming under one another, does, in my opinion, bar the true owner.'*¹⁹

6.20 Deputy Judge Gill went on to say that, if there was an interruption, adverse possession would cease at the point possession was first given up. The Court of Appeal upheld Cheung J's decision in the *Ng Lai Sum* case that the two periods of adverse possession could be added together.²⁰ It must, however, be pointed out that in both cases the successive squatters were not adverse to each other.²¹

Possession abandoned

6.21 The general position is that, for successive persons in possession to aggregate their periods of possession, the period of possession must be continuous. Where S1 takes adverse possession of O's land and, before the expiry of the limitation period, abandons possession, and then S2 takes adverse possession, S1 obviously cannot extinguish O's title.²² Since S1 is not in possession, he does not have the rights of a person in possession, nor can he point to his possession as evidence of a title. Hence, S1 cannot recover the land from S2.²³ Between S2 and O, S2 cannot add together the two periods of adverse possession if there is a time gap between his possession and S1's.²⁴ During the time gap, O re-gains possession of the land. When S2 takes adverse possession, a new right of action accrues to O. The position is unclear where S2 takes adverse possession immediately after S1's possession without any time gap.

6.22 Another scenario is where S1 takes adverse possession of O's land and, after the expiry of the limitation period, abandons possession, and S2 then takes adverse possession. In this case, S1 has extinguished O's title. The question is whether S1 can claim possession from S2, and the answer is far from clear. There is a suggestion that a squatter's possession for a period extending beyond the limitation period would give rise to an irrebuttable presumption that the squatter would acquire a lawful title to the

¹⁹ HCA 2963 of 1998, at 8.

²⁰ CACV 57/2000.

²¹ The successive squatters were not adverse to each other in *Wong Kar Sue v Sun Hung Kai Properties* [2006] 2 HKC 600. Deputy Judge Muttrie also held that successive squatters' periods of possession could be added together. In this case, the squatters were in adverse possession through receiving rent from the tenant.

²² "... if the squatter abandons possession before the limitation period has elapsed. The squatter's period of adverse possession prior to abandonment is ignored. If he or she subsequently re-enters, the owner's title will not be extinguished until the squatter has adversely possessed for the full limitation period: Limitation Act 1980, Schedule 1, para 8(2)." Law Commission, *Land Registration for the Twenty-First Century: A Consultative Document*, Law Com No 254, 1998, at para 10.4 footnote 15.

²³ *S Jourdan, Adverse Possession* (Butterworths, 2003), at 6-37, 20-48 and 20-56. *Mount Carmel Investments Ltd v Peter Thurlow Ltd* [1988] 1 WLR 1078.

²⁴ Section 13(2) of Cap 347. C Harpum (ed), *Megarry & Wade: The Law of Real Property* (Sweet & Maxwell, 6th ed, 2000), at 21-023. *S Jourdan, Adverse Possession* (Butterworths, 2003), at 6-37.

land.²⁵ This was, however, rejected in *Taylor v Twinberrow*.²⁶ Stephen Jourdan also said that there might be different limitation periods applicable to different persons interested in the disputed land.²⁷ In his opinion, it is therefore too simplistic to say that the passing of twelve years would give rise to a change in the essential nature of a squatter's possessory title. In contrast, the Law Commission in England stated in its joint report with the Land Registry:

*"Once a squatter has acquired title by adverse possession for the period prescribed by the Limitation Act 1980, that title will not be lost merely because the squatter then goes out of possession. He or she will remain the owner of the land unless and until some other person acquires title to the property by adverse possession"*²⁸

No authority was cited to support this. An Australian case, however, does offer support: *Kirk v Sutherland*.²⁹ In this case, a squatter acquired title to a strip of land by adverse possession, and then moved away. Several years later, he executed a conveyance of the land to the defendant. The Supreme Court of Victoria held that the squatter retained the title to the land and could make a good conveyance of it.³⁰

The consequences and applicability to Hong Kong of the decision in *Fairweather v St Marylebone Property Co Ltd*³¹

6.23 This case's key issue was whether, after the extinguishment of a lessee's title by a squatter upon expiry of the statutory limitation period, the

²⁵ That was the approach of Cozens-Hardy MR in *Re Atkinson and Horsell's Contract* [1912] 2 Ch 1. He said: "... whenever you find a person in possession of property that possession is prima facie evidence of ownership in fee, and that prima facie evidence becomes absolute when once you have extinguished the right of every other person to challenge it." In *Perry v Clissold* [1907] AC 73 at 79, Lord Macnaghten said: "... if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the Statute of Limitations applicable to the case, his right is forever extinguished, and the possessory owner acquires an absolute title."

²⁶ In *Taylor v Twinberrow* [1930] 2 KB 16 at 22, Scrutton LJ said that the defendant squatter's argument as to the effect of adverse possession for the limitation period was incorrect: "... the truer view is, that the operation of the statute in giving a title is merely negative; it extinguishes the right and title of the dispossessed owner, and leaves the occupant with a title gained by the fact of possession and resting on the infirmity of the right of others to eject him." S Jourdan, *Adverse Possession* (Butterworths, 2003), at paras 20-17 and 20-58.

²⁷ S Jourdan, *Adverse Possession* (Butterworths, 2003), at 20-59: "For example possession for more than 12 years will not bar persons entitled to the land in remainder under a settlement if their interests have not yet fallen into possession. And possession for more than 12 years of a land subject to a lease will bar the title or the lessee, but not of the landlord."

²⁸ Law Commission, *Land Registration for the Twenty-First Century: A Consultative Document* (1998, Law Com No 254), at para 10.4.

²⁹ [1949] VLR 33.

³⁰ "If that decision is good law, it means that the expiry of the limitation period does bring about a fundamental change in the nature of the squatter's title, so that thereafter abandonment of possession does not destroy the title." S Jourdan, *Adverse Possession* (Butterworths, 2003), at para 20-60.

³¹ [1963] AC 510.

lessee could, by surrender of the lease to the lessor, enable the lessor to claim possession of the land and thereby extinguish the squatter's title.

Facts

6.24 Before 1894 two adjoining properties, Nos 311 and 315, were held by a freeholder who built a shed in the back gardens, three-quarters of the shed being on the garden of No 315 and the remaining quarter, which contained the entrance, on the garden of No 311. In 1894 the properties were leased to separate lessees for 99 years. In 1920, M, the sub-lessee of No 311, repaired the shed and used it for his business. In 1929, M bought the head lease of No 311 and occupied the shed without interruption until 1951. It was common ground that M's occupation was adverse to the occupiers of No 315 and was sufficient to give M a title as against them under the Statutes of Limitation. Subsequently, the appellant became the lessee of No 311. In 1959 the respondents bought the freehold of No 315 subject to the 99-year lease. Shortly afterwards, that lease was surrendered to them, thus merging in the freehold, so that the respondents became freeholders in possession of No 315.

6.25 The respondents claimed possession of the part of the shed in their garden alleging that they had a right to eject the appellant, which arose on the surrender of the lease of No 315 to them, and the appellant contended that that right would not arise until the expiration of the full term of the 99-year lease.

House of Lords' decisions

6.26 The House of Lords held that the lease of No 315, including the site of the shed, was "*determined*" by the surrender in 1959, and upon that event the fee simple owner's right to possession of the demised property accrued. Since adverse possession had not been completed as against the lessor, the respondents were entitled to that part of the shed that was in the garden of No 315. Lord Radcliffe and Lord Denning set out the reasons for the decision:

"... an owner in fee simple subject to a term of years has an estate or interest in reversion or remainder and, consequently, his right of action against a squatter on the demised land is to be deemed to have accrued at the date when the preceding estate or interest represented by the term determines in such manner that his estate or interest falls into possession. It is therefore vital to the decision of this case to make up one's mind at what date the lease which preceded the respondents' fee simple interest and so their right to possession is to be treated as determining." (Lord Radcliffe) (at p 537); and

"... the title of the leaseholder to the shed is extinguished as against the squatter, but remains good as against the freeholder. This seems to me the only acceptable suggestion. If it is adopted, it means that time does not run against the freeholder until the lease is determined - which is only just. It also means that until that time the freeholder has his remedy against the leaseholder on the covenants, as he should have; and can also re-enter for forfeiture, as he should be able to do: see Humphry v. Damion, and can give notice to determine on a 'break' clause or notice to quit, as the case may be. Further, it means that if the leaseholder should be able to induce the squatter to leave the shed - or if the squatter quits and the leaseholder resumes possession - the leaseholder is at once in the same position as he was originally, being entitled to the benefits and subject to the burdens of the lease in regard to the shed. All this seems to me eminently reasonable but it can only be achieved if, despite the presence of the squatter, the title of the leaseholder remains good as against the freeholder" (Lord Denning) (at p 545)

6.27 Lord Radcliffe went further to explain the injustice to the lessor if a lessee's title to the land was extinguished for all purposes and in all relations:

"if the lessee's estate or right or title or interest - I do not believe that there is any useful distinction between these words in this connection - is really extinguished as against his landlord, I see no escape from the conclusion that the landlord's right to possession against the squatter accrues upon that event. The squatter has not got the lessee's term or estate and there is nothing between the fee simple owner and the man in possession. In the terms of this case, the landlord's right of action would have accrued in 1932 and become barred for good in 1944: and this, although the lessee was continuing throughout the period to pay the rent under the lease and, for all that appears, the landlord had neither means of knowing nor reason to know that dispossession of part of the premises had taken place or that time was running against him. This seems quite wrong; yet if the lessee's estate was extinguished for all purposes it must also have 'determined' at the same time within the meaning of section 2 of the Act of 1874 and section 6 (1) of the Act of 1939. This situation, manifestly unjust, could occur whenever there is current a long term of years and there have been 12 years or more of adverse possession of a portion or even the whole of the demised premises during the currency of the term." (at p 538)

6.28 He went on to point out that the anomalies stretched out further in terms of a landlord being deprived of the right to enforce covenants in the lease:

"If the lessee's estate or title is destroyed for all purposes, there disappears with it any privity of estate between him and the landlord. If privity of estate is gone so are gone the covenants on the part of the lessee which depend on such privity: if the current lessee is an assignee of the lease, as he is likely to be if the term in question is a long term of years, the landlord will find himself deprived by the act of the legislature of the right to enforce in respect of the squatter's portion of the land a set of covenants of value to him and he will have been so deprived without compensation or any necessary notice that the event that brings it about has in fact taken place. The squatter himself, on the other hand, is entitled to remain in possession as against the landlord without personal liability for rent or covenant. It seems a strange statutory scheme." (at p 539)

6.29 Lord Radcliffe therefore concluded that the effect of the "extinguishment" sections of the Limitation Acts was not to destroy the lessee's estate as between himself and the lessor, and that the lessee could offer a surrender to the lessor. He emphasised that the question was not whether there were any exceptions to the *nemo dat quod non habet* maxim, but whether the maxim was relevant to the situation in question. In his opinion, it was not.³²

6.30 Lord Denning agreed with Lord Radcliffe in rejecting the suggestions that the title of the leaseholder to the shed was extinguished completely (not only just against the squatter, but also against the freeholder), that the leasehold interest disappeared altogether, and that the freeholder became entitled to the land:

"I reject [these suggestions] completely. It would mean in this case that the freeholder would have become entitled to possession of the shed in the year 1932 [when the lessee's right of action against the squatter was time-barred] and time would have begun to run against [the freeholder] from 1932. So that 12 years later the title of the freeholder to the shed would have been extinguished, that is, in 1944. That cannot be right, and it was not seriously suggested. In 99 cases out of 100, the freeholder has no knowledge that the squatter is on the premises at all. It would be utterly wrong if the title of the freeholder could be eroded away during the lease without his knowledge. The correct view is that the freehold is an estate in reversion within section 6 (1) of the Act of 1939, and time does not run against the freeholder until the determination of the lease ...

On this footing it is quite apparent that at the date of the surrender, the leaseholder had something to surrender. He still had his title to the shed as against the freeholder and was in a

³²

[1963] AC 510, at 540.

position to surrender it to him. The maxim nemo dat quod non habet has no application to the case at all." (at p 544-545)

Dissenting judgment

6.31 Nonetheless, Lord Morris of Borth-y-Gest based his dissenting judgment on the *nemo dat quod non habet* maxim.

"If it can be said in a case where a squatter has during a lease remained in possession for the statutory period that the lessee has merely lost his right to possession vis-a-vis the squatter, how can he give his lessor a right to possession against such squatter? ...

As the lessees had not got possession or the right to possession of that part of No 315 on which the shed stood and as they did not obtain such possession or the right to it they were not able to give such possession to the plaintiffs. It follows in my view that the plaintiffs could not show that they had any right to eject the defendant." (at p 550)

He emphasised that the so-called surrender gave the respondent no right of action for possession of the part of No 315 because the lessees could not yield to the respondent something (a right to possession) which they had not got.³³ Lord Morris continued:

"If a squatter remains in possession for the statutory period then the title or estate or interest of the lessee is extinguished. But that does not mean that anything has happened which relieves the lessee from his contractual obligations towards his lessor or which in any way affects or adds to the pre-existing right of the lessor to resume possession when the term of the lease expires. If the extinguishment of the lessee's title or estate or interest could be said to be a 'determination' within section 6 (1) of the Act of 1939 it would not be a determination which would cause the future estate or interest of the lessor to fall into possession within the meaning of that subsection. In the absence of any arrangement between lessor and lessee the contractual obligations of the latter would not only continue but would continue for the duration of their contractual period." (at p 554)

Comments on the "Fairweather" decision

6.32 The *Fairweather* decision has been strongly criticised. The majority of the Supreme Court in Ireland declined to follow it in *Perry v*

³³ [1963] AC 510, at 552.

