

**ADVERSE
POSSESSION
IN HONG KONG**



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frontline of prosecuting and defending adverse possession cases. They have done exemplary and sterling work for which I am grateful. All errors in this Title are mine and mine alone.

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CHAPTER 1

OVERVIEW

Dicky Cheung

1. CONCEPT OF ADVERSE POSSESSION

[1-1] The basic idea of adverse possession is this: someone other than a person under lawful permission who possesses the land to the exclusion of all others, both factually and in his mind ('squatter'), for long enough should be able to continue to do so. If the owner does not recover the land within the prescribed period, his action will be time-barred by section 7 of the Limitation Ordinance (Cap 347), and his title will be extinguished by operation of section 17 of the same. The squatter obtains (or continues to obtain) a possessory title to the land, which entitles him to evict other persons of inferior title.

[1-2] Counter-intuitive it is in the sense that the squatter is permitted to take advantage of his own wrong. The longer and more assertive his wrong (ie. possession) is, the more likely he is going to obtain favourable legal protection as a result of his possession. One might argue that such a notion is repugnant to the common good sense and flouts the 'prevention principle' that 'a person is not permitted to take advantage of his own wrong'.¹

[1-3] However, the notion of adverse possession is intuitive in that if an owner were to fail to possess his own land and a squatter desired to possess and make use of the same and had, in fact, done so, according to the utilitarian principle, the squatter would be preferred as a matter of utility of land. Additionally, if the squatter were to make the land his home and fortress for so long, there is policy reason to allow him to stay.

2. LIMITATION ORDINANCE (CAP 347)

[1-4] The law of adverse possession was first developed as a defence against claims to recover the land as a matter of limitation of such action. The single most important statute is the Limitation Ordinance (Cap 347), in particular, sections 7 and 17:

7. Limitation of actions to recover land

- (1) No action shall be brought by the Crown to recover any land after the expiration of 60 years from the date on which the right of action accrued

¹ Despite being commented as the 'universal principle of law', it is often applied in the contract law context.

- to the Crown or, if it first accrued to some person through whom the Crown claims, to that person.
- (2) No action shall be brought by any other person to recover any land after the expiration of 12 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person:

Provided that, if the right of action first accrued to the Crown through whom the person bringing the action claims, the action may be brought at any time before the expiration of the period during which the action could have been brought by the Crown, or of 12 years from the date on which the right of action accrued to some person other than the Crown, whichever period first expires.

17. Extinction of title after expiration of period

Subject to the provisions of section 10, at the expiration of the period prescribed by this Ordinance for any person to bring an action to recover land (including a redemption action), the title of that person to the land shall be extinguished.

[1-5] Unless otherwise stated, this Title focuses on adverse possession under section 7(2) of the Limitation Ordinance, ie, recovery of land by a private person instead of the government which triggers a limitation period of 12 years instead of 60. Additionally, the Title will dedicate a focused and particular chapter to elaborating on adverse possession against government land.

[1-6] Generally, a statutory limitation period bars the remedy but not the right. However, in *Limitation Periods* (7th edn), the learned authors stated at para 1.010:

Expiry of the period

The effect of the expiry of the period again varies. Generally the result is that no action may be brought in respect of the time-barred claim. It is said, though, that the expiry of time bars the remedy but does not extinguish the right. By contrast, in cases involving real property the expiry of the limitation period can serve to deprive a person of title to property and to confer it upon another.

[1-7] The Limitation Ordinance also contains a list of the provisions that should be considered in conjunction with the period of limitation for actions to recover land.

[1-8] The Limitation Ordinance further provides for what amounts to the accrual of action in sections 8 and 13:

8. Accrual of right of action in case of present interest in land

- (1) Where the person bringing an action to recover land, or some person through whom he claims, has been in possession thereof, and has while entitled thereto been dispossessed or discontinued his possession, the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance.

