

## Adverse Possession and Proprietary Estoppel as Defences to Actions for Possession

Two recent cases, *Sze To Chun-keung v Kung Kwok-wai David*<sup>1</sup> and *Wong Tak-yue v Kung Kwok-wai David*,<sup>2</sup> marked the transition of the Hong Kong appeal system, as they were, respectively, the last appeal to the Privy Council from Hong Kong and the first appeal heard by the Court of Final Appeal. Both were on the single ground of adverse possession and were appeals from the same Court of Appeal decision, *Kung Wong Sau-hin v Sze To Chun-keung*,<sup>3</sup> which was itself an appeal from a High Court decision under the same name.<sup>4</sup> The initial proceedings were strikingly complicated, involving a total of 21 defendants and five distinct defences. As the case proceeded, only the defence of adverse possession was preserved when Sze To Chun-keung (D1) and Wong Tak-yue (D14) appealed to the Privy Council and the Court of Final Appeal respectively. Three other defendants, D2, D3, and D4, brought their own appeal on the grounds of adverse possession and proprietary estoppel, and succeeded on both (*Wong Shui-sang v Kung Kwok-wai*<sup>5</sup>).

It is interesting to see how diverse defences can be pleaded in the same case, and why some of them had to be abandoned as the case proceeded. Thus, how the various courts dealt with the defences raised in the above-mentioned cases will be considered in the first part of this article. Then, in the second part, the doctrines of adverse possession and proprietary estoppel will be compared in order to identify the factors which must be borne in mind when a choice has to be made between them.

### Defences to the Kungs' action for possession

#### *How the saga began*

The Kungs owned land in various parts of the New Territories. In 1980, they initiated proceedings against those who were found to be occupying their land, but the proceedings were in abeyance two years later. In 1990, the Kungs started all over again and brought proceedings against 21 occupiers. Five substantive defences were raised:<sup>6</sup>

<sup>1</sup> [1997] 2 HKC 231 (PC), hereafter referred to as '*Sze To Chun-keung* (PC).'

<sup>2</sup> [1998] 1 HKC 1 (CFA), hereafter referred to as '*Wong Tak-yue* (CFA).'

<sup>3</sup> [1996] 3 HKC 292 (CA), hereafter referred to as '*Kung Wong Sau-hin* (CA).'

<sup>4</sup> [1996] 2 HKC 616 (HC), hereafter referred to as '*Kung Wong Sau-hin* (HC).'

<sup>5</sup> [1997] HKLY 486 (CA), hereafter referred to as '*Wong Shui-sang* (CA).'

<sup>6</sup> There was also the preliminary issue of whether the plaintiffs' summonses should be dismissed either on the basis that a notice of intention to proceed had not been served, or on the basis of issue estoppel, but neither was held to be relevant.

[F]irst, that [the defendants] were occupying the land with the licence of the registered owners prior to 1960 and that this interest was held on constructive trust by the plaintiffs; second, that the defendants were tenants of the land; third, that the defendants had made improvements to the land with the knowledge or consent of the plaintiffs who were therefore estopped from obtaining summary judgment; fourth, the defendants had an interest based on adverse possession; fifth, the defendants' tenancy has been converted into a domestic tenancy which was protected by Pt II of the Landlord and Tenant (Consolidation) Ordinance (Cap 7).<sup>7</sup>

Not all of the defendants relied upon all or the same defences. D2, D3, and D4 were related<sup>8</sup> and together pleaded a licence, a tenancy, adverse possession, and proprietary estoppel as alternative defences, but only the last two were maintained on appeal. D1's case was less complex. He initially relied upon both adverse possession and proprietary estoppel, but dropped the latter when he appealed to the Privy Council. The other defendants, including D14 who was the appellant in *Wong Tak-yue (CFA)*, all relied upon adverse possession and a tenancy which they claimed should be protected under Part II of the Landlord and Tenant (Consolidation) Ordinance, but eventually the latter defence was abandoned, and only that of adverse possession was preserved when D14 appealed to the Court of Final Appeal.

Obviously, adverse possession and proprietary estoppel were the most and second-most persistent defences in this series of cases. How each of them was treated by different levels of the judiciary will be considered in detail, but before that, for the sake of completeness, the licence/tenancy defence will be briefly mentioned.

