

THE LAW REFORM COMMISSION OF HONG KONG

REPORT

ADVERSE POSSESSION

EXECUTIVE SUMMARY

(This Executive Summary is an outline of the Report. Copies of the Report 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	Managing Director Leung Shou Chun Land Surveying Consultants Ltd
Mr Louis Loong	Secretary General The Real Estate Developers Association of Hong Kong

Ms Dorothy Silkstone <i>(from October 2011 to March 2013)</i>	Assistant Director/Legal PARD & NTE (Legal Advisory and Conveyancing Office) Lands Department
Professor Michael Wilkinson	Department of Professional Legal Education University of Hong Kong
Mr David P H Wong	Partner Wong, Hui & Co, Solicitors
Ms Teresa Wong <i>(until June 2011)</i>	Deputy Director/Legal Lands Department
Mr Michael Yin	Barrister
Ms Polly Yip <i>(from March 2013)</i>	Assistant Director/Legal Lands Department
Ms Cathy Wan (Secretary from June 2010)	Senior Government Counsel Law Reform Commission

The consultation exercise

3. The consultation exercise commenced on 10 December 2012 and a press conference was held whereby the tentative recommendations were explained to the media and the public. Over 110 organisations and individuals had kindly provided us with their views and useful information. Members of the Sub-committee attended the Legislative Council's Administration of Justice and Legal Services Panel meeting on 26 February 2013, as well as a number of media programmes and interviews. The views and information gathered during those occasions have been useful in the formulation of the final recommendations.

4. The statistics shown in the table below is a rough indication of the volume of adverse possession disputes in Hong Kong.¹

¹ 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 cases in which the squatter was also the "real owner". Examples include cases in which the paper owner was a mere trustee of the occupant/squatter; and cases in which the paper owner was unable to prove good title and had to rely on adverse possession to gain a possessory title. Also included in the "Not applicable" column are cases in which no final decision on adverse possession was made; for example, where a retrial was ordered, or where the decision was only interlocutory. 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

	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>
2013 (36 cases)	11		3	8	11	3
2012 (18 cases)		2	3	6	5	2
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	

Chapter 1

The existing law on adverse possession

The relevant law

5. The 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

another owner in the building. See also Chapter 6.

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.

6. 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.

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

First justification: To protect against stale claims

8. 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

9. 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

10. 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

11. 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.

12. As to encouraging the development and maintenance of land under the second justification, 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.

13. 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

14. 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.

15. 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).

16. 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 of the Report, 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

17. 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.

18. The plaintiffs made an application to the European Court of Human Rights² 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.

19. 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, 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

20. The constitutionality of provisions on adverse possession was considered in *Harvest Good Development Ltd v Secretary for Justice and others*.³ The paper owner 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 in line with Articles 6 and 105 of the Basic Law, and to reinstate its property rights or provide compensation.

21. 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 *JA Pye (Oxford) Ltd v United Kingdom* (2005) 19 BHRC 705.

³ [2006] HKEC 2318.

22. 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.

23. Mr Justice Hartmann also considered the issue as to whether sections 7(2) and 17 were inconsistent with the Basic Law. 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

24. 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

25. It is also possible to gain title through adverse possession (except in Australian Capital Territory and the Northern Territory). There are broadly two approaches. The first approach is adopted in South Australia, Queensland, New South Wales, Victoria and Western Australia. 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.

26. 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

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

Unregistered land

28. 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 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

29. 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 for example, a title adverse to or in derogation of the title of the registered owner is not acquired by any length of possession.

England and Wales

Unregistered land

30. 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

31. 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.

Criminal offence of squatting in a residential building

32. Section 144 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 creates a new offence of squatting in a residential building, which will apply throughout England and Wales. The offence was introduced following public concern about the harm that trespassers can cause. There were also views in England that the law did not offer adequate protection to property owners. Even where there was a break in, it could be difficult to prove a particular person was responsible for the break in unless the offenders were caught in the act. Hence, once squatters have occupied the property, court proceedings would be required to evict the squatters.⁴ The new offence should make it more straightforward for a property owner to recover his property from a squatter, because the police have a right to enter and search the property for the purposes of making an arrest where there are reasonable grounds for believing the offence has been committed.

33. Subsection (1) of section 144 sets out the elements of the offence. The offence is committed when:

- a person is in a residential building as a trespasser having entered it as such;
- the person knows or ought to know that he or she is a trespasser; and
- the person is living in the building or intends to live there for any period.

