A Guide to Hong Kong Conveyancing

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CHAPTER 1

INTRODUCTION

1. EARLY HONG KONG LAND

1.1 Early days

[1-1] The areas which form Hong Kong, namely, the island, the waters, Kowloon and the New Territories, came under the general colony of Hong Kong at different times from 1841 onwards. The distinction made in this chapter between Hong Kong, Kowloon, and the New Territories reflects the historical divisions between these areas, from the beginnings of 'Hong Kong' up to 30 June 1997. The land and sea which has formed the Hong Kong Special Administrative Region of the People's Republic of China since 1 July 1997 are defined in Schedules 2 to 5A of the Interpretation and General Clauses Ordinance (Cap 1). Special attention will be paid to the New Territories in this chapter because Chinese custom and customary law were relevant there in 1898 and remain so today.

[1-2] The New Territories is defined in Schedule 5A of the Interpretation and General Clauses Ordinance as:

> All of Hong Kong except the land and sea comprised within the boundary of Hong Kong immediately before 9 June 1898.[1]

Section 3 of Cap 1 defines 'Hong Kong' as 'Hong Kong (香港) means the Hong Kong Special Administrative Region'. Schedule 2 of Cap 1 defines 'HKSAR' as:

> The land and sea comprised within the boundary of the administrative division of the Hong Kong Special Administrative Region of the People's Republic of China promulgated by the Order of the State Council of the People's Republic of China No. 221 dated 1 July 1997 and published as S.S. No. 5 to Gazette No. 6/1997 of the Gazette.

[1-3] Prior to 1 July 1997 (and the amendments in 1998 to Cap 1), the 'New Territories was defined as a being that land and sea' north of Boundary Street to the Sham Chun River and 235 islands, was leased to Britain in

1 See also section 3 of Interpretation and General Clauses Ordinance (Cap 1).

1898 by the Second Convention of Peking. The area known as [illegible] City, which was the main urban district on the Peninsula at that [illegible] not included in the lease, and continued to remain within the sover[illegible] China until it was demolished by order of the Executive Council in [illegible] demolition was finished in 1994, and the area is now a park. Many [illegible] of Chinese custom and customary law, in force prior to 1898, [illegible] thereafter; for the most part they affect rural New Territories land [illegible] subject to the New Territories Ordinance (Cap 97).

[1-4] On 20 January 1841, Hong Kong Island had been ceded to Britain by the Convention of Chuenpi; however, the treaty was later ratified. The Royal Navy landed on the island six days later proclamation issued, from the new Hong Kong Government resident Macau, on 2 February 1841, Captain Charles Elliot referred to the ce[illegible] the territory and the need to 'provide for the government thereof' [illegible] further instructions from London, the proclamation also declared that government of the said island shall devolve upon, and be exercised by person filling the office of Chief Superintendent of the Trade of [illegible] Subjects in China for the time being'. There were a few Chinese settlers on the island at that time, mostly on the south side, around Shek O [illegible] number of people, estimated to be between two to seven thousand, [illegible] boats in the waters around the islands making up Hong Kong. But foreign settlers, mostly merchants who were then living in Macau, soon after in Hong Kong to inspect the land with the intention of constructing buildings to facilitate trading, especially in China. Some merchants entered into agreements to buy land from the local residents; other settlers simply took possession of uncultivated and unoccupied land.

[1-5] From Macau on 1 May 1841, Captain Charles Elliot issued a Notice and Declaration advising that land auctions would take place in Hong Kong. The land sold was to be subject to a building condition, a reservation of the Government's rights. However, the British Government had failed to consider the type of tenure, and the notice added:

> Pending Her Majesty's further pleasure, the lands will be allotted according to principles and practice of British law, upon the tenure of quit rent to the Crown.

The notice went on to warn settlers:

> All arrangements with natives for the cession of lands in cultivation or substantially built upon, to be made only through an officer deputed by the Government of the island; and no title will be valid and no occupancy respected unless the person claiming shall hold under an instrument granted by the Government of the island, of which due registry must be made in the government records. It is distinctly to be understood, that all natives in the actual occupancy of lands in cultivation or substantially built upon, will be constrained to establish their claims to the satisfaction of the land officer, and to take out titles, and have them duly registered.