#### *Licence vs tenancy*

How a licence and a tenancy can be pleaded on the same set of facts is not difficult to understand as they both involve a grant of possession. In *Kung Wong Sau-hin (HC)* D2, D3, and D4 contended that they were occupying the land with the licence or permission of the original registered owners (D2's parents) who held the property until it was sold to the Kungs' predecessors-in-title in 1960. It was alleged that D2 and his family had been residing in a house built by D2's father since 1925, and that D3 and D4 moved into the property in 1947 and had been living there since.

The licence defence was doomed to failure because, even if a licence could be established in favour of D2, D3, and D4, it could only bind the original registered owners, but not the Kungs, who were not parties to the grant. As Le Pichon J said in *Kung Wong Sau-hin (HC)*:<sup>9</sup>

<sup>7</sup> *Kung Wong Sau-hin (HC)* (note 4 above), p 617.

<sup>8</sup> D3 was D2's brother-in-law whereas D4 was the mother-in-law of one of D2's younger brothers.

<sup>9</sup> Note 4 above, p 627.

A purchaser who buys land with notice of a licence is not bound by it unless the circumstances are such that his conscience is affected. In such cases, he may be compelled to give effect to the licence through the mechanism of a constructive trust.<sup>10</sup>

Since no constructive trust had been raised and no facts had been pleaded to suggest that special circumstances existed in the present case,<sup>11</sup> the defence of a licence was held to be unsustainable as any licence would have come to an end upon the sale of the land in 1960.

The alternative defence of a tenancy was even weaker. The only evidence relied upon by D2 was that in 1974 he as 'permittee' signed a modification of tenancy on behalf of the then registered owners. The modification could not be construed as a grant by the Crown or by the registered owners to D2 since, on the face of it, he was simply an agent. Nor could there be any implied grant of a tenancy. As the judge said,

[S]o far as an implied grant is concerned, there was no evidence of the acceptance by the registered owners of any periodical payments from the occupiers. The only payments that had been made by the occupiers have been for the Crown rent and rates and modification of tenancy fees. Such payments were not made to the registered owner [sic] but to third parties ... There is no evidence from which an implied grant could be inferred in the present case. That being so, there is no basis for the argument based on a tenancy and it must fail.<sup>12</sup>

The alternative defences of proprietary estoppel and adverse possession were also rejected by the court, but D1 to D4 persisted in pursuing both of them on appeal.

*Proprietary estoppel: High Court and Court of Appeal*

D2, D3, and D4 all asserted that they had made substantial improvements to the land, and that such improvements were made 'either with the knowledge or consent or without objection from the plaintiffs or their predecessors-in-title.' Nevertheless, the judge in *Kung Wong Sau-hin* (HC) found no factual support for the assertion of knowledge and held that such a 'bald assertion'<sup>13</sup> could not sustain a claim of proprietary estoppel: 'Where particulars of

<sup>10</sup> Such a proposition was obviously derived from Fox LJ's obiter dicta in *Ashburn Anstalt v Arnold* [1989] Ch 1, 25, followed in *IDC Group v Clark* [1992] 1 EGLR 187, but only the latter case was cited after the quoted passage.

<sup>11</sup> The only example of special circumstances that has ever been suggested is the payment of a lower price as a result of the existence of a licence: see *Ashburn Anstalt v Arnold* (note 10 above).

<sup>12</sup> *Kung Wong Sau-hin* (HC) (note 4 above), p 628.

<sup>13</sup> *Ibid*, p 630.

knowledge have not been pleaded nor acts that constitute unconscionable conduct, a plea based on proprietary estoppel is bound to fail.<sup>14</sup>

It is clear, after the enlightening decision of Oliver J in *Taylor's Fashions*,<sup>15</sup> that proprietary estoppel is based on a broad notion of unconscionability.<sup>16</sup> Unconscionability is basically a question of fact,<sup>17</sup> so the lack of sufficient factual support will be fatal to a plea of proprietary estoppel. However, the law as it stands does not require knowledge to be established in every estoppel case. The judge reached her conclusion on the estoppel issue by applying the five probanda promulgated in the ancient case of *Willmott v Barber*<sup>18</sup> as if they were necessary requirements for proprietary estoppel.<sup>19</sup>

Such a rigid approach was surprising, in view of Oliver J's warning against using any preconceived formula as a universal yardstick for every form of unconscionable behaviour,<sup>20</sup> and was subsequently rejected by the Court of Appeal as being inconsistent with the 'modern and true view.'