13. Right of action not to accrue or continue unless there is adverse possession

- (1) No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (hereafter in this section referred to as adverse possession) and where

under the foregoing provisions of this Ordinance any such right of action is deemed to accrue on a certain date and no person is in adverse possession on that date, the right of action shall not be deemed to accrue unless and until adverse possession is taken of the land.

- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action shall no longer be deemed to have accrued and no fresh right of action shall be deemed to accrue unless and until the land is again taken in adverse possession.

[1-9] In other words, the action does not accrue simply because the land is not occupied or possessed. It only runs from when the owner has been dispossessed of the land or he has discontinued use of it, and the squatter has adversely possessed the land.

[1-10] The provisions allow the limitation period to be accumulated by a series of periods of adverse possession by different possessors, provided that at no time during the 12-year period there is a break in adverse possession.² The effect of a successful claim to adverse possession is that the paper owner's title (ie, the owner of the property 'on paper') is extinguished.

3. A DEFENCE AS WELL AS A CLAIM

[1-11] No doubt, the predominant feature of an adverse possession claim by the squatter is a statutory-based limitation defence that the action by the owner to recover the land is out of time and cannot be brought. However, such being the predominant feature and origin of adverse possession, a squatter could positively claim some relief, most notably a declaration that he has acquired a possessory title and that the title of the owner is extinguished by virtue of section 17 of the Limitation Ordinance (Cap 347), so as to protect the squatter's possession.

[1-12] There is, however, no absolute causation or linkage between the establishment of this defence and the claim. It is possible that a limitation defence can be set up, but not the claim. Supposing that the owner sues the person occupying his land to evict him, and the occupier has occupied the land on behalf of his father for more than 12 years, the owner's cause of action might be time-barred and the occupier can fend off the owner's claim to recover the land on the basis of the owner being dispossessed for more than 12 years. However, the occupier, ie, the son, cannot claim the usual declaration for the possessory title in favour of him because he only possesses the land on behalf of his father. The son does not succeed in obtaining a possessory title because his possession is not his but his father's. This situation, despite uncommon, has been litigated time

² See *Wong Kar Sue & Ors v Sun Hung Kai Properties Ltd & Anor* [2006] 2 HKC 600 (CFI).

after time in Hong Kong from *Sze To Chun Keung v Kung Kwok Wai & Anor*³ to *The Incorporated Owners of Kam Luk Building v 吳靜燕*⁴

4. THE ELEMENTS OF ADVERSE POSSESSION

[1-13] In *Shine Empire Ltd v Incorporated Owners of San Po Kong Mansion & Ors*,⁵ the Court of Appeal summarised the law at 296C–F:

The House of Lords in *Pye* has said that whilst the term 'adverse possession' should be avoided as no intention of hostility to the paper title owner is required (paras. 36, 69), it is still necessary for the party ('the squatter') claiming that it has dispossessed the paper title owner to prove two separate elements: (1) a sufficient degree of factual possession in the sense of physical control, and (2) an intention to possess. To establish factual possession, the squatter has to show absence of the paper title owner's consent, a single and exclusive possession and such acts as demonstrated that in the circumstances, in particular, the nature of the land and the way it was commonly used, it had dealt with it as an occupying owner might normally be expected to do and that no other person had done so (para. 41). To establish an intention to possess, the squatter has to show that he intended to occupy and use the land as his own (para. 71), to exclude the world at large, including the paper title owner, so far as was reasonably possible.

[1-14] Therefore, there are three elements of adverse possession, the totality of which must be proved for more than 12 years: (1) factual possession; (2) the intention to possess or *animus possidendi*; and (3) the possession being adverse. This Title dedicates Parts B to D, respectively, covering each element as well as the running of time in depth (see Part F).

[1-15] By way of an overview, factual possession means a sufficient degree of exclusive physical control.