[1-6] The impression of the early settlers was that freehold titles would be granted subject to a well-ordered system for the collection of land revenue. In most colonies at that time, arrangements for the collection of land revenue, immediately on acquisition of a colony, were a common feature of British colonial rule, seeking to ensure that the colony could be as 'self-financing' as possible. However, inaction by the Government in London produced great confusion and opportunities for fraud. Purchasers, mainly merchants, urged the Government to grant freehold titles; the government procrastinated, and then when the decision to grant leasehold titles was made, further confusion resulted from this decision because there was no uniformity in the duration of the Government lease with terms of 20, 99, and 999 years being variously granted.

1.2 The first land sales

[1-7] The first land sales took place in 1841 (in Macau) and a Land Officer was appointed to deal with these sales. The sale of 100 lots had been planned. However, only 50 marine lots were prepared for sale.

[1-8] Sir Henry Pottinger, who had been appointed Governor of Hong Kong on 15 March 1841, issued a notification on 22 March 1842 advising that a Land Committee had been established whose first task was to demarcate and identify the size of lots in land. The question of the type of tenure remained undecided. The Committee did not function as planned. No document of titles were issued because of these title uncertainties. The only formal acknowledgment of alienation or dealings with alienated land was in the form of entries in the Land Officer's book. On 2 May 1842, the Land Officer noted that thereafter all dealings with alienated land were to be registered in the Land Office. However, on 16 May 1842, the office of the Land Officer was abolished. On 27 May 1842, a Land and Road Inspector was appointed. His duties included registration of all sales and transfers of land. Although there was still no clarification from London of the form of title, gradually it became clear that only leasehold titles would be granted, and even that some lesser interests, by way of short-term lease, or licence, would also be available for specific purposes.

1.3 The forms of leases

1.3.1 Hong Kong Island

[1-9] By 1843, the form of tenure for alienated land on Hong Kong Island was still undecided. New sales granted titles for no greater time 'than may be necessary to induce and enable the tenants to erect substantial buildings'.[2] Early purchasers claimed to have equitable rights in the land

2 Government Notification of 21 August 1843.

but were unsure of what the legal estate would be. A committee was established, mainly to determine whether titles should be in perpetuity or leasehold. Its decision was in favour of leasehold. However, title to the land on which St John's Cathedral is built was granted as freehold tenure in essence, this land remains the only freehold title to alienated land in Hong Kong. Leases subject to a building covenant, were to be granted for 75 years, whilst others were to be for a maximum of 21 years. Renewal was at the discretion of the Government, so no Government lessee was given an option to renew the lease. Later, leases were granted for varied terms some for 999 years, some 99 years, some 75 years, and some 14 years. By 1898, the practice of granting 999-year leases was halted. Terms for 75 years became the norm. Still later, complaints about the brevity of the lease resulted in the Government granting 75-year leases with an option to renew for a further 75 years.

[1-10] Government rent paid by the lessee reflected earlier English land law in which the fee simple owner paid 'quit rent' to the overlord in return for non-performance of feudal obligations. The term 'quit' is infrequently now used, being replaced by 'Government rent or land tax'.

1.3.2 Kowloon Peninsula

[1-11] Perpetual leases, of the Kowloon Peninsula up to Boundary Street and of Stonecutter's Island, were granted to Britain by China on the cessation of the Second Anglo-Chinese War (1856–1858); excluding however the Walled City. By the Convention of Peking in 1860, these were ceded outright. On the Peninsula, there were few landholders in the new areas held by the British; most inhabitants lived within the Walled City (just north of the new leases), where Chinese authority continued to be in force until 1986. A Land Commission was established to determine the compensation payable to those Chinese owners who sought to sell their lands outside the Walled City. The Commission also had to deal with applications for Government leases by those Chinese owners who remained in possession of their lands: it was assumed that this land had been within the domain of China, probably through the Canton Magistracy. This was the registration of land transactions for land in the New Territories and other parts of the Kowloon Peninsula not dealt with expressly by the 'Hong Kong' Government. Notification of a dealing with land required a long journey to Canton to register a deed; this deed became known as the 'red deed' due to the seal of the Magistracy attached to the dealing on registration. Unregistered dealings continued to show ownership dealt with dealings with the land and thus changes in ownership. This was complicated by the fact that tax or rent to the Chinese Government was based on the 'red

3 See now the Church of England Trust Ordinance (Cap 1014).

4 See Report of the Hong Kong Land Commission of 1886–1887 (Noronha Co.

deed', thus many decades later it was possible to find that an owner, perhaps long since dead, remained liable for tax. The unregistered deeds were then referred to as 'white deeds'. The absence of the red seal was a warning to a purchaser to check carefully details of ownership.