In *Kung Wong Sau-hin* (CA), an appeal brought by D1, D14, and another defendant, Nazareth VP said:

[T]he learned judge treated the five requisites stated by Fry LJ in *Willmott v Barber* as inflexible rules. But the modern and true view (as one sees from *Taylor's Fashions v Liverpool Victoria Trustees* and the cases referred to therein) is that Fry LJ's five requisites constitute no more than a valuable guide when addressing the question of unconscionability, a concept which calls for a broad approach.<sup>21</sup>

If Nazareth VP had stopped there, the prominence of the modern view would have been brought out. Nevertheless, he went on to say: 'The four ingredients of proprietary estoppel stated in Snell's *Principles of Equity* and adopted by the Court of Appeal in *Brinnand v Ewens*, clearly ... are not satisfied in this case.'<sup>22</sup> He was not suggesting that the four ingredients should substitute

<sup>14</sup> Ibid, p 631.

<sup>15</sup> *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133.

<sup>16</sup> As Oliver J said in *Taylor's Fashions* (ibid), the doctrine of proprietary estoppel 'requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.' This passage was cited and relied upon by counsel for D2 to D4 in the High Court.

<sup>17</sup> The burden of proof is on the claimant to show 'as a fact that the defendant, by setting up his right, is taking advantage of him in a way which is unconscionable, inequitable or unjust': *Crabb v Arun District Council* [1976] Ch 179, 195.

<sup>18</sup> (1880) 13 Ch D 96.

<sup>19</sup> 'In order to succeed in a plea of proprietary estoppel, five points must be established ... See per Fry J in *Willmott v Barber*': *Kung Wong Sau-hin* (HC) (note 4 above), p 629.

<sup>20</sup> *Taylor's Fashions* (note 15 above).

<sup>21</sup> Note 3 above, p 299.

<sup>22</sup> Ibid.

for Fry J's five probanda. It was in fact counsel for the plaintiffs who relied upon the four ingredients, and his Lordship was merely clarifying that no proprietary estoppel could be established according to any approach.

Nazareth VP was dealing with D1's case when he made the above remarks. It was contended that D1 expended moneys in 1961 in building a store and other structures on the land in question, and that one of the registered owners would have noticed D1's occupation and expenditure as he had to pass the lane adjoining the premises. Nevertheless, in his Lordship's opinion, D1's expenditure on the land was not incurred by reason of encouragement from the plaintiffs. Since, in 1961, D1 was granted a Crown land permit under which various structures were permitted to be maintained on the land, his expenditure must have been incurred pursuant to the permit. Accordingly, the defence of proprietary estoppel failed.

*Adverse possession: High Court and Court of Appeal*

All of the defendants pleaded adverse possession in the High Court proceedings, but each or each group of them had a different story. The case of D2, D3, and D4 was that they had been in adverse possession since 1960.<sup>23</sup> The issue was not whether their possession was adverse, as it clearly was, but how the limitation period should be calculated. On this particular point, the Court of Appeal decision in *Lam Island*<sup>24</sup> was then the most recent local authority,<sup>25</sup> and its effect was summarised by the judge as follows:

[T]he effect of the New Territories (Renewable Crown Leases) Ordinance (Cap 152) was that the 20-year period must either have accrued in total prior to 1 July 1973 or the entire period accrued after that date. In other words, periods falling on either side of that date could not be added together to constitute the 20-year period for the purposes of the Limitation Ordinance (Cap 347).<sup>26</sup>

The judge went on to say that 'on the law as it stands, D2, D3 and D4's occupation falls short of the requisite 20-year period.'<sup>27</sup> The defence of adverse possession thus failed, though the execution of the order for possession was stayed until after the determination of the *Lam Island* appeal to the Privy Council.<sup>28</sup>

<sup>23</sup> Possession prior to 1960 had been with the permission of the then registered owners, and thus did not count.

<sup>24</sup> *Lai Moon-hung v Lam Island Development Co Ltd* [1994] 2 HKC 11 (CA).

<sup>25</sup> The appeal to the Privy Council was still pending at that time.

<sup>26</sup> *Kung Wong Sau-hin* (HC) (note 4 above), p 631.

<sup>27</sup> *Ibid.*

<sup>28</sup> The *Lam Island* appeal was heard and allowed by the Privy Council on 8 July 1996, four months after the decision of the High Court in *Kung Wong Sau-hin* (HC): see *Chung Ping-kwans v Lam Island Development Co Ltd* [1996] 2 HKC 447, [1997] AC 38 (PC).