[1-16] Under the common law, there is a presumption that an owner, being the legal and registered owner, is deemed to be in occupation: *Powell v McFarlane*,⁶ *Wong Tak Yue v Kung Kwok Wai & Anor*.⁷ Thus, the squatter must prove that he has exercised sufficient physical control over the land. In *Powell*, Slade LJ said at 970:

Factual possession signifies an appropriate degree of physical control. It must be a single and conclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time.

³ *Sze To Chun Keung v Kung Kwok Wai & Anor* [1997] 2 HKC 231 (PC).

⁴ *The Incorporated Owners of Kam Luk Building v 吳靜燕* [2023] 1 HKC 683, [2022] HKCA 1896.

⁵ *Shine Empire Ltd v Incorporated Owners of San Po Kong Mansion & Ors* [2006] 4 HKC 288, [2006] 4 HKLRD 1 (CA).

⁶ *Powell v McFarlane* (1977) 38 P & CR 452 at 470.

⁷ *Wong Tak Yue v Kung Kwok Wai & Anor* [1998] 1 HKC 1, [1998] 1 HKLRD 241 (CFA) at 14E.

[1-17] The question of what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular, the nature of the land and the manner in which land of that nature is commonly used or enjoyed.⁸ The owners will be readily assumed to have the requisite intention to possess the land.⁹

[1-18] Intention to possess usually goes hand in hand with and manifests itself through factual possession because self-serving assertions are critically scrutinised and, in practice, carry little weight. Where the occupier has made self-serving statements as to what his intention was, whether during the period of occupation or when challenged in legal proceedings, the court should approach them with some scepticism. The courts would scrutinise the circumstances in which they were made and would give them such weight, if any, as they might deserve. Conversely, where the occupier has made statements as to what his intention was and such statements were against his interest, the court would usually accord to them considerable weight.¹⁰ As a result, the intention to possess is a matter of judicial scepticism and common sense. It is better that the intention be proved by factual possession and the manner and degree of the same.

[1-19] As held by Slade J in *Powell* at 471–472, the intention to possess requisite for adverse possession:

... involves the intention, in one's own name and on one's own behalf, to exclude the whole world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the process of the law will allow.

[1-20] It is the intention to possess, not the intention to own or acquire ownership of the land, that is required.¹¹ The possession being adverse simply entails that the possession was not under lawful licence or otherwise lawful authority. Thus, the adverse possession in and of itself is wrong. In *Buckinghamshire County Council*, the English Court of Appeal held at 636G–H that:

Possession is never 'adverse' within the meaning of the Act of 1980 if it is enjoyed under a lawful title. If, therefore, a person occupies or uses land by licence of the owner with the paper title and his licence has not been duly determined, he cannot be treated as having been in 'adverse possession' as against the owner with the paper title.

[1-21] The same principle was applied in *Cheung Chung Yan v Chan Man Kwong & Ors*,¹² in which Ma J (as he then was) sitting at the Court of Appeal held that:

17. As a matter of law, where a person occupies land as a licensee or otherwise with the permission of the true owner, he is not in adverse possession, for he enjoys his occupation under lawful title: see *Buckinghamshire County Council v Moran* [1990] Ch 623, at 636.

⁸ *Powell v McFarlane* (1977) 38 P & CR 452 at 470–471.

⁹ *Powell v McFarlane* (1977) 38 P & CR 452 at 472.

¹⁰ *Wong Tak Yue v Kung Kwok Wai & Anor* [1998] 1 HKC 1 at 13A–C, (1997–98) 1 HKCFAR 55, [1998] 1 HKLRD 241 (CFA).

¹¹ *Buckinghamshire County Council v Moran* [1990] 1 Ch 623 at 643E.

¹² *Cheung Chung Yan v Chan Man Kwong & Ors* [2004] HKCU 469 (unreported, CACV 268/2003, 12 February 2004) (CA).

