

# THE LAW REFORM COMMISSION OF HONG KONG

## ADVERSE POSSESSION SUB-COMMITTEE

### CONSULTATION PAPER

### ADVERSE POSSESSION

### EXECUTIVE SUMMARY

*(This Executive Summary is an outline of the Consultation Paper. Copies of the Consultation Paper can be obtained either from the Secretariat, Law Reform Commission, 20/F, Harcourt House, 39 Gloucester Road, Hong Kong, or on the internet at <<http://www.hkreform.gov.hk>>.)*

#### 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 (Chairman)	Senior Counsel
Ms Wendy Chow (until January 2010)	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 (from October 2011)	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 (until June 2011)	Deputy Director/Legal Lands Department
Mr Michael Yin	Barrister
Ms Cathy Wan (Secretary from June 2010)	Senior Government Counsel Law Reform Commission

## **Chapter 1**

### **The existing law on adverse possession**

#### **The relevant law**

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

4. The provisions in the Limitation Ordinance (Cap 347) can cause hardship to land owners in some circumstances. On the other hand, the purpose of statutes of limitation, as explained in *Adnam v Earl of Sandwich*<sup>1</sup> 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*

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<sup>1</sup> (1877) 2 QBD 485.

*they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties ... ."*

## **Proving adverse possession**

5. 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*). As an owner is presumed to be in possession of the land, a squatter must establish that he has taken a sufficient degree of exclusive physical control of the land.

6. 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*". 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.

7. 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.

## **Chapter 2**

### **Justifications for adverse possession: Adverse possession and human rights principles**

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8. 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.

#### ***First justification: To protect against stale claims***

9. 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.

#### ***Second justification: To avoid land becoming undeveloped and neglected***

10. If land ownership and the reality of possession are not working well in tandem, the particular land in question would become unmarketable. 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***

11. 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.

***Counter arguments***

12. 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. The owner is hence not in any true sense sleeping on his rights.

13. 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. The rule applies indiscriminately, as much to ancient and innocent encroachment as it does to forcible ejection.

14. 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. The time bar in respect of a plaintiff's action is automatic and not discretionary.

***Fourth justification: To facilitate conveyancing in unregistered land***

15. A more fundamental aim of the law of limitation was to facilitate the investigation of title to unregistered land by ensuring that any possible outstanding third parties' claims to ownership would be time-barred.

16. However, 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).

17. 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 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.

## **Human rights and adverse possession**

18. In a much-publicised series of judgments in *JA Pye (Oxford) Ltd and JA Pye (Oxford) Land Ltd v Graham* and *JA Pye (Oxford) Ltd and JA Pye (Oxford) Land Ltd v the United Kingdom*, the landowners complained 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.

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

20. The plaintiffs made an application to the European Court of Human Rights<sup>2</sup> 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.

21. 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.

22. The United Kingdom Government requested a re-hearing of the case before the Grand Chamber of the European Court of Human Rights (the

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<sup>2</sup> *JA Pye (Oxford) Ltd v United Kingdom* (2005) 19 BHRC 705.

Court) comprising 17 judges. In a judgment handed down on 30 August 2007, 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. 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."*

### **Basic Law implications**

23. The constitutionality of provisions on adverse possession was considered in *Harvest Good Development Ltd v Secretary for Justice and others*.<sup>3</sup> In *Harvest Good* the paper owner who lost in the *Chan Tin Shi*<sup>4</sup> 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.

24. 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."*

25. 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. Mr Justice Hartmann went on to consider whether sections

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<sup>3</sup> [2006] HKEC 2318.

<sup>4</sup> Court of Final Appeal decision, (2006) 9 HKCFAR 29.

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. 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"). He concluded that a loss of possessory title pursuant to sections 7(2) and 17 did not constitute an expropriation, *de facto* or otherwise.

26. 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. His reasons were as follows:

*"183. ... 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. ...*

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

## **Chapter 3**

### **Relevant law in other jurisdictions**

#### **Australia**

##### ***Unregistered land***

27. 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). 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).

### **Registered land**

28. It is also possible to gain title through adverse possession of land registered under the Torrens system in some jurisdictions in Australia (except the Australian Capital Territory and the Northern Territory). There are broadly two approaches. The South Australian regime for a squatter to apply to be registered as the new registered proprietor is similar to that in Queensland, New South Wales, Victoria and Western Australia. 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.

29. Tasmania adopts the second approach; when the limitation period expires, a registered proprietor is taken to hold the land on trust for the squatter. 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. In determining an application, the Recorder must consider all the circumstances of the claim, the conduct of the parties and other factors.

### **Canada**

30. Canada has 13 common law jurisdictions (including the Federal level) and one civil law jurisdiction.

### **Unregistered land**

31. 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. 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. If the person entitled to possession of land has been dispossessed in circumstances amounting to trespass, an action for possession of land is not governed by a limitation period and may be brought at any time.

32. In Saskatchewan, the Limitations Act 2004, 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*".

### **Registered land**

33. With the exception of Alberta, all Canadian provinces with registered land title do not allow adverse possession per se. 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. 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. 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.

## **England and Wales**

### ***Unregistered land***

34. As at July 2012, about 20% of the land mass of England and Wales remain as unregistered land. 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.

### ***Registered land***

35. The Land Registration Act 2002 confers greater protection on registered owners against the acquisition of title by means of adverse possession. 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.