As to D1, his plea of adverse possession was supported by his own affirmations, made in 1991, that he had been in possession since February 1955. In 1993, however, he abandoned this defence and relied instead upon the Crown land permit which was granted to him in 1961. The permit was granted for a period of twelve months, renewable at the Crown's pleasure, and was actually renewed every year until 18 March 1988 when the land was discovered to be private property. Then, in *Kung Wong Sau-hin (HC)*, D1, realising that the permit could not advance his case any further, applied for leave 'to resuscitate the adverse possession defence.'<sup>29</sup>

What was suspicious about this amended defence was that D1 claimed that his possession should be from February 1953, not from February 1955 as stated in his 1991 affirmations. Such an amendment was, in the view of the judge, 'a significant difference because, if true, [D1] would be in a position to establish 20 years possession prior to the coming into force on 1 July 1973 of the New Territories (Renewable Crown Leases) Ordinance (Cap 152).'<sup>30</sup> Counsel for the plaintiffs even submitted that such a defence 'had been tailored to meet the law,'<sup>31</sup> the law referring to the Court of Appeal decision in *Lam Island*. Be that as it may, the judge actually granted leave to amend, though 'not without hesitation.' Nevertheless, the substantive defence still failed because the judge was not prepared to find that D1 possessed the requisite intention:

D1's occupation of the land until 1988 was not qua squatter but as licensee of the Crown under a Crown Land Permit which was renewed annually until 1988. D1 entered as the Crown's licensee and during the period up to 1988, he could not have had any intention to dispossess the true owner who, as far as he was concerned, must have been the Crown against whom D1 could not acquire title by adverse possession. That fact negatives the necessary intention to dispossess the true owner, which is an essential ingredient in establishing adverse possession.<sup>32</sup>

When D1 appealed to the Court of Appeal, the same approach was adopted. D1's occupation between 1961 and 1988 was regarded as being in the capacity of a Crown licensee, and as such, lacking the necessary intention to dispossess the owner.<sup>33</sup> On the basis that the Crown was possessing the land through D1, the Court of Appeal held that such possession could not have been adverse to

<sup>29</sup> *Kung Wong Sau-hin (HC)* (note 4 above), p 632.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid, p 633. The scepticism was shared by the Court of Appeal in *Kung Wong Sau-hin (CA)* (note 3 above), where Nazareth VP said at p 298: 'D1's explanation for the change does not sound convincing and the new defence, it has to be said, does have every appearance of having been tailored to meet the law.'

<sup>32</sup> Note 4 above, p 631.

<sup>33</sup> Reference was made to *Buckinghamshire CC v Moran* [1989] 3 WLR 152, 167 per Hoffmann J; *Ho Hang-wan v Ma Ting-cheung* [1989-91] CPR 23.

the plaintiffs for two reasons: first, that in cancelling the Crown land permit in 1988, the government acknowledged the plaintiffs' title to the land, and second, that in any case, the government could not derogate from its grant to the plaintiffs.<sup>34</sup> However, neither reason was endorsed by the Privy Council, which allowed D1's appeal on the sole ground of adverse possession.

*Adverse possession: Privy Council and Court of Final Appeal*

In *Sze To Chun-keung* (PC), the Privy Council held that the Crown had been adversely possessing the land through its licensee, D1. In their Lordships' view, when the Crown land permit was cancelled, 'the Crown did no more than to renounce, as between itself and the defendant, its right to license the defendant to occupy and therefore to take the benefit of the defendant's possession. This could not rewrite the history of the past 27 years when the Crown had been in possession.'<sup>35</sup>

Their Lordships also refused to treat the cancellation as an acknowledgment of the plaintiffs' title, since any such acknowledgment must be made in writing 'to the person, or to any agent of the person, whose title ... is being acknowledged.'<sup>36</sup>

As to the issue of non-derogation from grant, their Lordships did not even consider it relevant to the establishment of adverse possession: 'The Court of Appeal said that the Government could not derogate from its grant to the plaintiffs. This is true, but the consequence is that the Crown had no more right to take possession than any other person.'<sup>37</sup> It was exactly because the land had been granted to the plaintiffs that the Crown's possession would be 'possession as of wrong,'<sup>38</sup> and thus adverse.

On the further question of whether such possession had been for a sufficiently long period to bar the plaintiffs' right of action, their Lordships did not hesitate to give an affirmative answer. Since the Court of Appeal decision in *Lam Island* had already been overruled by the Privy Council,<sup>39</sup> it was no longer necessary to segregate possession prior to 1 July 1973 from possession after that date. Their Lordships' conclusion that the limitation period ran from 1955 to 1975 was consistent with the final outcome in *Lam Island*, although the latter was not referred to in their Lordships' judgment.