[1-12] In 1898 some leases, for 999 years, were granted to owners of red deeds, on the same rent as formerly paid to the Chinese authorities in Canton. However, any new lease, granted by the Government of Hong Kong, was to be for a term sufficient only to induce the owner to erect substantial buildings. Most of these were for 75 years.

[1-13] The collection of land revenue from landowners required details of the land occupied and the owners. However, there was no system in force to acquire and maintain these details.

1.4 Land Registration Ordinance

[1-14] The first land sales were to be held on 7 June 1841 with 100 sea frontage, and 100 town or suburban lots to be put up for auction. Due to lack of roads, water and other services but especially a lack of qualified surveyors or demarcators, the sale on 14 June 1841 offered only 50 sea frontage lots for sale. The purchasers were obliged to pay rent for the first year immediately, and also the title was subject to a building covenant. Captain Elliot indicated that he intended to ask the British Government to 'pass the lands in fee simple for one or two years purchase at the late rates, or to charge them in future at no more than a nominal quit rent, if that tenure continues to obtain'. It was not until 1843 that the British Government decided on leasehold as the form of alienation. No title in fee simple was granted other than the later grant to St John's Cathedral subject to legislation.[5]

[1-15] The efforts in 1842 of the Land Officer in obtaining registration of details of all dealings with alienated land quickly pointed to the need for a formalised system of registration. The system chosen was that of a registration of deeds whereby the registration acted as a record of the transaction and as a priority against later transactions. In 1844, Ordinance No 3 of 1844, now the Land Registration Ordinance (Cap 128), was enacted; it remains the oldest surviving piece of legislation, largely unamended, in force. Although the system is that of the registration of deeds, and not of title, the land registers that were opened in 1844 show in a clear and accurate manner the devolution of title to each lot or section of a lot and details of all encumbrances thereon. The result is that in practice the system is regarded as virtually equivalent to registration of title.[6]

5 See now the Church of England Trust Ordinance (Cap 1014).

6 Report of the Registrar General 1955–1956 at para 4, and see *Wong Wai Ming v Tang Tat Chi* [1993] 1 HKC 341 (HC).

[1-16] Universal use of the register is now the norm with the result that registration of memorials evidencing dealings has become, in practice, almost mandatory,[7] despite the fact that the legislation does not make registration compulsory. Further, registration provides for notice of claim to a dealing with the land, or priority within the terms of sections 5 and 5A of the Land Registration Ordinance. The need for registration was clear from the beginning of the Colony, especially to assist with land revenue. The information on the register had to be precise and correct for several purposes, not only the collection of land revenue, but also to assist in establishing title and interests of claimants.

[1-17] Up until 1991, the legislation was enforced strictly to require registration to give priority to claims that were (1) in writing, and (2) were of an interest in land. In 1991, the Court of Appeal in *Wong Chim Ying v Cheng Kam Wing*[8] permitted an unwritten, and thus an unregistrable equity, to have priority over a subsequent purchaser with notice whose interest was in writing and was under a completed contract. This resulted in a parallel system of priority; for written documents concerning interests in land registration under the Land Registration Ordinance was necessary for the protection of priority, but priority of an unwritten interest affecting land was to be tested by reference to common law rules.

[1-18] From the earliest days, the form of title favoured by the Government had its critics who argued that title should be freehold. This was inappropriate in respect of New Territories land because of the length of the British lease of the New Territories. Anything more than a lease (up to the last three days of the lease over the New Territories) would have meant the Government had surrendered all its interest in the land covered by the Treaty. Another difficulty was the absence of reliable surveys of the land making uncertain disposition to claimants who may not have been the rightful owner.

[1-19] Despite several complaints from time to time, the system introduced in 1841 (and in 1898 in the New Territories) has continued to remain intact. There have been one or two attempts to convert the system to that of a *registration of titles*.[9]

[1-20] A Land Titles Ordinance (Cap 585) was enacted in 2004 but it has not been brought into force and consequently the legislation has lapsed.

7 *Yeung Shu v Alfred Lau & Co* [1997] 2 HKC 153 (CA).
8 *Wong Chim Ying v Cheng Kam Wing* [1991] 2 HKLR 253, [1991] HKCU 428 (CA).
9 On the attempt to introduce Torrens type system into the New Territories, see JE Sihombing, 'The Torrens System in the New Territories' (1984) 14 HKLJ 291.

