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OF HONG KONG

香港律師會

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28 April 2015

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Dear Sir,

LAW REFORM COMMISSION REPORT ON ADVERSE POSSESSION

The Law Society notes that the Law Reform Commission (LRC) has submitted its report on Adverse Possession of October 2014 to your Panel. We have reviewed the Report, and regret that much time has been taken on the deliberation of the matter, in particular in the light of most recent proposal from the Land Titles Ordinance Steering Committee, which we feel obliged to consider at the same time before rendering this submission to you.

The LRC Report on Adverse Possession contains 10 recommendations, 8 of which are the same as, and have already been set out, in an earlier Consultation Paper on Adverse Possession released by the LRC on 10 December 2012. The Law Society has already rendered views on those recommendations in a submission of 6 March 2013. Without repeating ourselves, we take the pleasure to enclose a copy of that submission for the attention of the Panel and we repeat our stance set out therein.

In addition to the enclosed submission, we have the following observations.

Secretary General

秘書長

Heidi K.P. Chu
朱潔冰

Deputy Secretary General

副秘書長

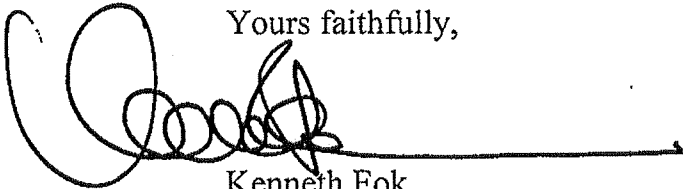
Christine W.S. Chu
朱穎雪

1. There remains in the Report a recommendation that the law of adverse possession be re-casted and reformed with the prospective registered land system (viz. Recommendation 2 in the LRC Report/Consultation Paper). We disagree and have concerns on the bundling of the reform of the law of adverse possession with the proposed land registration system. On one hand, the land title registration as proposed already embodies complex legal concepts; on the other hand, the law on adverse possession is equally if not more difficult and envisages consideration of intricate common law principles (e.g. *animus possidendi* or the principle on intention to possess, see *Powell v McFarlane* (1977) 38 P & CR 452). There could also be arguments arising from the Limitation Ordinance. Bundling of the two would render the discussion perplexing and complicated. The reform on adverse possession must become slow if not unduly tardy, if it is to tie in with the proposed land registration system.
2. Leaving aside the above intellectual arguments, which could go to the jurisprudential basis of the law of adverse possession and title registration, we note with worrying concern that, as the matter now stands, there have *not* been any noticeable progress in the discussion on the land registration system. Added to this concern are the four proposals set out in the most recently released paper No. 14 by the Land Titles Ordinance Steering Committee. In this paper, the Government has implicitly or otherwise indicated a preference to limit the implementation of title registration only to the new land grants, with a bare suggestion that the application of title registration to existing land would be pursued at a later stage (see option D on Paper 14). This suggestion, if implemented, would render the current reform on adverse possession to become meaningless, both legalistically and factually, because there is simply no current claim of adverse possession on new lands.
3. In any event there are 4 options offered for the primary conversion under the land title registration. Each one of the options could have different implications on adverse possession. Why should the reform be bundled with the land titles registration, when there is myriad of complex issues arising from each of these 4 options?

4. Lastly, deliberation of the land title registration system, realistically speaking, involves legal as well as *socio-economic and political* issues, the latter would necessarily but unfortunately add an uncomfortable layer of uncertainty and variables to the discussion on the law of reform of adverse possession, if the discussions of these two have to be tied together.

In view of the above, it is only logical that the consideration of the reform of the law of adverse possession be held independent of the land registration system and should proceed in a timely manner.

Yours faithfully,

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

Kenneth Fok
Director of Practitioners Affairs
The Law Society of Hong Kong

Encls.

c.c. The Law Reform Commission of Hong Kong



Law Reform Commission's Consultation Paper Adverse Possession

Submissions of the Law Society of Hong Kong

Recommendation 1:

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

Law Society's response:

We agree. However, the law of adverse possession for both regimes – registered land and unregistered land – should be uniform. There is no reason why the model set out under Recommendation 3 (subject to modifications as suggested below) should not apply to unregistered land. Standardization of both the said regimes will achieve consistency and avoid confusion.

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.

Law Society's response:

We disagree. Whilst the model set out in Recommendation 3 (subject to modifications as suggested below) is a sensible compromise of competing interests, there is no reason why the model should apply only to the prospective registered land system and leave the unregistered land to be governed by the old common law doctrine. As mentioned above, the law of adverse possession in respect of both regimes - registered land and unregistered land - should be uniform.