On the contrary, when the Court of Final Appeal heard the appeal by D14 in *Wong Tak-yue* (CFA), the question of aggregation of limitation periods was

<sup>34</sup> *Kung Wong Sau-hin* (CA) (note 3 above), p 298.

<sup>35</sup> *Sze To Chun-keung* (PC) (note 1 above), p 234.

<sup>36</sup> s 24(2), Limitation Ordinance, cited by Lord Hoffmann at p 234.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Buckinghamshire County Council v Moran* [1990] Ch 623, 644 per Nourse LJ, cited with approval by Lord Hoffmann (note 1 above, p 234).

<sup>39</sup> The Privy Council decision in *Lam Island* was delivered on 8 July 1996 whereas that in *Sze To Chun-keung* was on 27 June 1997.

not addressed at all. It was unnecessary to go that far because, in their Lordships' opinion, D14 could not even establish the requisite intention for adverse possession. D14 and his daughter had made affirmations, in 1990 and 1995 respectively, that D14 was at all material times ready, willing, and able to pay rent to the owners, and that he did not do so only because no one came along on behalf of the owners to collect rent. Such statements were against D14's interest and, as such, should be given more weight. As Li CJ said,

The question of intention to possess, as with any other question of intention, is one of fact. Whether it can be established depends on an assessment of all the circumstances in a particular case ... [W]here the occupier has made statements as to what was his intention and such statements are against his interest, the courts would usually accord to them considerable weight.<sup>40</sup>

The defence of adverse possession having been destroyed, it was unnecessary to consider whether D14 had, by his own affirmations, acknowledged the owners' title.<sup>41</sup>

To conclude, among all the appellants, only D14 failed to establish any arguable defence. Both D1's defence of adverse possession and D2 to D4s' dual defence of adverse possession and proprietary estoppel were allowed to proceed. The various stages of the Kungs' proceedings may be summarised as in the chart opposite.

### **Adverse possession and proprietary estoppel: overlapping to what extent?**

#### *Two distinct doctrines*

At first sight, adverse possession and proprietary estoppel may seem to have very little in common, the former being a common law doctrine whereas the latter is equitable in nature. Adverse possession operates in a negative fashion: a person who has squatted on another's property for a sufficiently long period will be able to bar the latter's right of recovery. To use the statutory language, '[n]o action shall be brought' by the original owner to recover the land after the expiration of the prescribed period,<sup>42</sup> and his title to the land 'shall be extinguished.'<sup>43</sup> Thus, the doctrine is invariably used as a shield (that is, as a defence) in possession proceedings and the effect of a successful plea would be

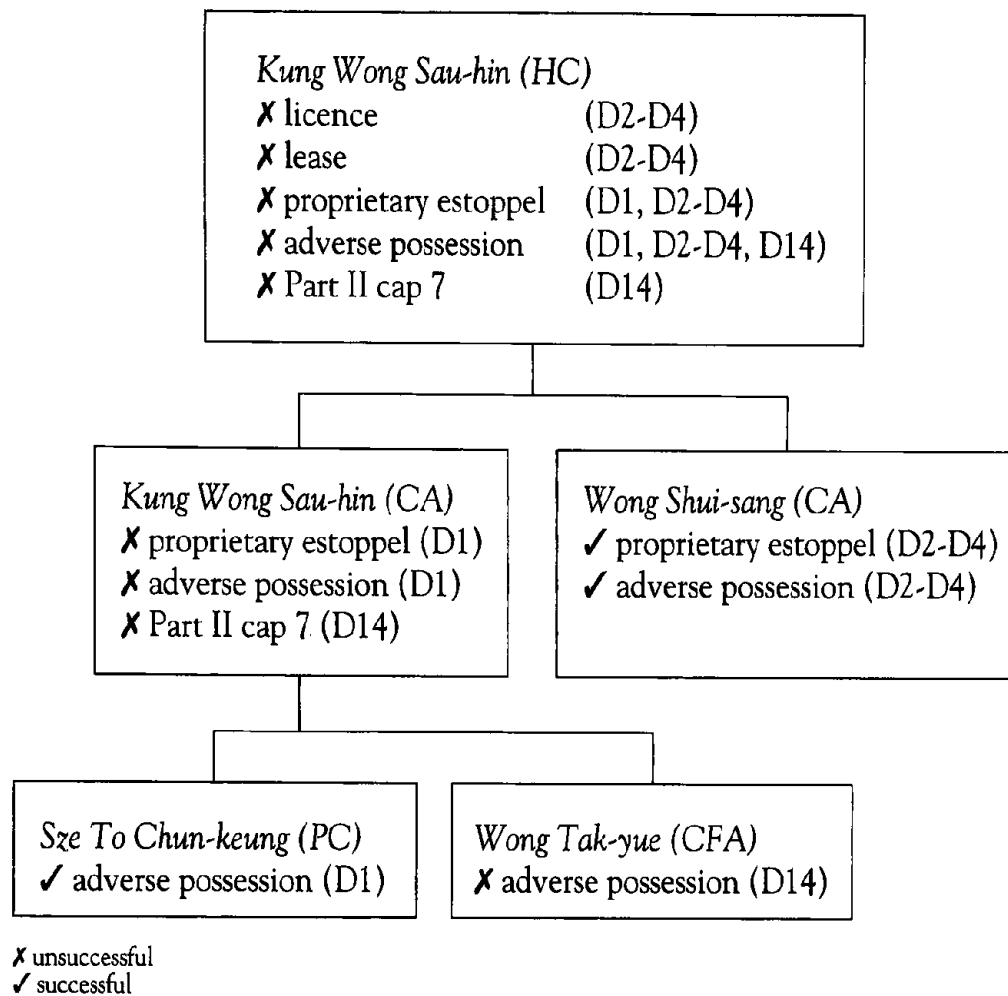
<sup>40</sup> *Wong Tak-yue* (CFA) (note 2 above), p 13.