1.5 Leasehold terms

[1-21] By 1898, there was a variety of leasehold terms under which land was held in the Colony of Hong Kong. On Hong Kong Island, there remained some 999-year leases, many 75-year leases, some of which were renewable for a further term of 75 years, and others which were non-renewable. On parts of the Kowloon Peninsula, south of Boundary Street, there were some 999-year leases although the majority of landholdings were for 75 years. In each area, there were also leases of lesser terms, most of which had expired by the turn of the century. In the New Territories, leases of 99 years less three days dated from 1 July 1898 were introduced although there were some leases of 75 years with a right to renew for 24 years less three days also. The 'last three days' made the grant clear that it was not absolute of the whole interest of the Government, but allowed the Government as lessee to redeem the reversion for the last three days of the 99 years' lease.

[1-22] Renewal of renewable leases, and from 1972 of certain non-renewable leases, is provided for in several Ordinances.[10] In general, a new lease will be granted on payment of a sum assessed at 3 per cent of the rateable value. The lease is subject to termination on re-entry where there has been a breach of the covenants in the Government lease.[11] In addition, the Government has a right to resume the land for public purposes.[12]

[1-23] It is possible to obtain a title by adverse possession against the Government or against a Government lessee. However, under the Limitation Ordinance (Cap 347), adverse occupation of 12 years (from 1991, previously 20 years) is required to be proved against the Government lessee, and 60 years against the Government. Title against the Government would be a rare thing in Hong Kong, apart perhaps for possessory rights claimed in respect of some New Territories lands: see *Man Kam-Tong v Man Li-Tai*[13] and *Lai Chung Yue v Chau Shing*.[14] See also *Secretary for Justice v Chau Ka Chik Tso & Ors*,[15] where Government lessee sought to claim land adjoining the leased land by adverse possession for more than 60 years. It was held that there was no adverse possession but rather encroachment over the adjoining land. The Court held that the lessees were:

> entitled to a leasehold interest in the additional land, until the end of their respective tenancies of the Lot.

10 See the Government Leases Ordinance (Cap 40); New Territories (Renewable Government Leases) Ordinance (Cap 152); Government Rent and Premium (Apportionment) Ordinance (Cap 125).
11 Government Rights (Re-entry and Vesting Remedies) Ordinance (Cap 126).
12 Lands Resumption Ordinance (Cap 124).
13 *Man Kam-Tong v Man Li-Tai* [1985] 2 HKC 299, [1984] HKLR 181 (HC).
14 *Lai Chung Yue v Chau Shing* [1987] 3 HKC 406 (HC).
15 *Secretary for Justice v Chau Ka Chik Tso & Ors* [2013] 2 HKC 303 (CFA).

The result was that they had rights as lessees until 30 June 2047.[16]

[1-24] The duration of a Government lease is now subject to the term of Article 120 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China which provides for the automatic termination of all Government leases on 30 June 2047 if not before.

2. Sources of Hong Kong Land Law

2.1 The sources of land law in Hong Kong

[1-25] By and large the historical sources of Hong Kong land law have been preserved since 1 July 1997. Article 8 of The Basic Law of the Hong Kong Special Administrative Region (Cap A101) (the 'Basic Law') provides that the law of Hong Kong is:

> The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.

2.1.1 Common law of England

[1-26] Common law was received into Hong Kong from 5 April 1843 being of general application to the then Colony, and as amended by the Courts of Hong Kong since then. Section 3 of the Supreme Court Ordinance (15 of 1844) provided that:

> the law of England shall be in full force in the said Colony of Hongkong, except where the same shall be inapplicable to the local circumstances of the said Colony, or of its inhabitants.

[1-27] Some principles of common law which were of general application or specifically applied, were made applicable by Order in Council, or by the relevant Imperial Act itself: on this see section 3 of the Application of English Law Ordinance (Cap 88) (the 'AELO'), 1966, in which the Schedule to the Ordinance contained a list of Imperial legislation which was to, or already did have, effect in Hong Kong. In 1997, it was considered that had the AELO remained in force, it would contravene the Basic Law. Consequently, it was not adopted as part of the law of the Hong Kong Special Administrative Region (the 'HKSAR'); and accordingly ceased to operate after 30 June 1997.

