

Law Reform Commission's Consultation Paper on Adverse Possession

Submission of the Hong Kong Bar Association

1. The Law Reform Commission consults the public on the topic of Adverse Possession. In the consultation paper, 8 recommendations are made. The Hong Kong Bar Association ("HKBA") makes this submission in response to the recommendations.
2. The HKBA agrees with Recommendation 1, which is that there should (basically) be no change to the existing law on adverse possession.
3.
 - (a) Recommendations 2 and 3 propose a change of law if and when the prospective Registered Land system comes into force.
 - (b) At the hearing before the LegCo Panel on Administration of Justice and Legal Services on 26th February 2013, a number of members of LegCo objected to imposing a heavier burden to acquire title by adverse possession (albeit possibly on a false basis because those recommendations are directed towards the (yet to be implemented) Registered Land system).
 - (c) Given the implementation of the Registered Land system is unlikely to be effective within the foreseeable future, and given the potential controversy over these recommendations, the HKBA considers there is no urgency in implementing these 2 recommendations, and they could and should be deferred until the Registered Land system is to be implemented.
4.
 - (a) Recommendation 4 proposes an amendment to the Limitation Ordinance (Cap 347) to abolish the implied license doctrine, which will bring the local law in line with the English position.
 - (b) The HKBA agrees with this recommendation.
 - (c) In addition, the HKBA is of the view that if the Limitation Ordinance is to be amended, to avoid argument a provision should be introduced to "overrule" the CFA decision in Wong Tak Yue v Kung Kwok Wai and Another (No.2)

(1997-98) 1 HKCFAR 55.

- (d) Wong Tak Yue was decided without the benefit of the Privy Council decision in Ocean Estates Ltd. v Pinder [1969] 2 AC 19.
 - (e) Wong Tak Yue is inconsistent with the House of Lord decision in J A Pye (Oxford) Ltd. v Graham [2003] 1 AC 419.
 - (f) Later decisions of the CFA 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.
 - (g) 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.
 - (h) 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.
 - (i) There is the possibility that if the point reaches the CFA again, it is likely the CFA would follow Pye, but in the meantime the difficulty exists.
 - (j) The HKBA therefore recommends that if the Limitation Ordinance is to be amended to abolish the implied license doctrine and to overrule Common Luck Investment Ltd v Cheung Kam Chuen (1999) 2 HKCFAR 229 (see 7 below), an amendment should also be made to overrule Wong Tak Yue.
5. Recommendation 5 preserves the existing law that adverse possession does not result in a "statutory assignment". The HKBA agrees that there is no reason why that should change.
6. Recommendation 6 deals with boundary problem in the New Territories, which is not really a legal issue.
7. (a) Recommendation 7 proposes to overrule Common Luck Investment Ltd. v Cheung Kam Chuen (see 4(j) above).
- (b) Common Luck is also at odd with well-established English cases, the latest of which is Ashe v National Westminster Bank Plc. [2008] 2 P&CR 183 where Common Luck was expressly referred to.

- (c) The HKBA shares the view that Common Luck was wrongly decided and the law should be amended to put it back on the right track.
8. (a) Recommendation 8 preserves the existing law that there can (practically) be no adverse possession against Tso/Tong land.
- (b) The Law Reform Commission's discussion leading to this recommendation is based on the established view that a Tso is a trust for the members for the time being.
- (c) Recently, Malcolm Merry of the University of Hong Kong published an analysis in the *Hong Kong Law Journal* challenging this view; see Malcolm Merry, *Are T'sos Really Trusts* (2012) 43 HKLJ 669.
- (d) The HKBA considers that it is useful for the Law Reform Commission to take account of Malcolm Merry's analysis and revisit recommendation 8. Whether land held by a Tso/Tong is not subject to adverse possession may be debatable as a matter of law. Whether land held by a Tso/Tong should enjoy the privilege in the sense that such land is exempt from the law of adverse possession is also debatable as a matter of policy.

Dated 5th April 2013.

Hong Kong Bar Association