*Woodfarm Homes Ltd.*³⁴ Academics, in general, endorse the view that the *nemo dat quod non habet* maxim should not be undermined:

*"Thus T, whose title against S is bad, can nevertheless confer upon L a good title against S, and thus accelerate L's right to possession. This is said to follow from the fact that the lease remains valid as between L and T. But this reasoning seems unsound, since it ignores the fact that T has lost all power to eject S and cannot therefore confer any such power upon L. As against S, T's lease is no longer a good title, whether pleaded by T or by L, and to allow it to be so pleaded violates the fundamental principle that no one can confer a better title than he has himself (nemo dat quod non habet). It would be different if L had a present right to determine T's lease, for he could then assert an immediate paramount title of his own without relying upon any right derived through T. The House of Lords' decision gravely impairs the squatter's statutory title, by putting it into the power of the person barred (T) to enable a third party (L) to eject the squatter. The operation of the Limitation Act 1980 in respect of leaseholds is thus substantially curtailed."*³⁵

6.33 Professor Wade also criticised the fact that if a tenant had lost his title to the land as against a third party, he could not by surrender give the landlord a good title against the third party because of the *nemo dat quod non habet* maxim.³⁶ He agreed with Lord Morris of Borth-y-Gest that the landlord in the *Fairweather* case had no claim to immediate possession except by way of surrender, and that the tenant had no power to surrender what he had not got.³⁷ Professor Wade explained that the landlord claimed through the tenant and so was subject to the squatter's estate to the same extent as the tenant, ie until the end of the term of the lease.³⁸ He also observed that the majority opinions in the *Fairweather* case did not explain why the *nemo dat quod non habet* maxim was not relevant to the case. In criticising the *Fairweather* decision, Professor Wade said that the Limitation Act had been deprived of its effect as against leasehold land:

"Twelve years' adverse possession will avail a squatter nothing if the dispossessed tenant can empower the landlord to turn him out. Similarly the landlord can reinstate the tenant by accepting a surrender of the old lease and granting a new one. It will usually be in the interests of landlord and tenant to conspire in this way, since between them they are given greater power than the sum of the powers they enjoy separately. This is the

³⁴ [1975] IR 104.

³⁵ C Harpum (ed), *Megarry & Wade: The Law of Real Property* (Sweet & Maxwell, 6th ed, 2000), at 21-062.

³⁶ HWR Wade, "Landlord, Tenant and Squatter", (1962) 78 LQR 541, at 549. This was regarded as a "powerful critique" by Lord Nicholls of Birkenhead in *Chung Ping Kwan v Lam Island Development Co Ltd* [1997] AC 38, at 47F.

³⁷ HWR Wade, "Landlord, Tenant and Squatter", (1962) 78 LQR 541, at 550.

³⁸ HWR Wade, "Landlord, Tenant and Squatter", (1962) 78 LQR 541, at 551.

*paradox of the whole position. By going through the form of a surrender they can between them fabricate a title, and turn a bad right into a good one.*³⁹

In his conclusion, Professor Wade highlighted the "nemo dat" argument:

*"The real reason why the minority opinion [in the 'Fairweather' case] is, with great respect, preferred is that it is more in keeping with our general law of land ownership. The statutory law of limitation is an essential part of the fabric of that law, and due effect must be given to the squatter's title. Against a dispossessed freeholder it is fully effective. Against a dispossessed leaseholder it should be equally effective, to the extent that the nature of the estate admits. Therefore the squatter should have no weaker title than any other legitimate claimant to an interest in the term, such as an assignee or sub-tenant. To hold that the squatter's title is an inferior one because he has no 'Parliamentary conveyance' is illogical. Parliament can confer a good title in other ways, and in the Limitation Acts it has done so by extinguishing the title of the dispossessed party. To all this is to be added the most decisive argument of all, that it infringes fundamental principles of property law to allow a man to cure his own bad title by transferring it to another. Nemo dat quod non habet is an inescapable truth."*⁴⁰

6.34 The Law Commission in England also questioned how a tenant, whose title had been extinguished, could make an effective surrender to the landlord:

*"It is of course true that as a contract, the lease remained on foot as between lessor and lessee, and the tenant could clearly surrender those obligations. But that could not affect the leasehold estate, which continued to exist, even though nobody actually owned it or could deal with it (the squatter of course had an independent freehold and had no title to the lease as such). It was for precisely this reason that the Irish Supreme Court declined to follow the Fairweather case in Perry v Woodfarm Homes Ltd [1975] IR 104."*⁴¹

6.35 On the other hand, the *Fairweather* decision is not without supporters. Cooke believes that the decision is correct.⁴² She elaborates that the tenant in the case did not give the landlord a right of possession, but had merely removed an obstacle to the landlord's own right to possession. She endorses Lord Radcliffe's following remarks:

³⁹ HWR Wade, "Landlord, Tenant and Squatter", (1962) 78 LQR 541, at 554-5.

⁴⁰ HWR Wade, "Landlord, Tenant and Squatter", (1962) 78 LQR 541, at 559.

⁴¹ Law Commission, *Land Registration for the Twenty-first Century: a Consultative Document*, (1998, Law Com No 254), at footnote 88.

⁴² E Cooke, "Adverse Possession - Problems of Title in Registered Land" (1994) 14 LS 1, at 7.

*"What the lessee surrendered in this case was the incumbrance on the fee simple in possession which was represented by the term of years. It was that incumbrance and nothing else, I think, which until then prevented the fee simple owner from asserting a claim to possession against the squatter."*⁴³

She vividly describes the situation by an analogy that the tenant no longer has a key to the door, but he can stand out of the way so that the landlord can use his own key.⁴⁴

6.36 Jourdan also observes that there is much to be said for the reasoning of the majority which survives the amendments to the law made by the Limitation Amendment Act 1980 which has not changed the law as laid down in the *Fairweather* decision.⁴⁵ The Law Reform Committee was divided in its views on the *Fairweather* decision and made no recommendation on whether to change it.⁴⁶

How did Hong Kong courts receive the "Fairweather" decision?

6.37 Leonard J of the Court of Appeal said in *Yeung Kong v Fu Mei Ling Mary*:

*"There being no material distinction between the relevant parts of the Limitation Ordinance on the one hand and the relevant parts of the Limitation Acts on the other, this court is bound by the majority decision in Fairweather as to the true meaning and effect of the legislation – de Lasala v de Lasala [1979] HKLR 214; [1980] AC 546."*⁴⁷

In agreeing with Leonard J, Keith J of the Court of Appeal in *Lai Moon Hung & Anor v Lam Island Development Co Ltd*⁴⁸ said the *Fairweather* decision was binding on Hong Kong courts, after taking into account Professor Wade's criticisms and the reluctance of the Supreme Court of Ireland to follow the decision.

6.38 After 1997, the Court of Final Appeal in *Chan Tin Shi v Li Tin Sung*⁴⁹ endorsed the *Fairweather* decision that the tenant's "title" was extinguished only as against the squatter, but as against the landlord it remained in existence, so that the tenant remained liable upon the covenants

⁴³ [1963] AC 510, at 540.

⁴⁴ E Cooke, "Adverse Possession - Problems of Title in Registered Land" (1994) 14 LS 1, at 7 footnote 31. See also the response to this analogy "As the tenant's interest has been extinguished, it is not clear how he can do this" in C Harpum (ed), *Megarry & Wade: The Law of Real Property* (Sweet & Maxwell, 6th ed, 2000), at 21-062 footnote 87.

⁴⁵ S Jourdan, *Adverse Possession* (Butterworths, 2003), at 24-68.

⁴⁶ Law Reform Committee, *Final Report on Limitation of Actions*, 1977, at para 3.46.

⁴⁷ [1994] 2 HKC 1, at 3. See also *Cheuk Chau Co Ltd v Chau Kwan Nam & Ors* (HCMP 274/82, unreported).

⁴⁸ [1994] 2 HKC 11, at 20-21.

⁴⁹ [2006] 9 HKCFAR 29, at para 20.

of the lease. The Court of Final Appeal, however, did not comment on whether a tenant can, by surrender of the lease, enable the landlord to evict a squatter:

"The ['Fairweather' decision] is authority for saying that [the landlord can evict a squatter] at an earlier date if the original lease had been surrendered. The [landlord] could immediately have claimed possession itself or regranted the land under a new lease which would have enabled the tenant to obtain possession. It is not necessary in these proceedings to decide whether that is correct because all the proceedings in these appeals were commenced after the old leases would have expired."

6.39 It is important to point out that the criticism of the *Fairweather* decision is directed at that part of the decision affirming the right of the dispossessed tenant to surrender his lease to his landlord and thereby defeats the title of the squatter. It is not clear whether the decision would apply to determination of the tenancy by disclaimer. In theory there is no reason why the same position will not follow.

6.40 It is well recognized that if the landlord of the dispossessed land should be able to determine the tenancy by forfeiture or on effusion of time, the squatter would not be able to assert his squatter title against the landlord, and the landlord may be able to grant another lease to the dispossessed tenant who would then be able to have a fresh title to evict the squatter.

6.41 Thus while there is force in the criticism that the dispossessed tenant should not be able to benefit from a collusion with his landlord by surrendering the tenancy to defeat the rights of the squatter, there is no reason to prevent the tenant from indirectly doing so by suffering the performance of the covenants under the tenancy to go into default thereby inviting or enabling his landlord to terminate the tenancy by forfeiture.

6.42 The *Fairweather* decision expressly re-affirms the principle that the successful squatter does not become an assignee of the tenant whose title he has extinguished. This has caused some difficulties to developers in Hong Kong, and this difficulty will be elaborated upon in the next chapter.

Liability of squatters and dispossessed owners under Government leases

6.43 In view of the leasehold system of land tenure in Hong Kong, it seems necessary to examine the liability of a squatter and the paper owner (either being the original government lessee or subsequent assignees) under the Government lease after the squatter has extinguished the paper owner's title.

Liability of an original Government lessee and that of subsequent Government lessees

6.44 Where a dispossessed owner is the original Government lessee's assignee, the question is whether the original Government lessee remains liable under the Government lease for breaches of the covenants committed after he has assigned the lease. At common law, an original Government lessee remains bound by and entitled to enforce the covenants because of privity of contract throughout the leasehold term, even though he is not personally responsible for the breach and the terms of the original covenants have been varied.⁵⁰ Original parties to a lease, because of privity of contract, remain liable on the covenants even after assigning their respective interests. Subsequent Government lessees, as assignees of the lease, have privity of estate, but not privity of contract, with the Government. An assignee of a lessee can be liable to the lessor for breaching covenants in the lease under the principles set out in the *Spencer's case*.⁵¹ For example, an assignee (T2) of an original Government lessee (T1) assigns the lease to another person (T3) who is dispossessed by a squatter. T2 no longer has privity of estate with the Government after assigning the lease to T3. There is, instead, privity of estate between T3 and the Government.⁵² The result is that T2 ceases to be bound by and entitled to enforce the covenants under the Government lease. The privity of contract between T1 and the Government is, however, not affected.

6.45 In practice, a lessee can require his assignee to promise to perform covenants in the Government lease, and the assignee will in turn ask his own assignee to give a similar covenant when he assigns his interest. There is, therefore, a chain of covenants to protect the original Government lessee (T1 in the above example) and pass on the liability to the party guilty of the breach. This practice is common and such a covenant is implied by statute in the case of assignment of a Government lease.⁵³ Section 35(1)(a) of the Conveyancing and Property Ordinance (Cap 219) provides:

"There shall be implied –

⁵⁰ *Centrovincial Estates Plc v Bulk Storage Ltd* (1983) 46 P & CR 393. S Nield, *Hong Kong Land Law* (Longman, 2nd ed, 1998), at para 14.2: "They may step out of the picture for all practical purposes, but legally their contractual responsibilities continue. They, in effect, become sureties for the continued performance of the covenants by subsequent assignees." See also M Merry, *Hong Kong Tenancy Law* (Butterworths, 3rd ed, 1997), at 119 to 120, and J Sihombing and M Wilkinson, *Hong Kong Conveyancing – Law and Practice* (Butterworths), vol 1(A) at XII paras 330 and 333.

⁵¹ (1583) 5 Co Rep 16a. A lessor can take action against an assignee of the lease provided that (1) the covenant "touches and concerns" the land; (2) the covenant is intended to run with the land (presumptions of running with the land in sections 39 and 40 (Cap 219)); (3) there is privity of estate; and (4) the lease and the assignment are recognized at law because they are made under seal or are created orally or in writing for a period not exceeding three years. S Nield, *Hong Kong Land Law* (Longman, 2nd ed, 1998), at para 14.3.1.1(a) to (d). C Harpum (ed), *Megarry & Wade: The Law of Real Property* (Sweet & Maxwell, 6th ed, 2000), at 15-030. Riddall, *Land Law* (LexisNexis, 7th ed, 2003), at 441.

⁵² M Merry, *Hong Kong Tenancy Law* (Butterworths, 3rd ed, 1997), at 120.

⁵³ S Nield, *Hong Kong Land Law* (Longman, 2nd ed, 1998), at para 14.2.1.1(b).

- (a) *in any assignment of the whole of the interest in land held under a Government lease, the covenant by a person who assigns, and the covenant by a person to whom an assignment is made, mentioned in Part I of the First Schedule ..."*

Part I of the First Schedule provides:

"B. BY A PERSON TO WHOM AN ASSIGNMENT IS MADE That the assignee and any person deriving title under the assignee shall at all times from the date of the assignment or other date therein stated pay the Government rent or as the case may be the apportioned Government rent and observe and perform all the covenants (other than the covenant to pay the whole of the Government rent if the Government rent has been apportioned) agreements and conditions contained in the Government lease and any Deed of Mutual Covenant and on the part of the lessee to be observed and performed so far as the same relate to the land assigned."

6.46 The purpose of this statutory covenant is to protect an assignor (T1 in the above example) of a Government lease from liability under the lease, because he remains liable even after assigning his interests.⁵⁴ Section 41(8) of Cap 219 makes further provision to protect assignors:

"A covenant shall not bind a person after he has ceased to have any estate or interest in the land affected by that covenant except in respect of a breach of that covenant committed by him before that cessation."