[1-28] Some traditional English law principles have been applied in Hong Kong despite apparent inconsistency between the two systems. The point

16 See *Chan Tin She v Li Tin Sung* [2006] 1 HKLRD 185, [2006] HKCU 16 (CFA)

has been made by the Court of Final Appeal in *China Field Ltd v Appeal Tribunal (Buildings) & Anor*[17] that:

> **[76]** Prior to 1 July 1997 'common law' was defined as 'the common law of England' [Section 3 of the Interpretation and General Clauses Ordinance 1966], but this was not limited by reference to any particular time. The common law as it was developed by the judges applied in Hong Kong provided that it was suited to local circumstances. This did not give Hong Kong judges a discretionary power to legislate by modifying the common law. They were required to apply English law, but a modified form of English law suited to local circumstances. On appeals to the Privy Council, the Board would defer to the views of the local courts on what was and what was not suited to the circumstances of Hong Kong.
>
> **[77]** On 1 July 1997 the 1966 Ordinance ceased to apply in Hong Kong as being contrary to the Basic Law. But the continuity of existing laws was of fundamental importance in the establishment of the Hong Kong Special Administrative Region under the principle of 'one country two systems' and constituted a vital element of the Joint Declaration and the Basic Law. ...
>
> Section 3 of the Interpretation and General Clauses Ordinance now defines 'the common law' as 'the common law in force in Hong Kong'.
>
> **[78]** The disappearance of any reference to local circumstances and the modification of English law was an inevitable consequence of the resumption by China of the exercise of sovereignty over Hong Kong. But it should not inhibit the courts of Hong Kong, and in particular this Court which has succeeded the Privy Council as the final appellate court of Hong Kong, from developing the common law in the context of Hong Kong. The language of the 1966 Ordinance was appropriate when Hong Kong was a British colony and Hong Kong judges were obliged to apply an occasionally modified version of English law. This is no longer the case. ... [I]n future our judges must develop the common law of Hong Kong to suit the circumstances of Hong Kong. It is well recognised that the common law is no longer monolithic but may evolve differently in the various common law jurisdictions.
>
> **[79]** The status of English and other common law decisions as binding precedents in Hong Kong was authoritatively set out by Li CJ in this Court in *Solicitor (24/07) v Law Society of Hong Kong* [2008] 2 HKC 1. The effect of that case may be shortly stated. Decisions of the Privy Council on Hong Kong appeals before the 1 July 1997 remain binding on the courts of Hong Kong. This accords with the principle of continuity of the legal system enshrined in Article 8 of the Basic Law. Decisions of the Privy Council on non-Hong Kong appeals are of persuasive authority only. Such decisions were not binding on the courts in Hong Kong under the doctrine of precedent before the 1 July 1997 and are not binding today. Decisions of the House of Lords before the 1 July 1997 stand in a similar position. It is of the greatest importance that the courts of Hong Kong should derive assistance from overseas jurisprudence, particularly from the final appellate courts of other common law jurisdictions. This is recognised by Article 84 of the Basic Law.
>
> **[80]** In that case the Chief Justice made it clear that this Court has the power to depart from previous decisions of the Privy Council on appeals from Hong Kong and its own previous decisions, but observed:

17 *China Field Ltd v Appeal Tribunal (Buildings) & Anor* [2009] 5 HKC 231, [2009] 5 HKLRD 662 (CFA).

'The doctrine of precedent is a fundamental feature of our legal system [which] on the common law. It gives the necessary degree of certainty to the law and provides reasonable predictability and consistency to its application. Such certainty, predictability and consistency provide the foundation for the conduct of activities and the conclusion of business and commercial transactions. But at the same time, a rigid and inflexible adherence by the Court to the previous precedents of Privy Council decisions on appeal from Hong Kong and its own decisions may unduly inhibit the proper development of the law and may cause injustice in individual cases. The great strength of the common law lies in its capacity to develop to meet the changing needs and circumstances of the society in which it functions.

[81] On the resumption of the exercise of sovereignty by China the Privy Council ceased to be the final appellate court of Hong Kong and its place was taken by this Court. The jurisdiction to ascertain, declare and develop the common law of Hong Kong formerly exercisable by the Privy Council is now exercisable by this Court. It will continue to respect and have regard to decisions of the English courts, but it will decline to adopt them not only when it considers their reasoning to be unsound or contrary to principle or unsuitable for the circumstances of Hong Kong, but also when it considers that the law of Hong Kong should be developed on different lines.