## **Ireland**

36. 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 status of a squatter on leasehold land was more fully explored in *Perry v Woodfarm Homes Ltd*. 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, 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.

## **New Zealand**

### ***Unregistered land***

37. In New Zealand, the limitation period for an action to recover land is 12 years from the date on which the right accrues, except in relation to Maori customary land and land registered under the Land Transfer Act 1952.

## ***Registered land***

38. 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.

## **Chapter 4**

### **A related problem- surveying and land boundaries in the New Territories**

#### **The Land Grant under the Block Crown Lease**

39. 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."*

#### **The problems of New Grant Plans**

40. 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. If the application is successful, the new plan would be annexed to the grant. 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.

41. 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.

### **The implications on the prospective registered land title system**

42. 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 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.

43. 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.

44. 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.

### **Chapter 5 Land Titles Ordinance (Cap 585) and The policy on adverse possession**

45. 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. 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 Kong 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.

46. 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.

### ***Progress with amendments to Land Titles Ordinance***

47. A series of LegCo panel papers from 2008 to 2011 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.

48. 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. Cap 585, as it stands, preserves the concept of adverse possession. 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.

## **Chapter 6**

### **Some legal issues relating to adverse possession**

#### **Whether an Owners Incorporation can claim adverse possession**

49. It seems that, according to the Court of Appeal in *Shine Empire Ltd v Incorporated Owners of San Po Kong Mansion & others*, [2006] 4 HKLRD 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.

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

50. 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. An ouster is presumed where there is a long exclusive enjoyment by one co-owner.

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

51. In *Incorporated Owners of Chungking Mansions v Shamdasani*, [1991] 2 HKC 342, the plaintiffs were the incorporated owners of Chungking Mansions. The defendant was the owner of 31 units, 16 of which 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. 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.

52. 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]*

*... 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.

## **Whether adverse possession can be established by successive squatters**

### ***Dispositions by squatter***

53. 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. 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***

54. In *Tsang Tsang Keung v Fung Wai Man*, HCA 11328/1996

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. ..."*

55. 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.

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

56. 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 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. The House of Lords held that:

*"... 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. ... ." (Lord Denning) (at p 545)*

57. Lord Radcliffe 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.

### **Comments on the "Fairweather" decision**

58. The *Fairweather* decision has been strongly criticised. The majority of the Supreme Court in Ireland declined to follow it in *Perry v Woodfarm Homes Ltd*. Academics, in general, endorse the view that the *nemo dat quod non habet* maxim should not be undermined. 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.

59. On the other hand, the *Fairweather* decision is not without supporters. Cooke believes that the decision is correct. 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. 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.

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

60. The Court of Final Appeal in *Chan Tin Shi v Li Tin Sung* 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 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 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.

### **The impact of adverse possession on "Tso" land**

61. 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*, it was held that: 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 of the Limitation Ordinance would start to run, and the new limitation period would not expire until 6 years after the member ceases to be an infant.

62. 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.

## **Chapter 7**

### **Recommendations**

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

##### ***Title to land in Hong Kong is possession based***

63. 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, 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. In other words, title to unregistered land is relative and depends ultimately upon possession.

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

64. In Chapter 2 above, 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*, 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 Hong Kong does not have a system of registration of title, the scheme of adverse possession contained in sections 7(2) and 17 of the Limitation Ordinance clearly pursues a legitimate aim.

65. In *JA Pye (Oxford) Ltd v the United Kingdom*, 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. The Court 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 scenario in Hong Kong***

66. 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 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.

67. 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.

68. We also discussed the land boundary problem 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. 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. 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 Limitations 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?**

69. In future, when a registered title regime is implemented in Hong Kong, 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**

70. 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. In others, adverse possession has been abolished outright. Other jurisdictions have restricted the application of adverse possession.

71. 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 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.

### **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**

72. The present position is that an owner's intention is, in general, "*irrelevant in practice*". 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. The Law Reform Committee also recommended abolishing the implied licence principle. The Limitation Amendment Act 1980 implemented the recommendation and the provision was consolidated as the Limitation Act 1980, Sch 1, para 8(4).

73. The relevant provisions in Hong Kong are still based on the Limitation Act 1939. Now that the English Limitation Act 1980 has spelt out the requirements, this has put the issue beyond doubt. 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***

74. In the previous chapter, we discussed the Court of Final Appeal decision of *Chan Tin Shi*. 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.

75. The Court of Appeal 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."*

76. 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. 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.

77. 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.

#### **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**

78. 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.

#### **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**

79. In Chapter 1, we discussed the case *Common Luck Investment Ltd v Cheung Kam Chuen* 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.

80. The Property Committee of the Law Society of Hong Kong has expressed some views on the issue. While considering another issue, 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 cases 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 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.

81. The Sub-committee shares the views of the Property Committee. The Sub-committee is also in general agreement with Harpum's analysis set out in the consultation paper. 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**

82. Some New Territories land in Hong Kong is owned by "Tso" which is a family group owning property for the purpose of ancestral worship. All male descendants of the common ancestor in a "Tso" are entitled to an interest in the land for his lifetime.

83. We have examined the application of adverse possession law on "Tso" land in the previous chapter. 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. Hence, under the existing law, it is impossible to establish adverse possession on "Tso" land.

### **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**

84. In the previous chapter, we discussed the *Fairweather* 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.

85. 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 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.

86. 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. 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.



87. 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**

88. 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). 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).