[1-22] The possession being adverse is often overlooked as an element; however, this element of 'adverse' is the distinguishing feature of adverse possession. Mere factual possession and intention to possess could also exist in the context of a lawful occupation. For example, a tenant exercises full exclusive control or possession over the land and intends to do so. In *Street v Mountford*,¹³ the House of Lords held at 816G that the grant of exclusive possession to the tenant is the defining characteristic of a tenancy. What distinguishes adverse possession from other forms of landholding is adversity.

[1-23] Thus, 'possession as of wrong' is a core concept in adverse possession. In the words of Lord Hope of Craighead in the *J A Pye (Oxford) Ltd v Graham*:¹⁴

69. It is plainly of some importance, both now and for the future, to understand what the use of the word 'adverse' in the context of section 15 of the Limitation Act 1980 was intended to convey. At first sight, it might be thought that the word 'adverse' describes the nature of the possession that the squatter needs to demonstrate. It suggests that an element of aggression, hostility or subterfuge is required. But an examination of the context makes it clear that this is not so. It is used as a convenient label only, in recognition simply of the fact that the possession is adverse to the interests of the paper owner or, in the case of registered land, of the registered proprietor. The context is that of a person bringing an action to recover land who has been in possession of land but has been dispossessed or has discontinued his possession: paragraph 8 of Schedule 1 to the 1980 Act. His right of action is treated as accruing as soon as the land is in the possession of some other person in whose favour the limitation period can run. In that sense, and for that purpose, the other person's possession is adverse to his. But the question whether that other person is in fact in possession of the land is a separate question on which the word 'adverse' casts no light.

[1-24] In the same vein, Lord Browne-Wilkinson added:

38. It is sometimes said that ouster by the squatter is necessary to constitute dispossession: see for example *Rains v Buxton* (1880) 14 Ch D 537, 539 per Fry J. The word 'ouster' is derived from the old law of adverse possession and has overtones of confrontational, knowing removal of the true owner from possession. Such an approach is quite incorrect. There will be a 'dispossession' of the paper owner in any case where (there being no discontinuance of possession by the paper owner) a squatter assumes possession in the ordinary sense of the word.

[1-25] However, despite what the terminology suggests, the adversity need not be aggressive, hostile or aimed at the owner.¹⁵

¹³ *Street v Mountford* [1985] AC 809.

¹⁴ *J A Pye (Oxford) Ltd v Graham* [2002] UKHL 30, [2003] 1 AC 419, [2002] 3 All ER 865.

¹⁵ *Ocean Estates Ltd v Pinder (Norman)* [1969] 2 AC 19 at 24C-E.

5. BURDEN OF PROOF AND STANDARD OF PROOF

[1-26] The Hong Kong Court of Final Appeal in *Wu Yee Pak & Anor v Un Fong Leung & Ors*¹⁶ held that the burden of proving the adversity of possession lies with the squatters:

5. Since possession by the appellant of the land through occupation is accepted, the key issue is whether his possession was adverse in that he was neither a tenant nor a licensee of the respondents. The burden of proof admittedly lies with the appellant and the evidence he has to adduce must be compelling. *Powell v McFarlane & Another* (1979) 38 P & CR 452; and *Wong Tak Yue v Kung Kwok Wai David & Another* (1997-98) 1 HKCFAR 55.

[1-27] On the other hand, a squatter must adduce clear and affirmative evidence to prove the unequivocal intention to possess.¹⁷

[1-28] If the acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner at best he can, he will be treated as not having had the requisite *animus possidendi*.¹⁸ In cases where any doubts arise, the benefit of the doubt should be given to the 'rightful owner'.¹⁹

[1-29] In *Birkenhead Properties and Investment Ltd v Lam Kai-man* (林啟文) & Anor,²⁰ the court summarised the elements required to be proved in order to establish adverse possession:

13. The burden of proof of these three requirements [ie, (i) *factual possession*; (ii) *intention to possess or animus possidendi*; and (iii) *possession is adverse*] is on the squatter. The standard of proof is the civil standard. However, the burden is a heavy one. The squatter has to adduce objective and compelling evidence: *Powell v McFarlane*. Self serving evidence is hardly likely to be of assistance. The court will scrutinize such evidence with great care. The squatter's evidence of his subjective intention will invariably be given no weight as being self serving evidence, but his statements against his interest will usually be accorded considerable weight. Objective evidence will be given such weight as they deserve. (emphasis added)

¹⁶ *Wu Yee Pak & Anor v Un Fong Leung & Ors* (2004) 7 HKCFAR 498, [2005] 2 HKLRD 169, [2004] HKCU 1284 (CFA).