[1-29] Two matters where there have been differences in English common law and the law of Hong Kong are those of (1) adverse possession; and (2) prescriptive rights. The general common law principle on *adverse possession* involves the barring of the right of recovery of possession by the true owner.[18] There is some difference in the general principles applicable to establishing adverse possession in England, from those applicable in Hong Kong, apart from the fact that in Hong Kong land is held only by leasehold. Following the decision in *JA Pye (Oxford) Ltd v United Kingdom*,[19] the adverse possessor in England can be liable to compensate the true owner where the land taken is registered land under the Land Registration Act 2002 (UK). This is because, under sections 96 to 98 of that Act, adverse possession of registered land is now subject to the European Convention on the Protection of Human Rights and Fundamental Freedoms. Action is taken against Governments rather than individuals under that Convention. As Britain left the European Union at the end of 2020, the European legislation and jurisprudence is not of the same relevance.

[1-30] In 2012, the Hong Kong Law Reform Commission issued a Consultation Paper on recommendations for the reform of the law relating to adverse possession. The proposed legislation would alter the existing law, making it more in line with current English provisions, including the requirement to give notice (two years before the end of the limitation period) to the paper-title owner about the claim, thereby allowing the

18 *Lau Wing Hong & Ors v Wong Wor Hung & Anor* [2006] 4 HKC 221, [2006] HKLRD 671 (CFI).

19 *JA Pye (Oxford) Ltd v United Kingdom* [2005] ECHR 921.

paper-title owner to object within the remaining two years. No such legislation has been enacted.

[1-31] Following *JA Pye (Oxford) Ltd v Graham*[20] the elements of adverse possession were re-stated. To gain title to land of another through possession it is now required to show:

(1) A sufficient degree of physical control and custody; and
(2) An intention to exercise such custody and control on one's own behalf and for one's own benefit;

thereby seeking to exclude all from the land, including the true owner.[21]

[1-32] It goes without saying that there must be the absence of any consent on the part of the true owner allowing the occupation of the land. To this effect, the *JA Pye* re-statement has been adopted in Hong Kong only in part.[22]

[1-33] Neither the Land Registration Ordinance (Cap 128) nor the terms of The Basic Law or of the Hong Kong Bill of Rights Ordinance (Cap 383) provide similarly to the relevant clauses in the European Convention.

[1-34] The second area of land law which had been uncertain over the years is that of *prescription*, ie especially in relation to the obtaining of an easement over the land of another either by lost modern grant, or as long user, or under the Imperial Prescription Act of 1832 (which had the effect of reducing the extent of the 'perpetuity' period). One reason for the uncertainty has always been that the doctrines behind long user and lost modern grant were predicated on the easement being held over land held in fee simple.[23]

[1-35] Originally, to obtain an easement by 'long user', it was necessary to show user since time immemorial, and this was dated back to 1189; however, in 1786 the courts set a minimum of 20 years as the timing necessary to show long user. However, even though the length of user was reduced, the claimant had to show that the right could have existed prior to 1189: see *Angus v Dalton*.[24] Lost modern grant is a fiction whereby it is said that a grant of the easement was presumed to have been made by the owner of the servient land to the owner of the dominant land in modern times, but that the deed had now been lost. If the use of the alleged

20 *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30, [2003] 1 AC 419 (HL).

21 *Wong Tak Yue v Kung Kwok Wai David* (No 2) [1998] 1 HKC 1, (1997–98) 1 HKCFAR 55, [1998] 1 HKLRD 241 (CFA).

22 See *King, Benji Henry v Asia Harbour Investment Ltd & Ors* [2019] HKCU 2539, [2019] HKCFI 1596 (CFI), and also see *Poon Chi Hang v Lai Ho Sun* [2019] HKCU 2441, [2019] HKCA 734 (CA).

23 See, for example, *Simpson v The Mayor etc of Godmanchester* [1897] AC 696 (HL).

24 *Angus v Dalton* (1878) 4 QBD 162 (CA, Eng).

easement can be proved back for 20 years, then the fiction can operate to give enjoyment of the right claimed: see *Bryant v Foot*.[25] In England the Prescription Act of 1832 set the time required for 'long user' at 20 years.