Chapter 4

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

The Land Grant under the Block Crown Lease

34. 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

⁴ Squatter possession proceedings can be commenced in the county court, but property owners need to bear solicitors fees, court fees, process servers fees, (maybe) counsel brief fees, as well as, cleaning, repairing and/or redecoration costs. The process can take four to ten weeks. The Interim Possession Order procedure is quicker but is also expensive as it involved two hearings. See Law Society Gazette of 3 Oct 2012.

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

35. 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.

36. 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

37. 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.

38. After considering possible solutions to the surveying and land boundary problems, we are 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

39. 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.

Progress with amendments to Land Titles Ordinance

40. 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. 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.

Chapter 6

Some legal issues relating to adverse possession

Whether an Owners Incorporation can claim adverse possession

41. 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

42. 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

43. 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.

44. 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

45. 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. 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.

The impact of adverse possession on "Tso" land

46. 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. Thus in practical terms, for Tso land it is almost impossible to establish a squatter title unless one could show that the whole lineage of the Tso has been extinguished.

Chapter 7

Recommendations

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

Title to land in Hong Kong is possession based

47. 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.

Responses

48. The organisations that responded were mostly in favour of retaining the existing law. The Hong Kong Bar Association was one of the organisations that supported the recommendation. A number of other organisations had a neutral stance on this issue. The Law Society of Hong Kong, however, suggested that the existing law should be altered such that the notification scheme devised for a registered title regime should be applied to the present unregistered title regime in Hong Kong. Two organisations were against retaining adverse possession under the existing unregistered title system. Heung Yee Kuk was, for example, one of these organisations.

49. The consultation responses from individuals, however, were rather different. By and large, the responses were of the view that the law on adverse possession was unfair to property owners and mentioned that failure of the paper owner to manage his own property should not be a ground for the squatter to encroach upon the property, otherwise more people would be encouraged to trespass other people's property. An elderly landowner in the New Territories voiced the view that he felt helpless in defending his land against trespassers. Given that he had savings and could not qualify for Legal Aid, he would like to see more protection to landowners. Another individual wrote to say that adverse possession had become a means of extortion and the riggers behind the scene included triad societies and local

bullies. He said that a local bully in Yuen Long put locks and iron chains on a neighbour's supposedly vacant house and applied for a new electricity account. Hence, this individual believed that adverse possession should not be allowed to operate anymore.

50. The Heung Yee Kuk also wrote to express the view that adverse possession should be abolished, whether under the existing unregistered land system or under the prospective registered land system. Heung Yee Kuk believed that a land owner is entitled to rent out his land, use it or let it lie idle and such right is guaranteed by Article 105 of the Basic Law. They stressed that the fact that the land was not being used by the owner did not mean that someone else could arbitrarily take it away for his own use. They also said that law on adverse possession had become a tool to encourage people to encroach on another person's land or an excuse for doing that, so it was damaging to the interests of land owners.

Our views

51. We are aware that individual owners are concerned about the hardship caused by adverse possession, and would like to see some curtailment of the rule. Hence, we have deliberated on the feasibility of applying the notification scheme originally intended for a registered title regime to the existing un-registered title regime in Hong Kong. We found that the effect of such a change unsatisfactory. If a squatter were to be required to give notification of adverse possession, this requirement would effectively deprive the squatter of the chance to establish adverse possession. Also, without the due diligence enquiries made when a registered title is established, including the sorting out of any boundary disputes, the application of the notification scheme to Hong Kong's present land title regime could create more problems than it solved.

52. With reference to calls to abolish adverse possession altogether: it seems that the majority of the consultees would favour some curtailment of instead of the complete abolition of adverse possession.

The scenario in Hong Kong

53. It is often said that the most cogent justification for adverse possession for un-registered land is that it facilitates conveyancing. 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.⁵

⁵ *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

54. 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. 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?

Consultees' responses and our views

55. The majority of the institutional responses agreed that in the context of a registered title regime, the law of adverse possession have to be recast so as to provide adequate, but not absolute, protection for registered titles against adverse possession. The Hong Kong Bar Association

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

expressed the view that a number of Legislative Council members⁶ objected to imposing a heavier burden to acquire title by adverse possession, and given the potential controversy over the present recommendation and the uncertainty over the implementation of the registered title regime, the Association considered that there is no urgency in implementing Recommendations 2 and 3 which should be deferred until a registered title regime is to be implemented. As for the Law Society of Hong Kong, they believed that the model set out in Recommendation 3 (subject to modifications) should be implemented to the present unregistered title regime without delay. With regard to responses received from individuals, the vast majority agree with this recommendation. We believe the formulation of a registered title regime provides a good opportunity to overhaul the law on adverse possession, and hence we have not adjusted this recommendation.