<sup>41</sup> *Ibid*, p 14, per Litton PJ: 'Whether his acts and declarations in the course of the 1980 court proceedings amounted to an acknowledgment of the owners' title in terms of s 23(1) [of the Limitation Ordinance], or fell short of that, the fact remains that he had no intention to exclude the owners.'

<sup>42</sup> s 7(2), Limitation Ordinance. In 1991, the prescribed period was reduced from twenty years to twelve years; see the Limitation (Amendment) Ordinance 1991, s 5.

<sup>43</sup> s 17, Limitation Ordinance.





dismissal of the plaintiff's action and extinguishment of his title as against the adverse possessor.

Proprietary estoppel is similar to adverse possession in being capable of being used as a shield in possession proceedings, but the equitable doctrine is not at all confined to such a scenario. It can also be used as a sword (that is, to support a cause of action), can be pleaded in other types of proceedings, and may give the claimant a wide range of positive remedies. Proprietary estoppel, like other equitable doctrines, is discretionary in nature, meaning that the court has an almost unfettered discretion in deciding which remedy is the most appropriate in a particular case. Apart from those typical 'discretionary bar' questions such as whether the claimant has come with clean hands, the court must also, in a proprietary estoppel case, consider all the surrounding circumstances in order to find the best way to achieve justice, or 'the relief appropriate to satisfy the equity' as Scarman LJ put it in *Crabb v Arun District Council*.<sup>44</sup> In that case, Scarman LJ succinctly described the steps to be taken by a court in applying the doctrine of proprietary estoppel as follows:

<sup>44</sup> [1976] Ch 179 (CA).

If the plaintiff has any right, it is an equity arising out of the conduct and relationship of the parties. In such a case I think it is now settled law that the court, having analysed and assessed the conduct and relationship of the parties, has to answer three questions. First, is there an equity? Secondly, what is the extent of the equity, if one is established? And, thirdly, what is the relief appropriate to satisfy the equity? ... Such therefore I believe to be the nature of the inquiry that the courts have to conduct in a case of this sort.<sup>45</sup>

In answering the third question, the court must determine 'upon what terms the plaintiff should be put to enable him to have the benefit of the equitable right which he is held to have.'<sup>46</sup> In *Crabb*, the court held that the equity should be satisfied by granting the plaintiff a right of access, and that since the defendants' action 'amounted to sterilisation of [the plaintiff's land] for a very considerable period of time, it must surpass any sort of sum of money which the plaintiff ought reasonably, before it was done, to have paid the defendants in order to obtain an enforceable legal right.'<sup>47</sup> Thus, the plaintiff was not required to pay anything for that right.