The purpose is that a lessee, after assigning his leasehold term, should cease to be liable on the leasehold covenants, except for breaches committed when he held the lease. According to section 41(2), section 41 applies to any covenant, positive or negative,

- (a) which relates to the land of the covenantor;
- (b) the burden of which is expressed or intended to run with the land of the covenantor; and
- (c) which is expressed and intended to benefit the land of the covenantee and his successors in title or persons deriving title to that land under or through him or them.

6.47 In Nield's opinion, the leasehold covenants given by a lessee should satisfy these conditions and therefore release an original Government lessee (T1 in the above example) from liability for breaches committed after

⁵⁴ J Sihombing and M Wilkinson, *Hong Kong Conveyancing – Law and Practice* (Butterworths), vol 1(A) at XII paras 330 and 333.

he has assigned his interest.⁵⁵ The first condition in section 41(2) is that the covenant relates to the land of the covenantor: the covenant relates to something to be done or not done on or in relation to the land held by the covenantor, and is not merely personal (section 41(2)(a)). The second condition is that the covenant is expressed or intended to run with the land of the covenantor (section 41(2)(b)). Section 40 provides that a covenant relating to a covenantor's land is deemed, unless the contrary intention is expressed, to be made by the covenantor on behalf of himself, his successors in title and persons deriving title under or through him or them. The third condition is that the covenant is expressed and intended to benefit the land of the covenantee and his successors in title or persons deriving title to that land under or through him or them (section 41(2)(c)). Section 39 provides that a covenant relating to a covenantee's land is deemed, unless the contrary intention is expressed, to be made with the covenantee and his successors in title and persons deriving title under or through him or them. A lessor's reversion may constitute a separate interest in land so as to satisfy this condition.⁵⁶ It is his reversion which constitutes the land to be benefited by the covenants. Nield considers that a lessor can, on this basis, enforce covenants against a sub-lessee with whom there is no privity of contract or privity of estate.

6.48 Hence, if the views of Nield are right, after a squatter has extinguished the paper owner's title (T3 in the above example), the original Government lessee (T1) can arguably, in fulfilling the conditions in section 41(2), invoke section 41(8) so as to escape liability for a breach of a covenant committed after he has ceased to have any interest in the land. It is noteworthy that sections 39 to 41 apply to covenants entered into before or after the commencement of these provisions.⁵⁷ The liability of subsequent Government lessees (if any) depends on whether he is the paper owner dispossessed by the squatter. T2 is not liable on the covenants because he no longer has privity of estate with the Government. The title of T3, the paper owner dispossessed by the squatter, is extinguished as against the squatter, but remains good as against the Government, and T3 thus is still liable on the covenants.⁵⁸ In the light of the *Fairweather* decision, it is, however, difficult for him to argue that "*he has ceased to have any estate or interest in the land*" as required under section 41(8).

6.49 However it is doubtful as to whether the provision in section 41(8) of the Cap 219 could have the effect of abrogating the well entrenched doctrine of privity of contract which makes the original convenator (i.e. T1 in the above example) liable. In *Sky Heart Ltd v Lee Hysan Co Ltd*,⁵⁹ it was held by the Court of Final Appeal that section 41 was not intended to change every previous rule of law and equity such that notwithstanding the words of section 41(5) a covenant in gross would still not run with the land so as to

⁵⁵ S Nield, *Hong Kong Land Law* (Longman, 2nd ed, 1998), at para 14.2.1.1(c). See also M Merry, *Hong Kong Tenancy Law* (Butterworths, 3rd ed, 1997), at 120 to 123.

⁵⁶ S Nield, *Hong Kong Land Law* (Longman, 2nd ed, 1998), at para 15.3.2.1(d)(2).

⁵⁷ Sections 39(2), 40(3) and 41(10).

⁵⁸ *Fairweather v St Marylebone Property Co Ltd* [1963] AC 510, at 545 (Lord Denning) and at 539 (Lord Radcliffe).

⁵⁹ (1997-98) 1 HKCFAR 318.

enable an original covenantee who had since disposed of his land to enforce the covenant. The Court of Final Appeal was concerned that there was no particular need to change the previous existing law in relation to the enforcement of covenant in gross and hence held that the law had not been changed by section 41. Likewise in the case of section 41(8) it is certainly more than arguable that there is no policy reason to change the law relating to the liability of the original covenantor under the doctrine of privity of contract. Section 41 is plainly intended to deal with the running of covenant in land and is required in order to make sure that the change of the law in section 41(5) will not affect the liability of someone who became liable simply because he had once upon a time become liable as a successor in title to the original covenantor.

Liability of an original lessee under the renewed or extended term

6.50 In Nield's opinion, it may be arguable that where a lease is continued by the operation of statute, the liability of the original lessee may not be extended to the renewed or extended term, at least not unless the terms of the original lease so provide.⁶⁰ In *City of London Corporation v Fell*,⁶¹ the defendant tenants entered into a lease for a "term of 10 years" from 25 March 1976 of business premises owned by the plaintiff landlords. In June 1979 the defendants, with the plaintiffs' consent, assigned the lease to a company for the residue of the unexpired term but remained liable to pay the rent and perform and observe the tenant's covenants and conditions during the remainder of the term. The ten-year term of the lease expired on 24 March 1986 but the assignee company continued in occupation pursuant to the provisions of Part II of the Landlord and Tenant Act 1954 until 23 January 1987, when it surrendered the premises, owing the plaintiffs unpaid rent. The company was then insolvent. The plaintiffs issued proceedings against the defendants, as the original lessees, for the outstanding rent.

6.51 The House of Lords held that the defendants were not contractually bound to pay the plaintiffs any rent for the period after 24 March 1986 because they had only contracted to pay rent until that date. A tenancy was capable of existence as a species of property independently of the contract which created the tenancy, and if the liability of the original tenant was released or otherwise disappeared, it did not follow that the term granted by the lease disappeared or that the assignee ceased to be liable on the covenants. When a lease was assigned, the provisions of the covenants by the original tenant continued to attach to the term, because those provisions touched and concerned the land (not because there continued to exist an original tenant, who although he ceased to own any interest in the demised land, remained liable in contract to fulfil the promises he had made under covenant). It followed that the defendants were not liable for the assignee company's breach of the covenant to pay rent occurring after the expiry of the defendants' ten-year contractual term.

⁶⁰ S Nield, *Hong Kong Land Law* (Longman, 2nd ed, 1998), at para 14.2.
⁶¹ [1994] 1 AC 458.

6.52 However in *Chan Tin Shi v Li Tin Sung*,⁶² the Court of Final Appeal appeared to have taken the view that the statutory extension of the leases in the New Territories by the New Territories Leases (Extension) Ordinance would still leave the original lessee of the Block Crown Leases liable for the rent payable to the Government during the extended period. However *City of London Corporation v Fell*⁶³ had not been cited to the Court of Final Appeal. However as *Chan Tin Shi* was decided by the Court of Final Appeal on the basis that the effect of the New Territories Leases (Extension) Ordinance was to re-write the length of the term granted under the original Government leases and not by conferring a new term on the Government lessee at the end of the original lease term, it would appear that *City of London Corporation v Fell*⁶⁴ should not make any difference to the decision in *Chan Tin Shi's* case.

Liability of a squatter

6.53 After occupying the land for the statutory limitation period, a squatter is entitled to the residue of the term of years of the ousted lessee (dispossessed owner). The squatter, however, is not an assignee of that lease and has neither privity of contract nor privity of estate with the lessor (the Government). Hence, a squatter is not liable on the covenants in the ousted lessee's Government lease at common law, except so far as the covenants are enforceable in equity as restrictive covenants.⁶⁵ If the Government lease contains a forfeiture clause, a failure to pay the Government rent or to perform other covenants will entitle the Government to forfeit the lease and to seek possession against the squatter, even though the squatter is not obliged to observe the covenants.⁶⁶ Squatters have no right to apply for relief against forfeiture.⁶⁷ According to *Megarry and Wade*, it follows that "*an adverse occupant of unregistered leasehold land will almost always have to pay the rent*".⁶⁸

6.54 Apart from the common law, some people may try to invoke section 41(3) of Cap 219 so as to make a squatter liable. Section 41(3) provides:

"(3) Notwithstanding any rule of law or equity but subject to subsection (5), a covenant shall run with the land and, in addition to being enforceable between the parties, shall be enforceable against the occupiers of the land and the

⁶² (2006) 9 HKCFAR 29, at p. 41G.

⁶³ [1994] 1 AC 458.

⁶⁴ Cited above.

⁶⁵ *Tichborne v Weir* (1892) 67 LT 735. S Nield, *Hong Kong Land Law* (Longman, 2nd ed, 1998), at para 7.5.2.3. C Harpum (ed), *Megarry & Wade: The Law of Real Property* (Sweet & Maxwell, 6th ed, 2000), at 21-067.

⁶⁶ S Nield, *Hong Kong Land Law* (Longman, 2nd ed, 1998), at para 7.5.2.3. C Harpum (ed), *Megarry & Wade: The Law of Real Property* (Sweet & Maxwell, 6th ed, 2000), at 21-067.

⁶⁷ *Tickner v Buzzacott* [1965] Ch 426. C Harpum (ed), *Megarry & Wade: The Law of Real Property* (Sweet & Maxwell, 6th ed, 2000), at 21-067.

⁶⁸ C Harpum (ed), *Megarry & Wade: The Law of Real Property* (Sweet & Maxwell, 6th ed, 2000), at 21-067.

covenantor and his successors in title and persons deriving title under or through him or them by the covenantee and his successors in title and persons deriving title under or through him or them."

6.55 The combined effect of this subsection and section 41(2) is to make the burden of both positive (subject to section 41(5)) and negative covenants run with the land. The result is that successors in title of a covenantor (for example, purchasers and persons to whom the land of the covenantor passes on his death or bankruptcy), persons deriving title from either the covenantor or his successors in title (for example, lessees) and even just occupiers of the land (for example, licensees or squatters) will be liable on the covenants.⁶⁹ This is, however, subject to section 41(5) which provides:

"A positive covenant shall not, by virtue only of this section, be enforceable against –

- (a) a lessee from the covenantor or from a successor in title of the covenantor or from any person deriving title under or through the covenantor or a successor in title of the covenantor; or*
- (b) any person deriving title under or through such a lessee; or*
- (c) any person merely because he is an occupier of land."*

6.56 Because of this sub-section, a lessee or occupier (such as a squatter) of land will not be liable to the covenantee by virtue of section 41 for breaching a positive covenant.⁷⁰ A positive covenant is a covenant to expend money or do something or which is otherwise positive in nature (section 41(6)). It therefore seems that a squatter would not be liable to pay the Government rent under this section.

⁶⁹ S Nield, *Hong Kong Land Law* (Longman, 2nd ed, 1998), at para 15.3.2. J Sihombing and M Wilkinson, *Hong Kong Conveyancing – Law and Practice* (Butterworths), vol 1(A) at XII paras 345 and 376.

⁷⁰ S Nield, *The Hong Kong Conveyancing and Property Ordinance* (Butterworths 1988), at 122: *"But a lessee's liability for positive covenants on other grounds is not affected. A lessee will be liable to his landlord, by privity of contract, and to an assignee of his landlord, by privity of estate, for breach of a positive covenant contained in his lease. A lessee's assignee will also be liable, by privity of estate, for breach of the positive covenants in the lease. A sub-lessee, on the other hand, may be liable for negative covenants under the doctrine in Tulk v Moxhay (1848) 2 Ph 744 but cannot be made liable under this section for positive covenants contained in his head lease."* See also *Annotated Ordinances of Hong Kong* (LexisNexis-Butterworths), Cap 219 at 178, and J Sihombing and M Wilkinson, *Hong Kong Conveyancing – Law and Practice* (Butterworths), vol 1(A) at XII para 377.

Anomaly

6.57 There is judicial recognition of this anomaly in the sense that the title of a paper owner (a Government lessee), dispossessed by the squatter, is extinguished as against the squatter, but remains good as against the Government (the lessor), and the paper owner thus remains liable on the covenants in the Government lease. This issue will be elaborated in the next chapter.⁷¹

The impact of adverse possession on "Tso" land

6.58 We wish to set out the peculiar position of "Tso" land in the context of adverse possession. In *Leung Kuen Fai v Tang Kwong Yu T'ong or Tang Kwong Yu Tso*,⁷² Deputy Judge Lam held inter alia that:

- (a) In respect of Tso land, the trust is a trust for the members for the time being rather than a trust for purposes, although the court was not prepared to decide on whether an unborn members have any interest in the Tso property which the court would protect.⁷³
- (b) The existing members of a Tso have beneficial interests in the Tso's landed property and such interest is within the meaning of equitable interests in land in s 10(1) of the Limitation Ordinance.⁷⁴
- (c) Given their position as beneficiaries, members of the Tso could claim possession of the Tso land against a stranger even though in the usual cases, it would be the managers who would be taking action.⁷⁵ A member could himself commence proceedings although he might have to join the managers as defendants.
- (d) A new born member of a Tso does not claim through another person within the meaning of that expression in the Limitation Ordinance⁷⁶ and the provision in section 22 of the Limitation Ordinance for the extension of the limitation period in case of disability for infancy would apply to an infant member. None of the proviso to section 22(1) of the Limitation Ordinance would apply. In effect the limitation period would be extended to 6 years after the member has reached the age of majority.⁷⁷

⁷¹ See paras 7.33 – 7.39 below.

⁷² [2002] 2 HKLRD 705.

⁷³ §§ 27 & 30 of the Judgment.

⁷⁴ § 32 of the Judgment.

⁷⁵ §§ 33 & 42 of the Judgment.

⁷⁶ § 43 of the Judgment.

⁷⁷ § 37 of the Judgment.