¹⁷ *Powell v McFarlane* (1977) 38 P & CR 452 at 472.

¹⁸ *Powell v McFarlane* (1977) 38 P & CR 452 at 472.

¹⁹ *Powell v McFarlane* (1977) 38 P & CR 452 at 478.

²⁰ *Birkenhead Properties and Investment Ltd v Lam Kai-man* (林啟文) & Anor (unreported, HCMP 1588/2012, 12 January 2016) (CFI).

CHAPTER 2

HISTORY OF ADVERSE POSSESSION LAW IN HONG KONG

Dicky Cheung

1. 1843–1965: REAL PROPERTY LIMITATION ACT 1833 (UK)

[2-1] On 26 January 1841, the British formally possessed the island and harbour of Hong Kong. On 2 February 1841, Captain Charles Elliot, Chief Superintendent of Trade and Her Majesty's Plenipotentiary in China in Hong Kong, issued a proclamation that all natives of China were to be governed according to the laws and customs of China, every description of torture excepted and all British subjects and foreigners in Hong Kong were to enjoy full security and protection according to the principles and practice of 'British law'. At that time, the possession of Hong Kong was by force, the primary scope of the application of British law concerned British criminal law, and was to maintain law and order. A local legislature which would legislate statutory civil law was not yet born.

[2-2] By the Hong Kong Letters Patent 1843, also titled the 'Charter of the Colony of Hong Kong' of 5 April 1843, Queen Victoria erected Hong Kong as a colony and established a law-making body that was the Governor acting by and with the advice of the Legislative Council. This body then enacted the Supreme Court Ordinance (15 of 1844), which, by its section 3, provided for the wholesale reception of English law. By further amendment through section 5 of the Supreme Court Ordinance 1873, the net result and wording of such whole reception was this:

[S]uch of the law of England as existed when the Colony obtained a local legislature, that is to say, on the 5th day of April, 1843, shall be in force in the Colony, except so far as the said laws are inapplicable to the local circumstances of the Colony or of its inhabitants, and except so far as they have been modified by laws passed by the said legislature.

[2-3] This section had been in force for 93 years until the Application of English Law Ordinance (Not adopted as the Laws of the HKSAR) (Cap 88).

[2-4] As of 5 April 1843, the applicable adverse possession statute in the law of England was the Real Property Limitation Act 1833 (UK), which, therefore became the governing adverse possession statute in Hong Kong. Importantly,

section 2 provided a simple 20-year limitation period in which an action to recover land must be started:

II. No Land or Rent to be recovered but within Twenty Years after the Right of Action accrued to the Claimant, or some Person whose Estate he claims.

And be it further enacted, That after the Thirty-first Day of December One thousand eight hundred and thirty-three no Person shall make an Entry or Distress or bring an Action to recover any Land or Rent but within Twenty Years next after the Time at which the Right to make such Entry or Distress or to bring such Action shall have first accrued to some Person through whom he claims; or if such Right shall not have accrued to any Person through whom he claims, then within Twenty Years next after the Time at which the Right to make such Entry or Distress or to bring such Action shall have first accrued to the Person making or bringing the same.

[2-5] The Real Property Limitation Act 1833 (UK) remained the applicable statute in Hong Kong until the local Limitation Ordinance 1965 came into effect in its original form on 11 June 1965. By virtue of section 39 of the Limitation Ordinance 1965, the Real Property Limitation Act 1833 (UK) shall cease to apply in Hong Kong.