Apart from the grant of an easement, as in *Crabb*,<sup>48</sup> financial compensation,<sup>49</sup> a lease,<sup>50</sup> an occupational licence,<sup>51</sup> and even the original owner's title (that is, a fee simple in England)<sup>52</sup> have all been awarded as remedies to satisfy estoppel claims. In determining which remedy is the most appropriate, the court may take into account any factor which it regards as relevant, such as the extent of the claimant's detrimental reliance, the conduct of the parties, their age, and their relative wealth and earning capacity. Sometimes, even their relationship and personality may be relevant. For instance, in *Dodsworth v Dodsworth*,<sup>53</sup> even though the claimant had spent £700 on improvements to his sister's house in reliance on her promise to allow him to stay there for as long as he wished, the court refused to grant him any occupational licence because the court considered that the amount he spent on the improvements was small, that the sister's wish to sell the house and buy a smaller one for herself should be respected, and that the relationship between the claimant and his sister had

<sup>45</sup> Ibid, pp 192-3.

<sup>46</sup> Ibid, pp 198-9.

<sup>47</sup> Ibid, p 199.

<sup>48</sup> Another example is *ER Ives Investment Ltd v High* [1967] 2 QB 379 (CA).

<sup>49</sup> *Dodsworth v Dodsworth* (1973) 228 EG 1115 (CA) and *Re Sharpe* [1980] 1 WLR 219.

<sup>50</sup> *JT Developments Ltd v Quinn* (1991) 62 P & CR 33 (CA).

<sup>51</sup> *Inwards v Baker* [1965] 2 QB 29 (CA), *Greasley v Cooke* [1980] 1 WLR 1306 (CA), and *Maharaj v Chand* [1986] AC 898 (PC).

<sup>52</sup> In *Dillwyn v Llewelyn* (1862) 4 De GF & J 517, *Pascoe v Turner* [1979] 2 All ER 945 (CA), *Re Basham* [1986] 1 WLR 1498, and *Voyce v Voyce* (1991) 62 P & CR 290 (CA), the claimant was granted the fee simple without compensation. In *Wayling v Jones* (1995) 69 P & CR 170 (CA) the property had already been sold and the claimant was awarded the proceeds of sale. In *Lim Teng-huan v Ang Swee Chuan* [1992] 1 WLR 113 (PC) the property was transferred to the claimant but only on payment of a reasonable price after deducting the amount expended on improvements.

<sup>53</sup> (1973) 228 EG 1115.

deteriorated to such an extent that it would be unrealistic to require them to live in the same house.

*Dodsworth v Dodsworth* may be contrasted with *Pascoe v Turner*,<sup>54</sup> where the legal owner of the property in question was compelled to convey the legal title to the claimant, who was his mistress, even though she had expended only £230 on improving the property. The court in that case considered that the claimant was a widow in her middle fifties, that she had spent a quarter of her modest capital on improvements to the property, and, most important of all, that 'the history of the conduct of the [legal owner] ... leads to an irresistible inference that he is determined to pursue his purpose of evicting her from the house by any legal means at his disposal with a ruthless disregard of the obligations binding on conscience.'<sup>55</sup> Whatever that means, the court concluded that the best way to protect the claimant against any future manifestations of ruthlessness was to have the property conveyed to her.

All these cases illustrate how a court in an estoppel case may, or should, tailor its order to the circumstances of the case. No such flexibility is available when it deals with the common law doctrine of adverse possession.

#### *Yet applicable in the same scenario*

Adverse possession operates to strip a landowner of his entitlement to possession when he has been dispossessed by another person (the adverse possessor), or when he has discontinued his own possession, allowing another person to enter and occupy the land.<sup>56</sup> It is usually in the latter case, namely, discontinuance of possession, that adverse possession overlaps with proprietary estoppel. A common scenario is that of mistaken boundaries: a landowner might have built on part of his neighbour's land, honestly believing that that strip of land was also within his own boundaries. If his neighbour subsequently sues him for possession, he may defend by saying, first, that he has acquired an independent title to that strip of land by virtue of adverse possession, and second or alternatively, that his neighbour, who has acquiesced in his possession, is estopped from asserting his title against him.

To establish adverse possession, a squatter must satisfy the court that he has been in exclusive possession of the disputed land for the prescribed period.<sup>57</sup> That means he has to prove two things:<sup>58</sup> (i) factual possession of the land, and (ii) an intention to exclude everyone from that land, including the paper

<sup>54</sup> [1979] 2 All ER 945.

<sup>55</sup> Ibid, p 951.

<sup>56</sup> s 8(1), Limitation Ordinance: '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.'

<sup>57</sup> s 7(2), Limitation Ordinance. In 1991 the prescribed period was reduced: see note 42 above.