- (e) Whenever a new member is born, a new equitable interest in the Tso land is created. A new limitation period under sections 7(2) and 22 would start to run. The new limitation period would not expire until 6 years after the member ceases to be an infant.⁷⁸
- (f) By reason of section 10(2) of the Limitation Ordinance, the title of the trustees (or managers) would not be extinguished so long as there is at least one beneficial owner whose right to recover the land is not barred.⁷⁹

6.59 *Leung Kuen Fai v Tang Kwong Yu T'ong or Tang Kwong Yu Tso*⁸⁰ was considered and upheld by the Court of Appeal in *Wong Shing Chau v To Kwok Keung*.⁸¹ Thus in practical terms, for Tso land it is impossible to establish a squatter title unless one could show that the whole lineage of the Tso has been extinguished. Even the squatter has managed to be able to extinguish the title of all existing members of a Tso, it is always possible for the Tso to have new members after sometime in the future. In this respect even it could be shown that biologically it is not possible for existing members to have any child it does not mean that no new members could be added to the Tso because there could still be persons capable of being new members to the Tso by reason of their right to succeed to the members of the Tso under Chinese law and customs.

Summary of this chapter

6.60 We have examined in this chapter various peculiar issues regarding the operation of the law on adverse possession in Hong Kong. Taking into consideration the information in earlier chapters, we will set out the recommendations in the next chapter.

⁷⁸ § 45 of the Judgment.

⁷⁹ § 46 of the Judgment.

⁸⁰ Supra.

⁸¹ CACV 20 of 2008.

Chapter 7

Recommendations

Introduction

7.1 It can be seen from earlier chapters in this paper that adverse possession can be topical and controversial. In *JA Pye (Oxford) Ltd*,¹ for example, not only the value of the adversely possessed 25 hectares of land is considerable, the outcome of the legal battle was quite unpredictable. At first instance, the judge held that the freehold owner's title was extinguished because the squatter (originally the licensee under a grazing agreement)² had been in factual possession with the necessary intention for the requisite number of years. The Court of Appeal reversed the decision of the Court of First instance. It held that the squatter did not show the necessary intention to possess, and the trial judge was wrong to infer the squatter's state of mind from circumstantial evidence and ignore the direct evidence from him. Hence, the freehold owner had not been dispossessed and the limitation period had never commenced.

7.2 The Court of Appeal's decision was then reversed by the House of Lords which explained that, in order to be in possession of land, the squatter had to exercise the necessary degree of physical custody and control and to show an intention to possess the land. The squatter had to intend to exclude the world at large, including the paper title owner so far as was reasonably practicable. The requisite degree of physical control was dependent, inter alia, on the nature of the land and the manner of its usage. It was also necessary to demonstrate that the squatter had been treating the land in the manner of an occupying owner and that no other individual had done so. It was immaterial that the squatter would have been willing to pay to occupy the land if requested to do so.³ Furthermore, it was not necessary to demonstrate an intention to own or acquire ownership of the land.

7.3 The saga then continued in the European Court of Human Rights with the freehold owner alleging that the English law on adverse possession violated the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁴ The Chamber of the former Fourth Section of the Court decided by a 4 to 3 majority that the English law on

¹ See discussion in paras 1.22 – 1.26 and paras 2.23 – 2.31 above.

² The grazing agreement expired in December 1983. The owner declined to renew it and requested the squatter, Graham, to vacate the land. Graham was permitted to take a cut of hay in 1984. Thereafter, Graham's continued use of the land lacked permission.

³ This aspect is inconsistent with Hong Kong's case law. See *Wong Tak Yue v Kung Kwok Wai and Another* [1998] 1 HKLRD 241.

⁴ See para 2.26 above.

adverse possession deprived the plaintiffs of their land and upset the fair balance between public interest and the plaintiffs' rights to peaceful enjoyment of their possession.⁵

7.4 However, the Grand Chamber of the European Court of Human Rights decided by a ten to seven majority that there had been no violation of the convention.⁶ It is evident that balancing the society's needs to have some time-bar to claims and at the same time to protect individual's property rights is a delicate issue.

7.5 Some commentators have described adverse possession as land robbery. The concept has also received also some negative judicial comment. In *JA Pye (Oxford) Holdings Ltd v Graham*,⁷ Neuberger J, having reluctantly given judgment in favour of a claim by squatters to be entitled to some 25 hectares of land in Berkshire commented that –

"A frequent justification for limitation periods generally is that people should not be able to sit on their rights indefinitely, and that is a proposition to which, at least in general, nobody could take exception. However, if as in the present case the owner of land has no immediate use for it and is content to let another person trespass on the land for the time being, it is hard to see what principle of justice entitles the trespasser to acquired the land for nothing from the owner simply because he has been permitted to remain there for 12 years."

Should adverse possession be retained under the existing unregistered land system?

Title to land in Hong Kong is possession based

7.6 Despite the enactment of the Land Titles Ordinance (Cap 585) in 2004 and the efforts of the Administration and stakeholders to have the Ordinance implemented,⁸ the present system of land registration under operation in Hong Kong is a deeds registration system governed by the Land Registration Ordinance (Cap 128). The system provides a record of the instruments affecting a particular property, but gives no guarantee of title. Even if a person is registered in the Land Registry as the owner of a property, he may not be the legal owner because there may be uncertainties or defects in his title to the property.

7.7 In other words, title to unregistered land is relative and depends ultimately upon possession. Hence, registration of instruments under Cap 128 does not confer title, even though it facilitates the tracing of title. Moreover, unwritten equities are not registrable, and a paper title owner, who

⁵ See para 2.27 above.

⁶ See paras 2.28 – 2.31 above.

⁷ [2000] Ch 676.

⁸ See discussion in Chapter 5 above.

relies on the title derived from a duly registered instrument, may still be subjected to such equities. Therefore, the title to land in Hong Kong is mainly possession-based, despite the instrument registration system under the Land Registration Ordinance (Cap 128). This view was explained by Mr Justice Hartmann in *Harvest Good Development Ltd v Secretary for Justice*:⁹

"3. It is therefore fundamental that in Hong Kong land law possession is at the root of title. An individual who possesses land is presumed to have leasehold ownership unless a better title can be demonstrated. This is because title to unregistered land is relative and depends ultimately upon possession. The person best entitled to the land is the person with the best right to possession of it. ...

*11. To expand on what I have said earlier, the land law of England and Wales – and Hong Kong – is at root only a law of possession and not a law of ownership. As Lord Hoffmann expressed it in *Hunter v. Canary Wharf Ltd* [1997] AC 655, at 703:*

'Exclusive possession de jure or de facto, now or in the future, is the bedrock of English land law. As it is said in Cheshire and Burn's Modern Law of Real Property, 15th ed. (1994), p. 26:

'All titles to land are ultimately based upon possession in the sense that the title of the man seised prevails against all who can show no better right to seisin. Seisin is a root of title, and it may be said without undue exaggeration that so far as land is concerned there is in England no law of ownership, but only a law of possession.'" (emphasis added)

The existing law on adverse possession is consistent with the Basic Law and Human Rights principles

7.8 In Chapter 2 above,¹⁰ we discussed whether the law on adverse possession is consistent with Articles 6 and 105 of the Basic Law; that the right of private ownership of property should be protected, and that the right to the acquisition, use, disposal and inheritance of property and the right to compensation for lawful deprivation of property should be protected. In *Harvest Good Development Ltd v Secretary for Justice and others*,¹¹ Mr Justice Hartmann held that section 7(2) and section 17 of the Limitation Ordinance were consistent with Articles 6 and 105 of the Basic Law. He also opined that given that Hong Kong does not have a system of registration of

⁹ [2007] 4 HKC 1.

¹⁰ At paras 2.37 – 2.43 above,

¹¹ HCAL 32/2006, unrep.

title, the scheme of adverse possession contained in sections 7(2) and 17 of the Limitation Ordinance clearly pursues a legitimate aim.¹²

7.9 The European Court of Human Rights had the opportunity to consider whether the English law on adverse possession (as comprised in the Limitation Act 1980 and the Land Registration Act 1925) were compatible with the European Convention on Human Rights.¹³ We discussed that the Grand Chamber of the European Court of Human Rights held that the 1925 and 1980 Acts were applied to the applicant companies as part of the general land law regulating the limitation periods in the context of the use and ownership of land; not by a "deprivation of possessions" within the meaning of Article 1 of the Convention but rather by a "control of use" of land. It was also decided that the "fair balance" between the demands of the general public interest and the interest of the individuals concerned was not upset in *JA Pye (Oxford) Ltd v the United Kingdom*.¹⁴

7.10 The European Court of Human Rights also observed that there was a general public interest in both the limitation period itself and the extinguishment of title at the end of the period. The Court also pointed out that a large number of member states possess some form of mechanism for transferring title in accordance with principles similar to adverse possession in the common law systems, and that such transfer is effected without payment of compensation to the original owner.

7.11 We have considered the dissenting judgment¹⁵ of the Grand Chamber of the European Court of Human Rights which is directed at the fact that the land concerned is registered land for which title depends not on possession, but on registration as the proprietor.

The scenario in Hong Kong

7.12 Earlier in this paper, we examined the justifications for adverse possession, namely:

- To protect against stale claims – that adverse possession is one aspect of the laws of limitations, and the passage of time would increase the difficulty of investigating the claim.
- To avoid land becoming undeveloped and neglected – that land would become unmarketable if land ownership and possession are not matched.
- To prevent hardship in cases of mistake – that for a squatter who incurs expenditure to improve the land under mistake as to

¹² At para 184.

¹³ See *JA Pye (Oxford) Ltd v the United Kingdom*. Application No. 44302/02. 15 Nov 2005 and 30 Aug 2007 (European Court of Human Rights).

¹⁴ See paras 2.28 – 2.31 above for a more detailed discussion.

¹⁵ See para 2.31 above.

boundary or ownership but does not satisfy the requirements of proprietary estoppel, the squatter can have a claim in adverse possession.

- To facilitate conveyancing in unregistered land – that it is in public interest that a person who has enjoyed a long period of undisputed possession should be able to deal with the land as owner, and the period of title which a purchaser of un-registered land must investigate is directly related to the limitation period.

7.13 It is often said that the most cogent justification for adverse possession for un-registered land is that it facilitates conveyancing. The period a vendor is required to prove his title is closely resembled to the limitation period. Cap 219 previously required a vendor to prove his title for a period of not less than 25 years, and at that time, the limitation period for an action to recover land was 20 years. Upon the reduction of the limitation period to 12 years from 1st July 1991, the period for a vendor to prove his title under Cap 219 was reduced accordingly to 15 years.

7.14 Possessory title is useful in cases where a person with a defective paper title wishes to dispose of his interest; and indeed, even in the ordinary case of a vendor having a good paper title. According to section 13 of the Conveyancing and Property Ordinance (Cap 219), a vendor is required to prove his title over a period of at least 15 years beginning with a good root of title, unless there is a contrary intention. A vendor may fail to prove a good title because of a gap in the devolution of title, as a result of which the chain of ownership is broken. Sometimes, the paper title owners of some land parcels cannot be traced for various reasons, such as war, emigration, or death without leaving an heir. This will hinder the development of the plot of land, including such parcels. If, however, there are squatters who have been in long uninterrupted possession of those parcels to the extent of dispossessing the missing paper owners, the concept of adverse possession will facilitate the development. In this case, a vendor can rely on his possessory title which is "readily saleable" though not a good title.¹⁶

¹⁶ *Chan Chu Hang & Ors v. Man Yun Sau* [1997] 2 HKC 144, Le Pichon J said at 150: "In such cases, the contract should contain a special condition to make it clear that what is being sold is a possessory title. The vendor should supplement his title by a statutory declaration that he has been in undisturbed possession of the property for so many years without acknowledging the right of any person. Such a title, though not a good title, is readily saleable: see *Sihombing and Wilkinson* above; *Barnsley* at 331-332. There would appear to be two qualifications to the general statement stated above. The first is where there has been such a long uninterrupted possession, enjoyment and dealing with the property as to afford a reasonable presumption that there is an absolute title in fee simple. See *Cottrell v Watkins* (1839) 1 Beav 361 at 365. Thus, a purchaser can be forced to accept a title based on possession but in such a case, the vendor must not only prove possession, but also the origin of the possession so that allowance can be made for possession during a limited interest. Since under the Limitation Ordinance the longest period in the case of disability is 30 years, even if it can be shown that the period exceeds the maximum of 30 years in respect of a disability, the vendor must also show that the period has not been extended by the operation of s 9 of the Limitation Ordinance which deals with reversionary interests. See the discussion in *Williams on Title*, above at 570-571; *Barnsley*, above at 333. The second is that good title may be part documentary and part possessory. If good title could be traced down to the date of the defect, possession as from that date would cure the defect and the title could be forced

7.15 Further, adverse possession can facilitate conveyancing of un-registered land because a good title is not completely invincible at all times. In proving his good title, a vendor is aided by a number of statutory presumptions.¹⁷ A presumption may turn out to be wrong after the completion of a transaction. As a result, the title regarded as good would become defective or even bad. In this case, possessory title could provide a mechanism enabling transaction of the land concerned.

7.16 In Hong Kong the value of the doctrine of adverse possession in assisting conveyancing is probably less than in other jurisdictions (for example, England and Wales) because in Hong Kong we are invariably dealing with leasehold land. Since in Hong Kong the sale of land would in effect mean sale and purchase of government leases, it is doubtful as to whether a purchaser is obliged to accept title where his vendor would only have a squatter title in respect of part of the land agreed to be sold. This is because the part of the land subject to squatter title may be at risk of forfeiture by the landlord (often the Government). However in cases where the land subject to squatter title would only form a minor part of the land to be sold and the risk of re-entry by the landlord of that part of the land is minimal, often one may say that a marketable title is made out.

7.17 We also discussed the land boundary problem¹⁸ and the prevalence of the discrepancies between the boundaries as shown on the DD sheet or New Grant Plans and the physical boundaries on the ground in the New Territories. Land boundary disputes are not uncommon, especially in the New Territories many parts of which are held under Block Government Leases.¹⁹ It is not unheard of that the lot boundaries of a land parcel delineated in a demarcation district sheet annexed to a Block Government Lease are not in line with the actual occupational boundaries.²⁰ Purchasers

on the purchaser: see *Re Atkinson and Horsell's Contract* [1912] 2 Ch 1; *Barnsley*, above at 332." (emphasis added)

¹⁷ There are a number of examples. Under Section 13(4) of Cap 219, a statement of fact in a document of title, mortgage, declaration or power of attorney relating to land not less than 15 years old is presumed to be true unless the contrary is proved. Sections 22, 23 and 23A(1) respectively provide a rebuttable presumption of capacity and a rebuttable presumption of due execution. There are also irrebuttable presumptions in favour of vendors, such as sections 13(4) and 23A(2).