[2-6] In *Leung Kuen Fai v Tang Kwong Yu & Ors*,¹ the court explained the law of time limitation under the Real Property Limitation Act 1833 (UK):

For reasons given below, the limitation period for persons born prior to the commencement of the Limitation Ordinance in 1965 should be governed by the Real Property Limitation Act 1833. Under that Act, the relevant limitation period for recovery of land was 20 years.

[2-7] Surprisingly, no reported or published judgment in Hong Kong could be found in this period invoking the Real Property Limitation Act 1833 (UK), nor were there generally any adverse possession cases.

2. 1965–TO DATE

[2-8] Sections 7 and 17 of the Limitation Ordinance 1965 were modelled after sections 4 and 16 of the Limitation Act 1939 (UK) respectively. However, the relevant limitation period to recover land by a private person was 12 years under the Limitation Act 1939 (UK) but remained 20 years in the Limitation Ordinance 1965. Thus, the Hong Kong Limitation Ordinance 1965 continued the legacy of the Real Property Limitation Act 1833 (UK).

[2-9] Commencing on 1 July 1991, pursuant to section 5 of the Limitation (Amendment) Ordinance 1991 (31 of 1991), the original period of 20 years was repealed and substituted with a period of 12 years, bringing section 7 to its present form.

[2-10] At the handover, by virtue of Article 8 of the Basic Law, the law previously in force in Hong Kong has been maintained to be part of the law of the Hong Kong Special Administrative Region.

¹ *Leung Kuen Fai v Tang Kwong Yu & Ors* [2002] 2 HKLRD 705 at 711C–D, [2002] HKCU 745 (CFI).

3. THE FIRST ADVERSE POSSESSION CASE IN HONG KONG

[2-11] As said, the adverse possession law has been in force in Hong Kong since at least 1843. However, through extensive research and studying of the records, reports and published judgments, the first and oldest adverse possession case in existing public records seems to be *Cheuk Chau Co Ltd v Chau Kwan Nam & Ors*.² Subsequent adverse possession cases in Hong Kong only pointed to as early as this case, eg, *Fortune Year Development Ltd v Mui Shu Huen*,³ and *Chui Shui On v Tang Koon Yung & Ors*.⁴

[2-12] In *Cheuk Chau Co Ltd*, the factual findings of the judges were:

- (1) In March 1980, the plaintiff bought a parcel of land from a vendor: at 2.
- (2) On the land, the defendants erected some huts and the judge found that adverse possession had been established at the least by February 1980: at 4.

[2-13] The court then turned to hold at 4–5 that:

Without any sinister purpose, as I find, but purely as a matter of re-negotiating the conditions of the lease under which the land was held from the Crown, the plaintiff surrendered the lease in respect of Lot 3965 and took, at a considerable premium, the re-grant of the same land with some minor adjustments to the boundaries.

[2-14] The issue in *Cheuk Chau Co Ltd* was whether the plaintiff's title was extinguished to the extent that he had nothing to surrender to the Crown and received a re-grant of it, and thereby defeating the squatter's title.

[2-15] Mantell J reluctantly ruled that the plaintiff's title was not extinguished vis-à-vis the Crown such that the plaintiff could receive a re-grant of it and thereby defeat the squatter's title. At 5–6, Mantell J relied on with some difficulty the decision of the House of Lords in *Fairweather v St Marylebone Property Co Ltd*:⁵

In effect, the issue which arose was whether or not adverse possession having been established against the holder of a lease, the surrender of the lease to the freeholder had the effect of bringing to an end the right of occupation by the dispossessor and it was held that it had. There was, it is to be noted, no question of a re-grant in the sense that it has occurred in this case. Nonetheless, much as one might seek for some basis for distinguishing between that case and the present, I have been unable to find any.

...

² *Cheuk Chau Co Ltd v Chau Kwan Nam & Ors* (unreported, HCMP 274/1982, 6 July 1983) (SC).