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

56. 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.

Consultees' responses and our responses

57. Save for a few exceptions, consultees agreed that the proposed scheme had struck the right balance between protecting the paper owner and the squatter. Whilst we agree that the fine details are important for the successful implementation of the scheme, we need to leave some leeway for the eventual body to devise the details of the scheme taking into account its set-up. Therefore, we see fit to specify only the broad principles of the proposed scheme.

⁶ LegCo Panel on Administration of Justice and Legal Services meeting on 26th February 2013.

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

58. 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).

59. 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.

Consultees' views and our views

60. We received written responses from nine organisations on this recommendation, all of which agreed that the "implied licence principle" should be abolished. One of the consultees reminded us that we should include the proviso in the Recommendation that where there is on actual facts an implied licence, the position would not be affected. It was indeed the Sub-committee's intention at the time of the Consultation Paper that the proviso stated in para 8(4) of Schedule 1 of the Limitation Act 1980 should be taken on board, and hence it was mentioned that a provision "along the lines of" of the said provision should be recommended.⁷ To put matters beyond doubt, the proviso has been included in the actual recommendation.

Recommendation 4

We recommend that the "implied licence" principle should be abolished, and there should be in the Limitation Ordinance (Cap 347) 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.

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

Para 7.32 of Consultation Paper.

The decision in *Chan Tin Shi & Others v Li Tin Sung & Others*

61. 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.

62. The Court of Appeal found in favour of the leaseholders. 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.

Consultees' views

63. Out of the ten responses on this recommendation, the majority supported the recommendation. Both the Law Society of Hong Kong and Heung Yee Kuk disagreed with the recommendation and supported devising a statutory presumption or assignment to the effect that the adverse possessor would shoulder all liabilities under the covenants in the Government Lease. The Law Society of Hong Kong also wrote that once adverse possession is successfully established by the squatter, he has stepped into the shoes of the paper owner, taking both the benefit and burden of the Government lease, and should also be in a position to surrender the land to the Government as well.

64. The Hong Kong Bar Association, however, was of the view that the existing law should not be changed. Other consultees mentioned that the concern was more academic than real, and it would be appropriate to tolerate the anomaly because in practice the consequence was not so harsh as it might appear.

Our views

65. We have considered the fact that nowadays the Government Rent can be a substantial sum, and that certain covenants for repair could be costly. However, in reality the problem was only theoretical in most cases. The user of the land would definitely not run the risk of Government re-entry by failing to perform the obligations.

66. We believe that devising a statutory assignment would be too problematic. In addition to the problems discussed above, it is also uncertain at which point in time the statutory assignment or presumption is deemed to take place; whether it would be on the 12th year of adverse possession or on a date to be decided by the court. Hence, we have decided not to recommend devising a statutory presumption or assignment.

Recommendation 5

We are 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

67. 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. We believe 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.

Consultees' views and our views

68. Amongst the 14 written responses that commented on this recommendation, most agreed that the Government should step up its efforts to address the boundary problem in the New Territories.

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

69. 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.

70. The Property Committee of the Law Society of Hong Kong has expressed some views on the issue, and we share the views of the Property Committee. 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.

Consultees' views and our views

71. Amongst the seven organisations that responded to this recommendation, all agreed with introducing legislation to bring about the proposed change.

Recommendation 7

In relation to a mortgagee's right to take possession of a mortgaged property vis-a-vis the mortgagor, we recommend the enactment in the Limitation Ordinance (Cap 347) a provision 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

72. 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. 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. 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 almost impossible to establish adverse possession on "Tso" land.

Consultees' views and our views

73. Nine organisations have responded on this recommendation, and most agreed that the need to change the existing law was not apparent. The Law Society of Hong Kong, however, was of the view that given the scarcity of land, it is immoral and unacceptable for an owner to allow his/her land to be unproductive, and there is no reason why a squatter should not have a successful claim merely because of a technical objection which should be removed by legislation. The Hong Kong Bar Association said it is debatable as a matter of policy whether a "Tso" should enjoy the privilege that its land is exempt from the law of adverse possession. Also, there is a body of opinion which took the view that a "Tso" could become extinct.

74. We note from the consultation exercise that the public is generally agreeable to the existing law and the need to change the law on this aspect is not apparent. Further, even if a "Tso" can in theory become extinct, it would be extremely difficult to establish adverse possession against "Tso" land.