[1-36] Common law prescription is predicated on the presumption that there was a grant in the past by the owner of the fee simple. Both lost modern grant and prescription under the 1832 Act are also based on this view.

[1-37] Was prescription part of Hong Kong law? And especially was it part of Hong Kong law which could continue post-1997? The question has now been decided by the Court of Final Appeal in *China Field Ltd & Anor v Appeal Tribunal (Buildings) & Anor*[26] to the effect that, when considering any traditional principles of common law, the court:

> will decline to adopt them not only when it considers their reasoning to be unsound or contrary to principle or unsuitable for the circumstances of Hong Kong, but also when it considers that the law of Hong Kong should be developed on different lines. (paragraph 81)

The result has been that easements can be obtained by prescription in appropriate circumstances.

[1-38] Another area of interest in relation to the application of English common law principles has been that of the operation of the *rule against perpetuities*. Whilst reliance on the rule is not commonplace, early doubts were raised as to whether or not the rule applied in the case of the Chinese customary trusts such as a the t'ong and the t'so. It has now been settled that these trusts are outside the operation of the Ordinance. In relation to transactions with other property, the Ordinance does apply to prevent the postponement of vesting of interests.

[1-39] In *Re Estate of Lau Wai Chau*,[27] Bokhary PJ in the Court of Final Appeal, at 683, observed:

> Ancestral worship trusts, being endowments in perpetuity for the purpose of ancestral worship, exist under Chinese law and custom as an institution of the legal system dating from Qing times. In regard to certain matters and in certain circumstances, Hong Kong law makes room for Chinese law and custom to apply in Hong Kong. Our law even disapplies the rule against perpetuities where such application is necessary for the purpose of enforcing Chinese law and custom in Hong Kong. One of the matters in respect of which Chinese law and custom has application in Hong Kong is New Territories land unless exemption from the provisions of Pt II of the New Territories Ordinance (Cap 97).

25 *Bryant v Foot* (1867) LR 2 QB 161 (QBD).

26 *China Field Ltd & Anor v Appeal Tribunal (Buildings) & Anor* [2009] 5 HKC 2[illegible] [2009] 5 HKLRD 662 (CFA).

27 *Re Estate of Lau Wai Chau* [2000] 1 HKC 681, [2000] 1 HKLRD 924 (CFA)

[1-40] And as decided, in *Chan Kong v Chan Li Chai Medical Factory (HK) Ltd & Ors*[28] Chinese custom and customary rights can only prevail in respect of land held under Part II of the New Territories Ordinance, ie now largely rural land in the New Territories. Further, the arrangement did not constitute a Chinese Partnership which was required to be registered as such under the Chinese Partnership Ordinance from 1911 to 1971. No such registration had been effected.

[1-41] The provisions of the Perpetuities and Accumulations Ordinance (Cap 257) were repealed from 1 December 2013, pursuant to the Trust Law (Amendment) Ordinance 2013, subject to certain reservations.

2.1.2 The rules of equity

[1-42] These rules were developed by the Court of Chancery, received in 1844, and as amended by the Courts of Hong Kong since then. In recent years there has been much resort to decisions in equity from jurisdictions other than that of England. See, for example, the successful reliance on unconscionability, linked to estoppel, in *Pacific South (Asia) Holdings Ltd v Million Unity International Ltd.*[29]

2.1.3 Hong Kong legislation

[1-43] Hong Kong legislation, including subordinate or delegated legislation, since 1844 which is still in force, and that made by LegCo. From 1844 onwards, some early Imperial legislation was applied in Hong Kong by reference to the Supreme Court Ordinance. Some of these Imperial statutes were not referred to in the Schedule to the AELO and are thought to be part of the law of Hong Kong. This is mainly because the underlying principles which have evolved from the legislation have become part of the common law.

[1-44] For land law, the more important local Hong Kong legislation includes:

(1) the Conveyancing and Property Ordinance (Cap 219);
(2) the Land Registration Ordinance (Cap 128);
(3) the Building Management Ordinance (Cap 344);
(4) the Landlord and Tenant (Consolidation) Ordinance (Cap 7), although as the security of tenure and rent control provisions have now been repealed, this ordinance has lost much of its effect;

28 *Chan Kong v Chan Li Chai Medical Factory (HK) Ltd & Ors* [2006] HKCU 1035 (unreported, HCA 4101/2001, 10 March 2006) (CFI).