³ *Fortune Year Development Ltd v Mui Shu Huen* [1993] HKCU 233 (unreported, HCA 2951/1993, 13 July 1993) (SC) at para 11.

⁴ *Chui Shui On v Tang Koon Yung & Ors* [1992] 2 HKC 323 (HC) at para 12.

⁵ *Fairweather v St Marylebone Property Co Ltd* [1963] AC 510, [1962] 2 All ER 288, [1962] 2 WLR 1020.

Until I had the advantage of reading the speeches of Lord Radcliffe and Lord Denning, I would have thought the result in law might have been that which was cursorily dealt with by Lord Denning at page 1033:

The first suggestion is that the title of the leaseholder to the shed is extinguished completely, not only against the squatter, but also against the freeholder. So that the leasehold interest disappears altogether, and the freeholder becomes entitled to the land. I reject this suggestion completely. It would mean in this case that the freeholder would have become entitled to possession of the shed in the year 1932 and time would have begun to run against him from 1932. So that 12 years later the title of the freeholder to the shed would have been extinguished, that is, in 1944. That cannot be right and it was not seriously suggested. In 99 cases out of 100, the freeholder has no knowledge that the squatter is on the premises at all. It would be utterly wrong if the title of the freeholder could be eroded away during the lease without his knowledge. The correct view is that the freehold is an estate in reversion within section 6(1) of the Act of 1939, and time does not run against the freeholder until the determination of the lease.

[2-16] Mantell J further made the following observations at 6-7:

I have found difficulty with the reasoning behind that proposition because it seems to me that the acquisition of title by adverse possession should not and is not affected by any question of notice. Nonetheless, that reason appealed to the House of Lords and certainly in the case of Lord Denning formed a basis of the decision. What Lord Denning and in different words, Lord Radcliffe concluded was that the title of the leaseholder to the shed in that case, was extinguished against the squatter but remained good as against the freeholder. That seems to Lord Denning:

to be the only acceptable suggestion. If it is adopted, it means that time does not run against the freeholder until the lease is determined - which is only just.

[2-17] Mantell J held at 7 that 'the title of the lessee remains good against the lessor' and further observed that:

Continuing from the speech of Lord Denning:

On this footing it is quite apparent that at the date of the surrender, the leaseholder had something to surrender. He still had his title to the shed as against the freeholder and was in a position to surrender it to him. The maxim *nemo dat quod non habet* has no application to the case at all.

[2-18] Mantell J then recited at 7 how Lord Denning in *Fairweather* dealt with the objection to this conclusion:

... it seems to me that the proposition I am about to extract from the speech of Lord Denning must have application.

The only reason, it seems to me, which can be urged against this conclusion is that it means that a squatter's title can be destroyed by the leaseholder and freeholder putting their heads together. It is said that they can by a surrender or by a surrender and regrant - destroy the squatter's title completely and get rid of him. So be it. There is no way of preventing it. But I would point out that, if we were to deny the two of them this right, they could achieve

the same result in another way. They could easily do it by the leaseholder submitting to a forfeiture. If the leaseholder chooses not to pay the rent, the freeholder can determine the lease under the proviso for re-entry. The squatter cannot stop him. He cannot pay the rent without the authority of the leaseholder. He cannot apply for relief against forfeiture. The squatter's title can thus be defeated by a forfeiture - or by a forfeiture and regrant - just as it can be a surrender - or by a surrender and regrant. So there is nothing in the point.