Recommendation 8

We are aware that practically speaking it is almost impossible to establish adverse possession on "Tso" land, but we do not see the need to change the law on this issue.

The *Wong Tak Yue v Kung Kwok Wai David* decision

75. We discussed the Court of Final Appeal decision in *Wong Tak Yue v Kung Kwok Wai David*.⁸ In that case, the court held that a squatter's willingness to pay rent if the owner had requested it is inconsistent with the requisite intention to possess.

76. The Hong Kong Bar Association ("the HKBA") had in its written response to the consultation proposed the enactment of a provision to bring *Wong Tak Yue* in line with the *Pye*⁹ decision. The HKBA wrote that:

- *Wong Tak Yue* was decided without the benefit of the Privy Council decision in *Ocean Estates Ltd v Pinder* [1969] 2 AC 19, especially at 24D-F.
- *Wong Tak Yue* is inconsistent with the House of Lord decision in *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419.
- Later decisions of the Court of Final Appeal applies *Pye* without reference to *Wong Tak Yue*, see, e.g. *Incorporated Owners of San Po Kong Mansion v Shine Empire Ltd* (2007) 10 HKCFAR 588.

⁸ (1997-98) 1 HKCFAR 55.

⁹ [2003] 1 AC 419 (HL).

- Despite that, it is (at least) arguable that *Wong Tak Yue* remains binding on all the lower courts, see, e.g. *Lau Wing Hong v Wong Chor Hung* [2006] 4 HKLRD 671 paras 33 and 34.
- That puts the Hong Kong law on adverse possession at variance with the rest of the common law world, and puts legal advisers in a very difficult position.
- There is the possibility that if the point reaches the Court of Final Appeal again, it is likely the Court of Final Appeal would follow *Pye*, but in the meantime the difficulty exists.
- The HKBA therefore recommends that the Limitation Ordinance should be amended to overrule *Wong Tak Yue*.

77. We agree with the views of the HKBA as set out in the preceding paragraph. We are aware that the proposal to overrule *Wong Tak Yue* was not one of the tentative recommendations in the Consultative Paper, and hence had not been subjected to formal extensive consultation. However, as it would take substantial resources and time for the issue to be re-considered by the Court of Final Appeal, we now recommend the enactment in the Limitation Ordinance (Cap 347) a provision to the effect that willingness to pay rent by a squatter is not inconsistent with the requisite intention to possess in order to establish adverse possession.

Recommendation 9

We recommend the enactment in the Limitation Ordinance (Cap 347) a provision to the effect that willingness to pay rent by a squatter is not inconsistent with the requisite intention to possess in order to establish adverse possession.

***Secretary for Justice v Chau Ka Chik Tso* (2011) 14 HKCFAR 889**

78. In paragraph 1.27 of the report, we mention that we do not propose to make any review or proposal in relation to the law on encroachment. However in *Secretary for Justice v Chau Ka Chik Tso* (2011) 14 HKCFAR 889, which was a case turning on the effect of a Government lessee's encroachment on land belonging to Government, there were some ground breaking and novel observations on the extent of the interest acquired by a squatter upon the expiration of the limitation period by Lord Scott whose judgment was agreed to by Bokhary PJ and Litton NPJ of the Court of Final Appeal.

79. While we do not wish to express any view on what is the correct jurisprudential basis for the law on encroachment, we take the view that the view expressed by Lord Scott NPJ has certainly done violation to the language of sections 7 and 17 of the Limitation Ordinance as pointed out by

Ribeiro PJ in the said case. The idea that the type of estate to be acquired by a squatter by adverse possession should be dependent on the intention of the squatter will create uncertainties and endless problems. Even though it may be argued that the observations in paragraphs 112-114 of the judgment in *The Chau Ka Chik Tso's* case should be understood as merely an explanation of the law on encroachment and was not intended to affect the law on adverse possession, in view of the generality of the language used and the fact that they represented the views of three members of the Court of Final Appeal, we would recommend that the law should be clarified by making it clear that the views so expressed do not represent the law.

Recommendation 10

We recommend that there should be in the Limitation Ordinance a provision to the effect that:

"Without prejudice to the law on the rights and obligations of landlord and tenant in relation to the land encroached upon by the tenant, the nature and extent of the estates acquired by a person who has successfully extinguished the title of another person by virtue of section 17 of the Limitation Ordinance shall not be affected by the actual or presumed intention of the person as to what estate he intends to acquire by his adverse possession."

E N D

20 October 2014