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.

Law Society's response

We support the proposed model subject to the following modifications/comments:

1. **The recommended model is based on the UK model, but the Government should exercise care when considering such model due to the specific requirements of UK legislation (and interpretation thereof), to be compliant with EU Conventions and treaties.**
2. **The limitation period for claiming adverse possession in Hong Kong should be as follows:**
 - (i) **12 years for private land; and**
 - (ii) **60 years for Government land.**
3. **Government land is community's land and therefore justifies a longer limitation**

period of 60 years.

4. "Mediation" should be added as an option. However, it should remain at the parties' choice to go for mediation or not and "Mediation" should not be imposed as a pre-requisite before adjudication.
5. This model should apply to both registered land and unregistered land and appropriate amendments should accordingly be made to the Land Title Ordinance and Conveyancing and Property Ordinance Cap.219 respectively.

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."

Law Society's response:

We agree. However, the Government should use this opportunity to make a clear distinction between the laws relating to "encroachment" and "adverse possession", which are two different legal concepts, and set out clearly the elements of "encroachment", and those of "adverse possession" in legislation. The recent judgment of the Court of Appeal in *Chau Ka Chik Tso & Ors v Secretary for Justice (2011) 2 HKC 441* failed to clarify the distinction and tends to merge "encroachment" with "adverse possession".

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.

Law Society's response:

We disagree. The Law Society advocates that the law of adverse possession in respect of registered land and unregistered land should be uniform. Once adverse possession is successfully established, the paper title should be vested in the squatter who becomes the proprietor of the land. In other words, the squatter steps into the shoes of the paper owner, subject to the benefit and burden under the Government Lease, etc. For examples, the squatter should be liable for payment of Rates and Government Rent and performance of all covenants under the Government Lease, and also be in a position to

surrender the land to the Government.

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.

Law Society's response:

We agree. The Law Society urges the Government to expedite the introduction of a comprehensive resurvey of boundaries and a registered title system and there is no reason for holding up or delaying this matter.

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.

Law Society's response:

We agree. A submission was already made by the Law Society on 2nd March 2000 on the implication of the Court of Final Appeal's decision in *Common Luck Investment Ltd. v Cheung Kam Chuen* FACV No.22 of 1998 as follows:

".....4. The Committee is concerned that if the CFA 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-à-vis the mortgagor can never be statute-barréd under the provisions of the LO [Limitation Ordinance]. On the other hand, if the mortgagee in possession is entitled to rely on S.14 of the LO to claim that the Mortgagor's equity right of redemption is statute-barréd, this will lead to an unsatisfactory position when the mortgagor will always be the loser in all circumstances.

5. The Committee finds it difficult to reconcile the CFA decision with the other decisions and with the provisions of the LO. Members believe that this is a good time to raise the concerns with the Administration so that the implications of the CFA decision on the provisions of the LO could be carefully reviewed."

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.

Law Society's response:

We disagree. In view of scarcity of land, it is immoral and unacceptable for an owner to allow his/her land to be unproductive. So long as a squatter has used the Tso's land exclusively for 12 years, there is no reason why such a squatter should not have a successful claim of adverse possession against the "Tso" merely because of a technical objection that a new limitation period will start to run upon birth of new members to the "Tso" from time to time and it is almost impossible to extinguish the title of the whole lineage of a "Tso. This technical objection can be removed by legislation.

The Fairweather v St. Marylebone Property Co. Ltd.'s decision (Fairweather decision):

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.

Law Society's response:

Although the Adverse Possession Sub-Committee of the Law Reform Commission has not made any recommendation in respect of the effect of the Fairweather decision, the Law Society advocates that legislation should be introduced to abolish the effect of the decision for the following reasons:

- 1. The Fairweather decision created strange and illogical results which do not fit the modern situation in Hong Kong.**
- 2. While a squatter has successfully established adverse possession against a lessee, it only extinguishes the lessee's title as against the squatter. The paper title is not vested in the squatter and the lessee's title remains good as against the lessor (i.e. Government). It creates an odd situation that while the squatter occupies and enjoys the land, the lessee is still obliged to pay Rates and Government Rent and be responsible for performance of the covenants under the Government Lease.**
- 3. The Fairweather decision reaffirms the principle that a squatter is not an assignee of the lessee whose title such squatter has extinguished. The Government therefore refuses to accept surrender of land from any persons deriving title from the squatter. Hence, a developer, even if he has acquired the title of a squatter, is still unable to surrender the land to the Government to secure a re-grant for re-development. The effect of the Fairweather case affects re-development activities.**

The Law Society of Hong Kong
6 March 2013