¹⁸ See Chapter 4 above.

¹⁹ In response to the question raised by the Hon Mr Patrick Lau, the Secretary for Housing, Planning and Lands said, "*Over 210 000 private lots in the New Territories are held under Block Government Leases, and are known as old schedule lots. These old schedule lots were surveyed 100 years ago using graphical survey method for the purpose of recording ownership and related taxation purposes.*" Official Record of Proceedings, Legislative Council (8 February 2006).

²⁰ In response to the question raised by the Hon Mr Daniel Lam, the Secretary for Housing, Planning and Lands said, "... *survey work was conducted 100 years ago, and relevant plans and official records are available. However, the Demarcation District (DD) Sheets produced at that time were mainly for recording ownership and related taxation purposes, so they are not very accurate. Problems will certainly arise as a result. ... the Lands Department will undertake re-survey if the landowner concerned considers it necessary to do so and has kept the relevant record. Upon agreement of the two sides, a deed of rectification will be entered into and a new record filed. ... as a result of the implementation of infrastructure projects, land resumption, building of small houses and land development, and so on, 400 such cases are received every year. Any person who considers there is such a need may proceed by going*

usually inspect the land so as to ascertain the occupational boundaries which may be self-evident from the size and shape of the lot and features such as fences or fence walls, bunds, roads, water courses, etc.²¹ Vendors may also describe to the purchasers the land boundaries to the best of their knowledge or belief.²² In practice, vendors and purchasers usually agree that the land is to be sold according to the physical occupational boundaries *in situ* rather than the lot boundaries as shown in the demarcation district sheet which were delineated at the turn of the 20th Century by means of some primitive equipment.²³ In case some part of the land to be sold is within the physical boundaries but not the boundaries as shown in the demarcation district sheet, the vendor will not be able to give the purchaser a good title in respect of that part. The Sub-committee notes that, often adverse possession is the only practical solution to such land title problems.

Recommendation 1

After careful consideration of the situation in Hong Kong, including the existing possession based un-registered land regime, the land boundary problem in the New Territories, and that the existing provisions in the Limitation Ordinance on adverse possession have been held to be consistent with the Basic Law, we are of the view that the existing provisions on adverse possession should be retained since they offer a practical solution to some of the land title problems.

Should adverse possession be retained under the prospective registered land system?

7.18 In Chapter 5 of this paper, we discussed the Land Titles Ordinance (Cap 585) and some of the problems encountered in the implementation of the Ordinance. We appreciate that the proposed registered title regime would be subject to modifications or even substantial changes. It would nonetheless be useful, we believe, to set out our views as

through the necessary procedures." Official Record of Proceedings, Legislative Council (8 February 2006).

²¹ Physical boundaries are prone to changes because of various reasons, such as soil erosion due to weather factors or encroachment by neighbours, by mistake or out of greed.

²² It is rather rare for a purchaser to require, as a condition of his purchase, the land boundaries to be set out on the ground by a land surveyor in accordance with the lot boundaries as delineated in the demarcation district sheet.

²³ If a land parcel held under a Block Crown Lease is to be sold according to the lot boundaries as shown in the demarcation district sheet, there may be complications. First, the lot boundaries as shown in the demarcation district sheet do not definitively locate the land parcel, as different land surveyors may come to different conclusions. Secondly, a vendor may discover some part of the land to be sold is within the boundaries as shown in the demarcation district sheet but not the physical boundaries. In this case, he may have difficulties in delivering vacant possession or passing a good title in respect of that part of land.

to how adverse possession should fit into a registered title regime in Hong Kong.

7.19 Where title is registered, the basis of title is primarily the fact of registration rather than possession. The doctrine of adverse possession will run counter to the fundamental concept of indefeasibility of title in registered land. In many common law jurisdictions which have systems of title registration, adverse possession has been either abolished or substantially restricted.

7.20 It is evident that the unqualified application of adverse possession principles to a registered title regime cannot be justified. If the system of registered title is to be effective, those who register their titles should be able to rely upon the fact of registration to protect their ownership except where there are compelling reasons to the contrary. Registration should of itself provide a means of protection against adverse possession, though it should not be unlimited protection.

Recommendation 2

We recommend that the law of adverse possession should be recast under the prospective registered land system. Registration should of itself provide a means of protection against adverse possession, though it should not be an absolute protection. This is to give effect to the objective of a registered land system – that registration alone should transfer or confer title.

Proposed outline of scheme to deal with adverse possession claims under the registered land system

7.21 We have examined the different regimes for dealing with adverse possession in other jurisdictions which have title registration. Some jurisdictions have retained the same rules as those which apply to unregistered land.²⁴ In others, adverse possession has been abolished outright.²⁵ Other jurisdictions have restricted the application of adverse possession.²⁶

7.22 Amongst the jurisdictions which have restricted the application of adverse possession, we believe the provisions adopted in Schedule 6 of the Land Registration Act 2002 (England and Wales) have struck the right balance between ensuring the conclusiveness of the register, protection of

²⁴ Tasmania, Victoria and Western Australia.

²⁵ Australian Capital Territories, Northern Territories.

²⁶ England and Wales, New South Wales, Queensland, South Australia, New Zealand, and British Columbia.

private property rights, and enabling the law of adverse possession to work in a very limited range of situations where there are compelling grounds. The underlying principle is that adverse possession alone does not extinguish the title to a registered estate.

7.23 The detailed mechanisms governing the registration of possessory title have been set out in chapter 3.²⁷ The main gists of the scheme are set out below. Subject to some exceptions²⁸ and formalities, a squatter may apply to the registrar to be registered as the proprietor of a registered estate in land if he has been in adverse possession of the estate for ten years. The Land Registry will arrange for inspection, and if it is likely that the squatter is entitled to make the application, the Land Registry will give notice of the application to the proprietor of the estate and relevant persons.²⁹ If the application is not challenged, the squatter will be registered as proprietor.

7.24 However, if the registered proprietor serves a counter-notice, then the squatter's application will fail unless he can prove one of the three conditions set out in paragraph 5 of Schedule 6, Land Registration Act 2002.

The first condition

- (a) it would be unconscionable because of an equity by estoppel for the registered proprietor to seek to dispossess the applicant, and
- (b) the circumstances are such that the applicant ought to be registered as the proprietor.

The second condition

the applicant is for some other reason entitled to be registered as the proprietor of the estate.³⁰

The third condition

- (a) the land to which the application relates is adjacent to land belonging to the applicant,
- (b) the exact line of the boundary between the two has not been determined under rules under section 60,
- (c) for at least ten years of the period of adverse possession ending on the date of the application, the applicant (or any predecessor

²⁷ Paras 3.16 – 3.28.

²⁸ Exceptions include mental disability of registered proprietor, the estate in land was held on trust, or that the registered proprietor is an enemy or is detained in enemy territory. See para 3.18 above.

²⁹ Para 3.18(iii) above.

³⁰ Examples are where the squatter is entitled under the will or intestacy of a deceased proprietor, or where the squatter paid the purchase price but the legal estate was not transferred to him.

in title) reasonably believed that the land to which the application relates belonged to him, and

- (d) the estate to which the application relates was registered more than one year prior to the date of the application.

7.25 On rejection of the squatter's application, the registered proprietor has a period of two years to obtain possession of the land from the squatter, either by judgment or eviction following a judgment, or to begin possession proceedings against him. If the proprietor fails to act in one of the ways stated above, the squatter may then make a second application to be registered, but only if he has been in adverse possession of the land from the date of the first application until the last day of the two year period. If an objection is raised to the squatter's further application, the matter will be referred to the adjudicator for resolution. Taking into account also the requisite ten year adverse possession and the 65 business day period for raising objection, it follows that the second application can only succeed where the squatter has been in undisturbed adverse possession of the land for at least 12 years before the second application is made.

7.26 In other words, as explained in the relevant English Law Commission papers,³¹ under the new regime after occupying the land for the required number of years, a squatter can be registered as proprietor only in the following situations:

- (a) Where the registered proprietor has disappeared and cannot be traced – This happens when the registered proprietor abandons the land or dies in circumstances in which no steps are taken to wind up the estate. Although the squatter is in a sense a "land thief", the law of adverse possession does at least ensure that the land remains in commerce and is not rendered sterile.
- (b) Where there have been dealings "off the register" and the register is not conclusive – Possible examples include: (i) a farmer who agreed to land swap with his neighbour under a gentleman's agreement, but does not register the change; and (ii) a registered proprietor dies and the property is taken over by the daughter, but no steps were taken to register the title. The English Law Commission explained that in such cases, the register does not reflect the reality of title, and there is every reason why the person in occupation should be registered as proprietor.
- (c) Where under the principles of proprietary estoppel, it would be unconscionable for the registered proprietor to object to the squatter's application – The applicant will have to establish that (i) in some way, the registered proprietor encouraged or allowed the applicant to believe that the squatter owned the land in

³¹ Law Com No. 254, Cm 4027, Sep 1998, Part X; and Law Com No. 271, HC 114, July 2001, Part XIV.

question; (ii) in this belief, the applicant acted to his detriment to the knowledge of the proprietor; and (iii) it would be unconscionable for the proprietor to deny the applicant the rights which the applicant had.

- (d) Where the applicant is the owner of adjacent property and has been in adverse possession of the land in question under the mistaken but reasonable belief that the applicant himself was the owner of it.

Recommendation 3

We recommend that when a registered title regime is in place in Hong Kong, adverse possession alone should not extinguish the title to a registered estate. The rights of the registered owner should be protected. If, for example, the registered proprietor is unable to make the required decisions because of mental disability, or is unable to communicate such decisions because of mental disability or physical impairment, then a squatter's application will not be allowed. However, such protection would not be absolute. Under the proposed scheme:

- **The squatter of registered title land will only have a right to apply for registration after 10 years' uninterrupted adverse possession.**
- **The registered owner will be notified of the squatter's application and will be able to object to the application.**
- **If the registered owner fails to file an objection within the stipulated time, then the adverse possessor will be registered.**
- **If the registered owner objects, the adverse possessor's application will fail unless he can prove either: (a) it would be unconscionable because of an equity by estoppel for the registered owner to seek to dispossess the squatter and the circumstances are such that the squatter ought to be registered as the proprietor; (b) the applicant is for some other reason entitled to be registered as the proprietor of the estate; or (c) the squatter has been in adverse possession of land adjacent to their own under the mistaken but reasonable belief that they are the owner of it.**

- **If the squatter is not evicted and remains in adverse possession for two more years, then the squatter would be entitled to make a second application, and the matter can be referred to the adjudicator for resolution.**

Abolition of the "implied licence" principle

7.27 The present position is that an owner's intention is, in general, "irrelevant in practice".³² In the past the courts, however, were reluctant to find adverse possession where a squatter used the land in a way consistent with the owner's future plans for it. Bramwell LJ said:

*"In order to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it."*³³

In a subsequent case, both Hodson LJ and Sellers LJ endorsed Bramwell LJ's dictum.³⁴

7.28 The majority of the Court of Appeal in *Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd*³⁵ treated *Leigh v Jack* as laying down a rule that a squatter could not be in adverse possession unless his use of the disputed land was inconsistent with the owner's purposes. Lord Denning MR went further to hold that, unless the squatter's use was inconsistent with the owner's purposes, the squatter's possession of the land was to be treated as being pursuant to an implied licence from the true owner. By using the land, knowing that it did not belong to him, the squatter impliedly assumed that the owner would permit it. Sir John Pennycuik, in delivering the judgment of the Court of Appeal in *Treloar v Nute*,³⁶ referred to the principle established in these cases, but decided that on the facts of the case, the principle did not apply.

7.29 On the other hand, Slade J expressed doubts about the implied licence principle.³⁷ The Law Reform Committee also recommended abolishing the implied licence principle.³⁸ The Limitation Amendment Act 1980 implemented the recommendation and the provision was consolidated as the Limitation Act 1980, Sch 1, para 8(4):

³² *Buckinghamshire County Council v Moran* [1990] Ch 623, at 645, per Nourse LJ.

³³ *Leigh v Jack* (1879) 5 Ex D 264, at 273

³⁴ *Williams Bros Direct Supply Ltd v Raftery* [1958] 1 QB 159, at 169 and at 165 and 173 respectively. In *Tecbild Ltd v Chamberlain* (1969) 20 P & CR 633, at 642, Sachs LJ quoted with approval from Sellers LJ.

³⁵ [1975] QB 94, CA. *Gray v Wykeham-Martin and Goode* [1977] Bar Library Transcript No 10A, adopted the same approach of implying a licence.

³⁶ [1976] 1 WLR 1295.

³⁷ *Powell v McFarlane* (1979) 38 P & CR 452, at 484-485.

³⁸ Law Reform Committee, *Final Report on Limitation of Actions*, (1977) Cmnd 6923 (The Law Reform Committee was set up in 1952 by the Lord Chancellor).

"For the purpose of determining whether a person occupying any land is in adverse possession of the land it shall not be assumed by implication of law that his occupation is by permission of the person entitled to the land merely by virtue of the fact that his occupation is not inconsistent with the latter's present or future enjoyment of the land.

This provision shall not be taken as prejudicing a finding to the effect that a person's occupation of any land is by implied permission of the person entitled to the land in any case where such a finding is justified on the actual facts of the case."

7.30 The difficulty of applying the "implied licence" principle is two-fold. First, the principle requires one to look at the intended use of the paper title owner. It would be difficult to ascertain his intention because in many cases the landlord basically did not do anything. For these cases, subsequent self-serving statements by the paper owner would have little worth. In other situations, there would be no evidence of the owner's intentions as the owner was not aware of the adverse possession. There are also cases in which one could not even find the paper owner. Apart from the difficulty in ascertaining the intention of the owner, whether the use is "inconsistent" with the paper owner's intention can also be a matter of debate.