29 *Pacific South (Asia) Holdings Ltd v Million Unity International Ltd* [1997] 3 HKC 440, [1997] 1 HKLRD 1238 (CA).

(5) the New Territories Ordinance (Cap 97) – as well as several others concerning New Territories land, such as:
   (a) the New Territories (Renewable Government Leases) Ordinance (Cap 152);
   (b) the New Territories Land Exchange Entitlements (Redemption) Ordinance (Cap 495);
   (c) the New Territories Land (Exemption) Ordinance (Cap 452); and
(6) a series of legislation relating to the regulation of Government leases, rent and other matters, including the Government Rent (Assessment and Collection) Ordinance (Cap 515) for the payment of rent in respect of renewed, renewable, Government leases, the Government Leases Ordinance (Cap 40) providing for various matters concerning Government leases including covenants therein, and the Government Rent and Premium (Apportionment) Ordinance (Cap 125) which deals with the apportionment of Government rent on the sectioning or division of land;
(7) the Lands Resumption Ordinance (Cap 124);
(8) the Partition Ordinance (Cap 352);
(9) The Stamp Duty Ordinance (Cap 117);
(10) the Residential Properties (First-Hand Sales) Ordinance (Cap 621); and
(11) the Protection of the Harbour Ordinance (Cap 490).

2.1.4 Chinese custom and customary law

[1-45] Article 8 of the Basic Law provides that 'customary law', previously in force, is to be maintained post 1997. However, section 13(1) of the New Territories Ordinance empowers the Court of First Instance and the District Court 'to recognize and enforce any Chinese custom or customary right affecting land referred to in Part II of the Ordinance, ie now primarily rural land in the New Territories which has not been exempted from the provisions of Part II. Section 13(1) has long been interpreted as applying to Chinese 'customary law' when considering what proprietary rights exist over land in the New Territories, or perhaps more correctly what rights an indigenous New Territories villager may have, in respect of land, because of that status.[30]

[1-46] Note that the reference to custom or customary law varies dependent on the legislation in which it is found. For example:

30 *Tang Yau Yi Tong v Tang Mou Shau Tso* [1996] 2 HKC 471, [1996] 2 HKLR 212 (CA); *Kan Fat-tat v Kan Yin-tat* [1987] 4 HKLR 516, [1987] HKCU 258 (HC).

(1) Article 8 of the Basic Law preserving 'the law presently [ie, 01 07 1997] in force in HK [ie] … *customary law*';
(2) Article 41 of the Basic Law protecting '*lawful traditional rights and interests of the indigenous inhabitants* of the New Territories'; and
(3) Section 13 of the New Territories Ordinance (Cap 97) provides:

> the Court of First Instance or the District Court in relation to land in the New Territories, the court shall have power to recognize and enforce any *Chinese custom or customary right affecting such land*.

[1-47] In general, the distinction between custom and customary law is that custom represents established patterns of behaviour, of traditional practices, accepted by the community, or specific groups within the community, which can be verified. By contrast where these practices have the force of law binding on the members of the community, and it is possible to ascertain some precedent in how the principles of these particular practices operate, then the practices have become customary law.

[1-48] For example, in *Wong Sui Yeung v Chiu Kwong Wing & Ors*,[31] action had been taken for compensation for the destruction of a lychee tree which a landowner claimed was his family's fung shui tree, even though it was not growing on his land. In the event, expert evidence was unavailable, for various reasons, and the court held that the interest in such a tree may represent 'traditional practices'. But no evidence was produced which indicated such practices had been 'elevated into the status of custom or customary rights enforceable by law' [paragraph 29]. In the event no cause of action was disclosed.

[1-49] Article 8 does provide for possible amendment to these laws as they are 'subject to any amendment by the legislature of the Hong Kong Special Administrative Region'. In addition, Article 84 does permit judges in applying Hong Kong SAR law to 'refer to precedents of other common law jurisdictions'. The courts do make use of this facility. In Hong Kong, the common law and principles of equity are robust as a consequence. But when and in what circumstances will the court adopt overseas developments? The decision in *China Field* (above) seems to have answered this question.

2.2 Alienation of land

[1-50] Historical factors, such as Chinese custom in the New Territories and the fact that land holding from 1841 has been by way of leasehold, continue to be relevant. The current practice for the alienation of land

31 *Wong Sui Yeung v Chiu Kwong Wing & Ors* [2005] 3 HKLRD 495 (CFI).