[2-19] Mantell J concluded at 8 to give judgment in favour of the plaintiff landowner:

... applying the principle in *Fairweather*, if adverse possession having been achieved against Mr. Mui, Mr. Mui had surrendered the land in question and taken a re-grant of it, the effect would have been to extinguish the title acquired by each of the defendants under the Limitation Ordinance... If follows that his status, that is Mr. Mui's status as lessee in relation to the Crown and in relation to the strip of land beyond the fence was transferred by assignment to the plaintiff, putting the plaintiff precisely in the same position as Mr. Mui would have been and consequently, it follows that upon the surrender of the lease by the plaintiff to the Crown and on the subsequent re-grant of part of the land including that in question to the plaintiff, the rights of the defendants to remain in occupation of their dwellings came to an end. Consequently, there will be a judgment in this case for the plaintiff and I shall make orders for possession in relation to the land on which the defendants' huts stand in favour of the plaintiff.

[2-20] This case illustrates the deep philosophical reluctance of the learned judge to apply the decision in *Fairweather* to frustrate the adverse possession claim (established on facts) by the squatter. The squatter's title against the plaintiff owner had come to an end on the surrender of the lease which was an extraordinary event beyond their control and through no fault of the squatter's own. The learned judge did faithfully apply *Fairweather*. In Mantell J's own words at 8:

So, notwithstanding the difficulty I have felt with regard to that case, not least because it seems to me that the effect of it is very largely to stultify the effect of possession acquired under section 7 of the Limitation Ordinance since in Hong Kong all land is held from the Crown, I am bound to apply it [*Fairweather*].

[2-21] Nonetheless, for the purpose of this chapter which features a historical interest, as opposed to a substantive analysis of the merit, it is doubtful at the material time, *Chau Co Ltd* appears to be the first decided adverse possession case in Hong Kong because, in the judgment, Mantell J did not comment that the limitation point so taken was novel or a new point unseen to the Hong Kong Courts. Rather, Mantell J was applying *Fairweather* and the Limitation Ordinance in analysing the facts as much as any present-day judges would in the ordinary judicial manner. It appeared that adverse possession cases must have come before the courts of Hong Kong earlier but it was only due to a lack of records that this historical interest cannot be fully gratified now.

CHAPTER 3

THEORETICAL JUSTIFICATION AND OBJECTIONS: POLICY AND HUMAN RIGHTS

Dicky Cheung

[3-1] In the peculiar law of adverse possession, perhaps standing at odds with the rest of the common law and enactments, the counterintuitive aspect is that an initial wrongful act will be validated and protected if the wrongful act is perpetrated long enough. In other words, a 'land theft' long enough is approved by law.

[3-2] The result of a successful plea of adverse possession is also drastic. A private owner whose private property rights are protected constitutionally in Hong Kong under articles 6, 7, 105 and 120 of the Basic Law of the Hong Kong SAR, and articles 1 and 13 of section 8 of the Hong Kong Bill of Rights Ordinance (Cap 383) will be deprived and his title will be extinguished by section 17 of the Limitation Ordinance (Cap 347).

[3-3] But perhaps what at first appears repugnant to good and common sense can be rationalised with a historical interest in property law, in particular, the doctrine of relativity of title and the interlinkage between possession and ownership.

1. NATURE OF LAND TITLE AND OWNERSHIP

[3-4] A defining feature of Hong Kong land ownership and holding system is the doctrine of relativity of title. The law is concerned with as between the competing claimants, who has a better title to the land but not who absolutely owns the land:

At common law ... there is no such concept as an 'absolute' title. Where questions of title to land arise in litigation the court is concerned only with the relative strengths of the titles proved by the rival claimants. If party A can prove a better title than party B he is entitled to succeed notwithstanding that C may have a better title than A, if C is neither a party to the action nor a person by whose authority B is in possession or occupation of the land.¹

[3-5] In other words, there is no absolute title in Hong Kong land law save perhaps that all 'land ... within the Hong Kong Special Administrative Region shall be State property' according to article 7 of the Basic Law.

¹ *Ocean Estates Ltd v Pinder* [1969] 2 AC 19 at 24, 25, [1969] 2 WLR 1359, per Lord Diplock. See also *Wells v Pilling PC* [2008] EWHC 556 (Ch), [2008] 2 EGLR 29 at 30 and para 7.