7.31 Another difficulty of applying the "implied licence" principle is that it is already overtaken by the *Pye* case which clarified that what mattered was the fact of possession, not the quality of possession. Although the *Pye* decision is not binding in Hong Kong, the reasoning is cogent. *Pye* explained that the law was accurately stated in *Powell v McFarlane* (1977) which spelt out the requirements of "factual possession" and "intention to possess". Further, *Powell v McFarlane* considered the Limitation Act 1939. The relevant provisions in Hong Kong are still based on the 1939 Act. Now that the English Limitation Act 1980 has spelt out the requirements, this has put the issue beyond doubt.

7.32 Hence, a provision along the lines of para 8(4), Sch 1 of the Limitation Act 1980 will put it beyond doubt that the implied licence principle does not apply in Hong Kong. We recommend that there should be a provision similar to the Limitation Act 1980, Sch 1, para 8(4) in Hong Kong.

Recommendation 4

We recommend that the "implied licence" principle should be abolished, and there should be in Hong Kong a provision to the effect that:

"For the purpose of determining whether a person occupying any land is in adverse possession of the land it

shall not be assumed by implication of law that his occupation is by permission of the person entitled to the land merely by virtue of the fact that his occupation is not inconsistent with the latter's present or future enjoyment of the land."

The decision in *Chan Tin Shi & Others v Li Tin Sung & Others*³⁹

7.33 In the previous chapter, we discussed the Court of Final Appeal decision of *Chan Tin Shi*.⁴⁰ The case concerns section 6 of the New Territories Leases (Extension) Ordinance (Cap 150) which was passed at the time of the Joint Declaration to enable all leases in the New Territories which were due to expire within 13 years to be extended or renewed up to 30 June 2047. Some squatters on lots of leasehold land applied for declarations that they had adversely possessed the land for over 20 years but the leaseholders opposed the applications on the basis that leaseholders could rely on the new title created by the Ordinance, as opposed to the existing title, to defeat the claims.

7.34 The Court of Appeal⁴¹ found in favour of the leaseholders. Rogers V-P observed that:

*"Whilst it might be said that statutes relating to limitation are beneficial and should be construed liberally and not strictly, that does not, in my view, predispose that construction of a statute relating to ownership of land, but not in any way concerned with limitation, has to be favourable to squatters, who, after all, commenced their occupation as trespassers and thus were wrongdoers. This would be all the more so since they would be occupying land without paying rent and one of the purposes behind the Extension Ordinance was to enact provisions which had been agreed on the basis that they would preserve the income of the ultimate landlord i.e. the government."*⁴²

7.35 On appeal, the question before the Court of Final Appeal was whether the effect of Section 6 of the New Territories Leases (Extension) Ordinance (Cap 150) was to create a new estate in respect of government leases. In resolving that question, Lord Hoffmann NPJ and Mr Justice Litton NPJ applied the rule of literal interpretation to the English word "extended" in the English version of section 6 of the Extension Ordinance. It has been pointed out⁴³ that the precise meaning of "extended" can be found in the

³⁹ (2006) 9 HKCFAR 29; [2006] 1 HKLRD 185.

⁴⁰ See para 6.52 above.

⁴¹ Rogers V-P, Le Pichon and Yuen JJA

⁴² At para 21.

⁴³ David PH Wong, "Squatter's Title in the New Territories: An Extended or Renewed Saga" Hong Kong Lawyer May 2006, 34-40.

words "續期" as used in the Chinese version of the Extension Ordinance.⁴⁴ If the terms of Annex III to the Joint Declaration are read together, then it is clear that "可續期" means "renewable", and the English translation of 'may be extended' seems mismatched.

7.36 The Court of Final Appeal held that the effect of the New Territories Leases (Extension) Ordinance was to re-write the length of the term granted under the original Government leases and not by conferring a new term on the Government lessee at the end of the original lease term. The judgment produces an anomalous result. On the basis that the term was only extended with no new estate created, so that the old term simply continued until 30 June 2047, the original owner would remain liable for the Government rent charged annually at 3% of rateable value. If the squatter does not pay the Government rent or absconds, the original owner may be held liable. The anomaly was explained by Litton NPJ at pp 34-55:

"A squatter, confirmed in his possessory title by a court declaration, can greatly enhance the value of the property by improvements on the land, increasing rateable value. But the burden of paying the annual rent of 3% of the rateable value falls on the dispossessed registered owner, not on the squatter. They comprise nearly 121,000 square feet of land, on the edge of Tai Po. Although part the land is left vacant at present, and the rest used for low-grade farming, there is nothing to prevent the appellant [the squatter] from fencing off the whole lot and turning it into a luxurious country residence, free of all obligation to pay government rent"

7.37 To deal with this anomaly, we have considered whether there should be a statutory presumption to the effect that a squatter, having dispossessed a paper owner for the limitation period, is to be regarded as the assignee of the paper owner's title to the land under the Government lease so as to make the squatter liable on the covenants. After careful consideration of this proposition, we are of the view that it is not desirable to do so partly because of the complications involved in this proposed statutory assignment. It is also because, on reflection, we think that the anomaly is not as serious as it appears. Mr Justice Hartmann observed in the judicial review of the constitutionality of the adverse possession concept:

"15. ... the consequence, in practice, is not always so harsh as may, at first blush, appear. The Rating Ordinance, Cap. 515 (sic), provides that both the leaseholder and the occupier of a tenement are liable to pay rates and, in the absence of agreement, the rates are to be paid by the occupier. As for both rates and Government rent, the leaseholder would be entitled to obtain reimbursement from the occupier. But, of course, in seeking reimbursement, the leaseholder is forced to

⁴⁴

The Basic Law has elevated the status of the Chinese Language to the primary language for legislation: See Article 9.

take the occupier as he finds him; in many cases, no doubt, he will find him to be a man of straw. ...

159. Under the scheme, the leaseholder not only loses possessory title but does so while retaining obligations in respect of the land : rates, rent and other covenant responsibilities may have to be met. As I said at the beginning of this judgment – paragraph 15 – the disadvantages may not be as severe as, at first blush, they may appear. ...⁴⁵ (Emphasis added.)

Recommendation 5

The Sub-committee is aware of the possible anomalous situation in which a dispossessed registered owner remains liable for the covenants in the Government Lease. However, we do not recommend devising a statutory presumption or assignment to the effect that the adverse possessor become liable under the covenants in the Government Lease.

Surveying and Land Boundaries Problems

7.38 We have in Chapter 4 set out the surveying and land boundaries problems in the New Territories, and in Chapter 5 some discussion on proposals to address the land boundaries problems.⁴⁶ It is generally accepted that land surveying in the New Territories is plagued by historical problems, and the determination of land boundaries according to plans is fraught with difficulties. The law of adverse possession is seen by some as offering a practical solution irrespective of the true position of the legal boundaries on ground.

7.39 It should be noted that some of the "adverse possession" cases really owe their roots to inaccurate "DD sheets" or New Grant plans. Boundaries found on DD sheets or the New Grant plans are not readily identifiable on the ground. While individual land owners may arrange for survey plans to be prepared and lodged with the Land Registry or the Survey and Mapping Office, these survey plans are not cross-referenced to the DD sheets or the New Grant plans, and are not accorded definitive legal status. It has been suggested that a comprehensive resurvey of New Territories land could resolve these problems. The Sub-committee believes that a resurvey alone could not solve the problem because persons who are disadvantaged may resort to litigation or other methods to recover their loss. Legislative backing will be required and the land boundary problem is best dealt with together with the implementation of the Land Titles Ordinance.

⁴⁵ *Harvest Good Development Ltd v Secretary for Justice*, HCAL 32/2006.

⁴⁶ See paras 5.9 – 5.13 above.

Recommendation 6

We recommend that Government should be urged to step up its efforts to address the boundary problem in the New Territories. However, we are of the view that a comprehensive resurvey of the boundaries alone could not solve the problem, because persons who suffer any loss or disadvantage under the re-surveyed boundaries may not accept the new boundaries. It would appear that the land boundary problem in the New Territories is best dealt with together and in the context with the implementation of the Land Titles Ordinance.

The *Common Luck* decision

7.40 In Chapter 1,⁴⁷ we discussed the case *Common Luck Investment Ltd v Cheung Kam Chuen*⁴⁸ which laid down the law on when a mortgagee's right to recover possession of property is time-barred under section 7(2) of the Limitation Ordinance in the situation where the mortgagor has defaulted in repayment but remains in possession of the mortgaged property. The facts, the judgment and some academic analysis were set out.

7.41 The Property Committee of the Law Society of Hong Kong has expressed some views on the issue.⁴⁹ While considering another issue,⁵⁰ members of the Property Committee noted that the judicial interpretation of the provisions of the Limitation Ordinance concerning the relationships between parties to a mortgage is confused or unclear. The gists of their views are:

- Whereas mortgagors in some cases⁵¹ could successfully rely on sections 7 and 19 of the Limitation Ordinance to bar the claims of the mortgagees, the Court of Final Appeal in *Common Luck Investment Ltd v Cheung Kam Chuen* adopted a different approach to interpret the mortgagor's right under the Limitation Ordinance and came to a totally different conclusion.
- The Property Committee is concerned that if the Court of Final

⁴⁷ See paras 1.31 – 1.38.

⁴⁸ [1999] 2 HKC 719.

⁴⁹ CB(2) 1297/99-00 (01) 2nd March 2000.

⁵⁰ The approach of relying on the provisions of the Limitation Ordinance to seek a declaration that a mortgage is no longer subsisting in situation where the mortgagee, the mortgage document or both cannot be located.

⁵¹ *Tang Kun Nin Tony v Tang Chun Chack* (HCMP 761/1991, unreported) [1992] HKLY 588; *Castle City Ltd v Choi Yue Development Ltd* [1995] 2 HKC 593; *Broada Ltd & Another v Chow Cheuk Yin* [1997] 3 HKC 168. In each of these cases, the mortgagee was barred from taking action to enforce the mortgage by virtue of sections 7 and 19 of the Limitation Ordinance.

Appeal decision is right and the defaulting mortgagor in possession is to be regarded as occupying the property as a licensee so long as the mortgagee has done nothing to enforce its right, the mortgagee's right to take possession vis-a-vis the mortgagor can never be statute-barred under the provisions of the Limitation Ordinance. On the other hand, if the mortgagee in possession is entitled to rely on section 14 of the Limitation Ordinance to claim that the mortgagor's equity right of redemption is statute-barred, this will lead to an unsatisfactory position when the mortgagor will always be the loser in all circumstances.

- The Property Committee finds it difficult to reconcile the Court of Final Appeal decision with the other decisions and with the provisions of the Limitation Ordinance. They believe that it was time to raise the concerns with the Administration so that the implications of the Court of Final Appeal decision on the provisions of the Limitation Ordinance could be carefully reviewed.

7.42 The Sub-committee shares the views of the Property Committee. The Sub-committee is also in general agreement with Harpum's analysis set out earlier in this paper.⁵² All that was required for there to be adverse possession for the purpose of the Limitation Ordinance was that a cause of action should have accrued against someone who is in possession of the land. Clearly, the requirement was fulfilled when there was default in payment by the mortgagor. Therefore the mortgagee's rights were time-barred after the lapse of the limitation period.

Recommendation 7

In relation to a mortgagee's right to take possession of a mortgaged property vis-a-vis the mortgagor, we recommend that legislation should be passed to spell out clearly that the limitation period starts to run from the date of default of the mortgagor's obligations.

The impact of adverse possession on "Tso" land

7.43 Some New Territories land in Hong Kong is owned by "Tso" which is a family group owning property for the purpose of ancestral worship.⁵³ All male descendants of the common ancestor in a "Tso" are entitled to an interest in the land for his lifetime.

⁵² See paras 1.33, 1.36 – 1.38.

⁵³ "Tso" is a customary land trust and is not a legal entity. (*Tang Yau Yi Tong v Tang Mou Shau Tso* [1996] 2 HKLR 212).

7.44 We have examined the application of adverse possession law on "Tso" land in the previous chapter.⁵⁴ Under the Limitation Ordinance, where land is held on trust and adverse possession is taken by a stranger, the trustee's title to the legal estate is not affected until **all** the beneficiaries have been time-barred. Further, under the Limitation Ordinance, the limitation period for land owners aged under 18 to commence actions to recover land is not 12 years after the right of action accrued, but 6 years after the owner turns 18. We discussed that a "Tso" is a trust for the members for the time being, and the existing members of a "Tso" have equitable interests in land in section 10(1) of the Limitation Ordinance. Given their position as beneficiaries, members of the "Tso" could claim possession against an adverse possessor of "Tso" land. Whenever a new member is born, a new equitable interest in the "Tso" land is created, and a new limitation period would start to run.⁵⁵ Hence, under the existing law, it is impossible to establish adverse possession on "Tso" land.⁵⁶

Recommendation 8

We are aware that practically speaking adverse possession cannot be established on "Tso" land, but we do not see the need to change the law on this issue.

The *Fairweather v St Marylebone Property Co Ltd* decision

7.45 In the previous chapter,⁵⁷ we discussed the *Fairweather*⁵⁸ decision which held that, after the extinguishment of a lessee's title by a squatter upon expiry of the statutory limitation period, the lessee could by surrender of the lease enable the landlord to claim possession of the land. We discussed the reasons supporting the *Fairweather* decision, as well as criticisms of it. With reference to the conceived inequity of collusion between the lessor and lessee (which is the focus of the criticism about the *Fairweather* decision), in the Hong Kong context, the problem does not exist because the Government as lessor has refused to accept "possessory title lots" for surrender and exchange.

7.46 Apart from the legal debate, in Hong Kong the *Fairweather* decision has led to the practical problem of "possessory title lots" not being accepted by the Government for surrender. The *Fairweather* decision expressly re-affirms the principle that the successful squatter does not become an assignee of the tenant whose title he has extinguished. The

⁵⁴ See paras 6.58 – 6.59 above.

⁵⁵ Sections 7(2) and 22 of the Limitation Ordinance.

⁵⁶ However, a "Tso" can acquire possessory title to land. *Chow Tin Sang v Citehero International Ltd* HCA 2315/2009, unrep.

⁵⁷ See paras 6.23 – 6.42.

⁵⁸ [1963] AC 510.

Government is not prepared to accept the surrender of any land from persons deriving title from the squatter as such person would not be in possession of the term granted by the Government lease. In some cases when a developer has assembled various pieces of land for redevelopment he may be faced with the problem that he is unable to locate the paper title owner of some pieces of land and the best he could do is to obtain title from the person in possession – the squatter. As the squatter is unable to assign to him the Government lease, the developer would not be able to surrender the land with squatter title to the Government to obtain a re-grant for redevelopment purposes. As a result, land exchange in the New Territories involving "possessory title lots" has come to a standstill.

7.47 Hence there are some suggestions from the land developers that the law should be amended so that a successful squatter is deemed to have a statutory assignment of the lease of the land he managed to acquire a squatter title. The majority of the Sub-committee do not favour this proposed change of the law. The difficulty faced by the developer in this respect is no more than in those cases where the developer is unable to convince the paper title owner of a piece of land at a strategic position that he wants to acquire for the purpose of the redevelopment. At any rate the deemed statutory assignment would not be able to solve the problem if the immediate title of the dispossessed land is in the hands of a tenant or sub-tenant of the Government lessee. Further the majority do not see any reason for differentiating the law applicable to cases where the dispossessed land was held by a Government lessee directly from the Government and cases where the land was held under a private tenancy agreement.

7.48 It has also been suggested that to overcome the problems caused by *Fairweather* is that the Government can consider issuing a "letter of no-objection" or "letter of tolerance" to "possessory title lots" in situations which the Government finds it inappropriate to accept these lots for surrender and exchange. However, in situations where the lessor is not the Government, but a sub-tenant, the proposal would not be applicable. At present, we do not see justifications for having a two-tier approach differentiating developers and other land users.

7.49 Hence, although we are aware of the real and justified concern of developers, rather than making a recommendation on the issue, the Sub-committee wishes to highlight the problems caused by the operation of the *Fairweather* decision discussed above, and urge the Administration to consider devising appropriate administrative measures to address the problems.

Conclusion

7.50 The Sub-committee invites members of the public to express their views on the recommendations. The above recommendations represent an attempt by the Sub-committee to review the law on adverse possession against a background which is reliant on a deeds registration system governed by the Land Registration Ordinance (Cap 128) which was enacted in 1844. We hope that our views on adverse possession can be considered in the broader and on-going reviews of the Land Titles Ordinance (Cap 585).

Chapter 8

Summary of recommendations

(Discussions of the recommendations of this consultation paper are to be found in Chapter 7)

Recommendation 1: Should adverse possession be retained under the existing unregistered land system? (paragraphs 7.6 – 7.17)

After careful consideration of the situation in Hong Kong, including the existing possession based un-registered land regime, the land boundary problem in the New Territories, and that the existing provisions in the Limitation Ordinance on adverse possession have been held to be consistent with the Basic Law, we are of the view that the existing provisions on adverse possession should be retained since they offer a practical solution to some of the land title problems.

Recommendation 2: Should adverse possession be retained under the prospective registered land system? (paragraphs 7.18 – 7.20)

We recommend that the law of adverse possession should be recast under the prospective registered land system. Registration should of itself provide a means of protection against adverse possession, though it should not be an absolute protection. This is to give effect to the objective of a registered land system – that registration alone should transfer or confer title.

Recommendation 3: Proposed outline of scheme to deal with adverse possession claims under the registered land system (paragraphs 7.21 – 7.26)

We recommend that when a registered title regime is in place in Hong Kong, adverse possession alone should not extinguish the title to a registered estate. The rights of the registered owner should be protected. If, for example, the registered proprietor is unable to make the required decisions because of mental disability, or is unable to communicate such decisions because of mental disability or physical impairment, then a squatter's application will not be allowed. However, such protection would not be absolute. Under the proposed scheme:

- The squatter of registered title land will only have a right to apply for registration after 10 years' uninterrupted adverse possession.
- The registered owner will be notified of the squatter's application and will be able to object to the application.
- If the registered owner fails to file an objection within the stipulated time, then the adverse possessor will be registered.
- If the registered owner objects, the adverse possessor's application will fail unless he can prove either: (a) it would be unconscionable because of an equity by estoppel for the registered owner to seek to dispossess the squatter and the circumstances are such that the squatter ought to be registered as the proprietor; (b) the applicant is for some other reason entitled to be registered as the proprietor of the estate; or (c) the squatter has been in adverse possession of land adjacent to their own under the mistaken but reasonable belief that they are the owner of it.
- If the squatter is not evicted and remains in adverse possession for two more years, then the squatter would be entitled to make a second application, and the matter can be referred to the adjudicator for resolution.

Recommendation 4: Abolition of the "implied licence" principle (paragraphs 7.27 – 7.32)

We recommend that the "implied licence" principle should be abolished, and there should be in Hong Kong a provision to the effect that:

"For the purpose of determining whether a person occupying any land is in adverse possession of the land it shall not be assumed by implication of law that his occupation is by permission of the person entitled to the land merely by virtue of the fact that his occupation is not inconsistent with the latter's present or future enjoyment of the land."

Recommendation 5: The decision in *Chan Tin Shi & Others v Li Tin Sung & Others* (paragraphs 7.33 – 7.37)

The Sub-committee is aware of the possible anomalous situation in which a dispossessed registered owner remains liable for the covenants in the Government Lease. However, we do not recommend devising a statutory presumption or assignment to the effect that the adverse possessor become liable under the covenants in the Government Lease.

**Recommendation 6: *Surveying and Land Boundaries Problems*
(paragraphs 7.38 – 7.39)**

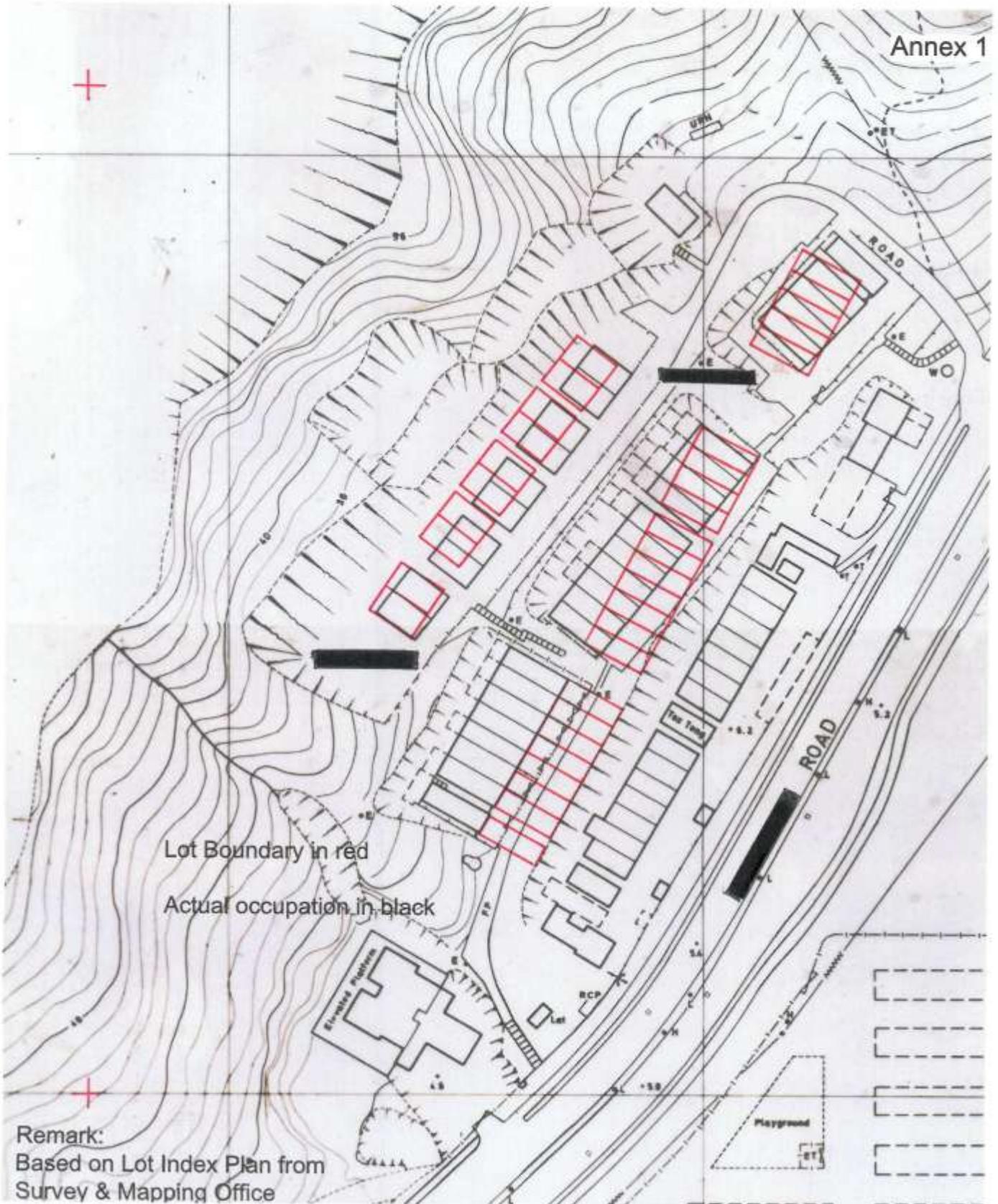
We recommend that Government should be urged to step up its efforts to address the boundary problem in the New Territories. However, we are of the view that a comprehensive resurvey of the boundaries alone could not solve the problem, because persons who suffer any loss or disadvantage under the re-surveyed boundaries may not accept the new boundaries. It would appear that the land boundary problem in the New Territories is best dealt with together and in the context with the implementation of the Land Titles Ordinance.

Recommendation 7: *The **Common Luck decision* (paragraphs
7.40 – 7.42)**

In relation to a mortgagee's right to take possession of a mortgaged property vis-a-vis the mortgagor, we recommend that legislation should be passed to spell out clearly that the limitation period starts to run from the date of default of the mortgagor's obligations.

**Recommendation 8: *The impact of adverse possession on "Tso"*
land (paragraphs 7.43 – 7.44)**

We are aware that practically speaking adverse possession cannot be established on "Tso" land, but we do not see the need to change the law on this issue.

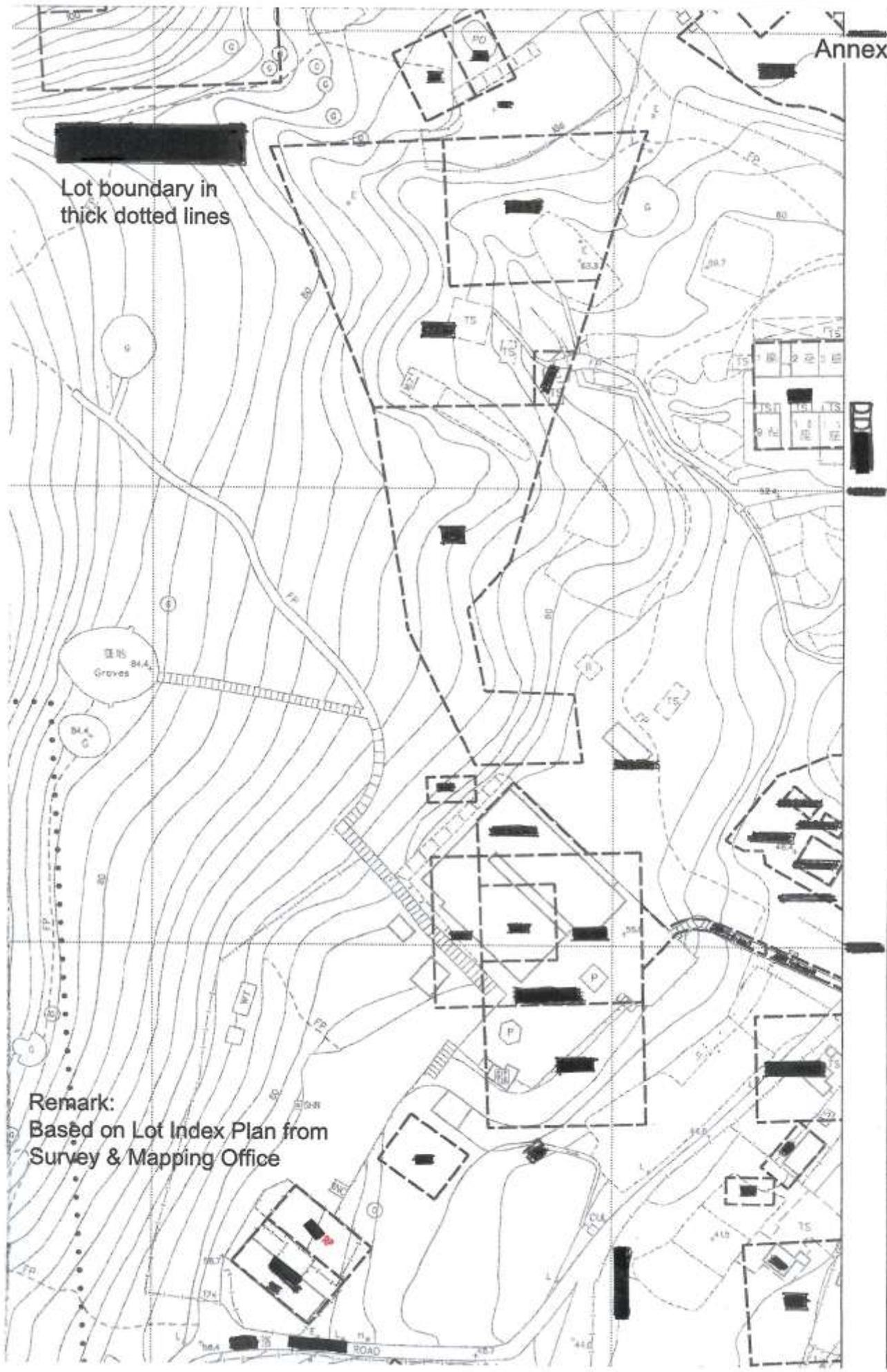


Lot Boundary in red
Actual occupation in black

Remark:
Based on Lot Index Plan from
Survey & Mapping Office



Lot boundary in thick dotted lines

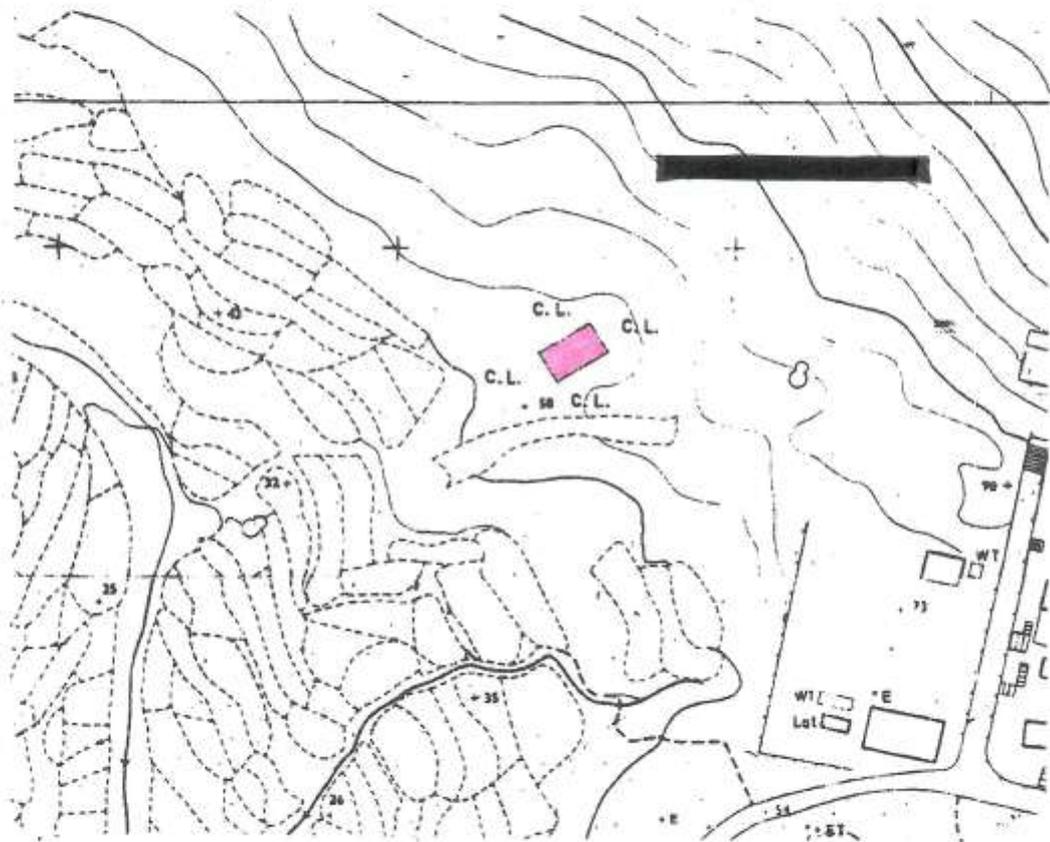


Remark:
Based on Lot Index Plan from
Survey & Mapping Office

PROPOSED LEASE

Annex 3a

LOT No. [REDACTED] IN D.D. [REDACTED]

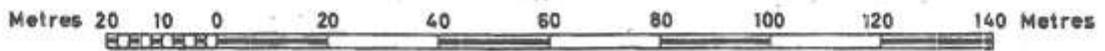


Coloured pink area 65.04 m² or 700 sq. ft. (about)

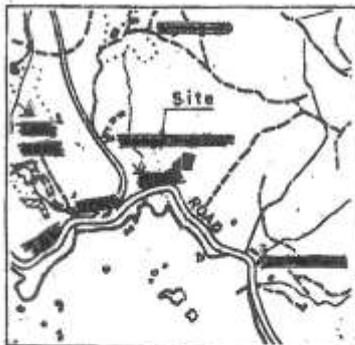
(Subject to survey)

SCALE 1 : 1 200

(Heights in feet)



LOCATION



Scale 1:25 000

Grantee's signature _____

Date _____

District Officer, [REDACTED]

[REDACTED] District Office
New Territories

Drawing No. [REDACTED]

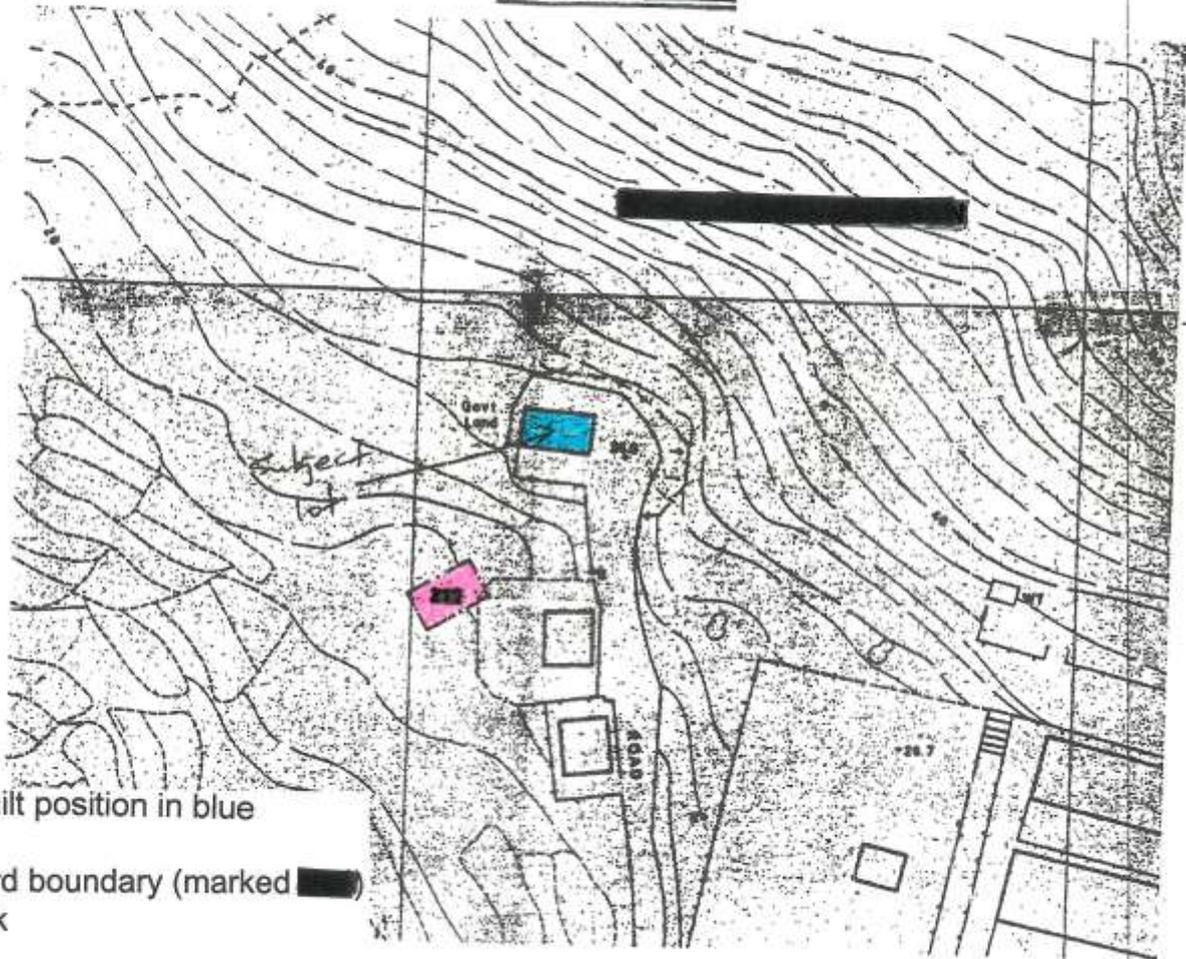
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Survey Sheet No. [REDACTED]

PROPOSED EXCHANGE

Annex 3b

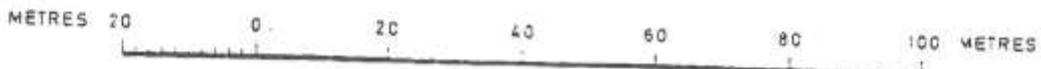
D. D. [REDACTED]



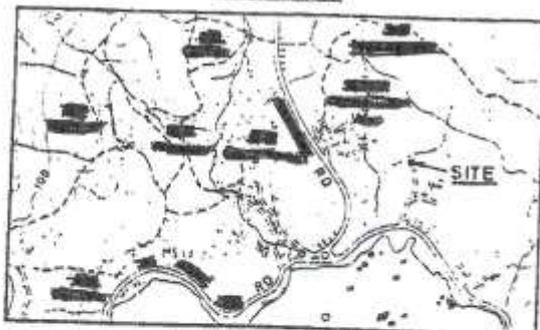
As-built position in blue

Record boundary (marked [REDACTED]) in pink

SCALE 1:1 000



LOCATION



SCALE 1:20 000

[Pink box] Area to be surrendered
Lot No. [REDACTED] 65.04 m² (about)
Non-industrial (in pink)

[Blue box] Area to be regranted
65.04 m² (about) (in blue)

PROVISIONAL PLAN - SUBJECT TO SURVEY

District Lands Office, [REDACTED]
Lands Department
Plan prepared by District Survey Office

File Ref. No. DLO / [REDACTED]

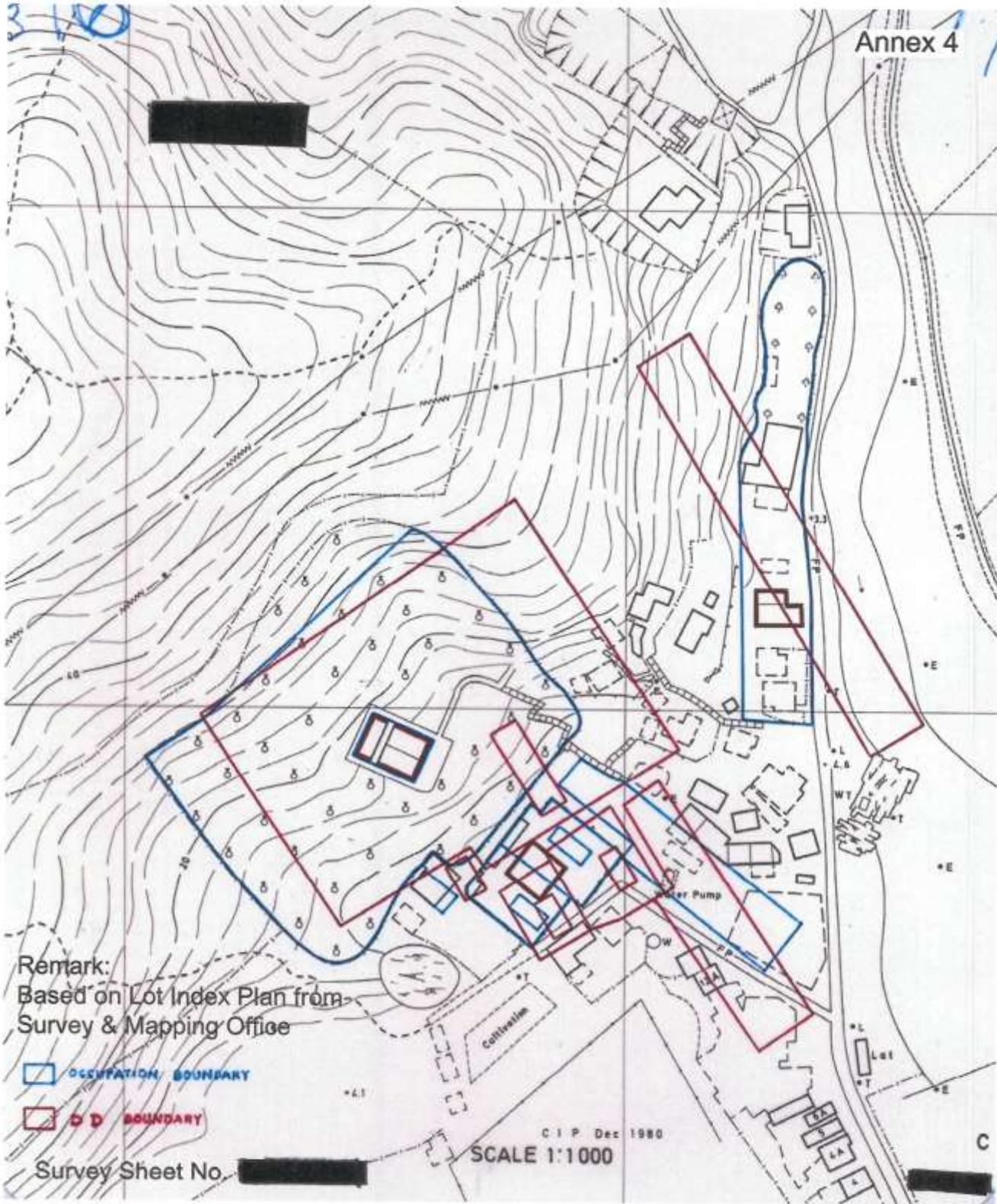
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Layout Plan No. [REDACTED]

Engineering Drg. No. [REDACTED]

PLAN No. [REDACTED]

Annex 4



Remark:
Based on Lot Index Plan from
Survey & Mapping Office

-  OCCUPATION BOUNDARY
-  D D BOUNDARY

Survey Sheet No. [Redacted]

C I P Dec 1980
SCALE 1:1000

C