<sup>58</sup> *Buckinghamshire County Council v Moran* [1990] Ch 623 (CA), 636 per Slade LJ and 644-5 per Nourse LJ.

owner (that is, an *animus possidendi*).<sup>59</sup> An intention to own the land is not required.<sup>60</sup> In fact, whether the squatter knows that the land belongs to another, or whether he knows of the identity of that other person, is irrelevant. That no such knowledge is required was reinforced recently in England as well as in Hong Kong. In England, Saville LJ in *Hughes v Cork*<sup>61</sup> explained the requirements of adverse possession as follows:

What the law requires is factual possession ie: an exclusive dealing with the land as an occupying owner might be expected to deal with it, together with a manifested intention to treat the land as belonging to the possessor to the exclusion of everyone else.

Obviously if the possessor knows or believes someone else has the paper title to the land he must intend to exclude that person along with everyone else. But in the absence of such knowledge or belief it is in my judgment sufficient for this part of the second requirement simply to establish a manifest intention to exclude everyone.<sup>62</sup>

This judgment was adopted by Barnett J in Hong Kong in the case *Wong Luen-chun v Secretary for Justice*<sup>63</sup> where adverse possession was relied upon by someone who believed herself to be the true owner of some land which had been conveyed to three purchasers. It was contended that the three names were in fact aliases of the claimant, but the judge found it unnecessary to base his decision on this contention since he held in favour of the claimant on the point of adverse possession.

In a case like this, where the squatter mistakenly believes that he or she owns the land in question, a claim based on proprietary estoppel may also succeed if it can be proved that the true owner has acted unconscionably towards the squatter. Therefore, if the true owner knew of the mistaken belief but failed to stop the squatter's possession of or activities on the land, he would be estopped from asserting his own rights.

If the squatter is not so mistaken and yet wishes to raise proprietary estoppel as an alternative defence, then he must show that the owner has, by his words

<sup>59</sup> 'The *animus possidendi* involves the intention, in one's own name and on one's own behalf, to exclude the 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': per Slade J in *Powell v McFarlane* (1979) 38 P & CR 452, 471-2, approved by the Court of Appeal in *Buckinghamshire County Council v Moran* (note 58 above).

<sup>60</sup> *Buckinghamshire County Council v Moran* (ibid), p 643 per Slade LJ: 'There are some dicta in the authorities which might be read as suggesting that an intention to own the land is required ... Nevertheless, I agree with the judge that "what is required for this purpose is not an intention to own or even an intention to acquire ownership but an intention to possess" — that is to say, an intention for the time being to possess the land to the exclusion of all other persons, including the owner with the paper title.'

<sup>61</sup> (Unreported) 14 February 1994 (CA).

<sup>62</sup> Ibid.

<sup>63</sup> [1998] 4 HKC 122.

and/or conduct, encouraged him to act to his detriment, and that it would be unconscionable for the owner to assert his legal rights against him.

To summarise, adverse possession and proprietary estoppel will most likely overlap in the case of discontinuance of possession, which can appear in two scenarios:

*Adverse possession*

A: owner left his land and was followed in by a person who believed that he was entitled to use the land

B: owner left his land and was followed in by a person who knew that the land belonged to someone else

*Proprietary estoppel*

owner's failure to correct mistaken belief + detrimental reliance

owner's encouragement (by words and/or conduct) + detrimental reliance

In either scenario, if the one who followed into possession can prove that he has been in exclusive possession, with *animus possidendi*, for a period prescribed by the limitation statute, he will be able to arm himself with both adverse possession as well as proprietary estoppel.

*Double defence, double chance of winning?*

A litigant's chance of winning depends on two factors: (i) how he puts his case, and (ii) how his case is taken by the court. Concerning the first factor, as the Kungs' cases illustrate, there is no correlation between the number of defences raised by or on behalf of a litigant and his chance of winning. If the defences raised are incompatible in principle, or entail inconsistent facts, the proceedings will only be protracted unnecessarily. Worse still, the court may have the impression that the defendant is playing some sort of clutching-at-straws or sidetracking tricks. It is not, therefore, unwise to put all one's eggs in one basket provided that the basket is strong enough.

As to the second factor, in our adversarial system precedents have an important role to play as an indicator of the courts' attitude towards a particular line of argument. Nevertheless, the defendants in the Kungs' cases were unable to predict how the defences of adverse possession and proprietary estoppel would be treated by the courts at different levels, even though both were long-established doctrines.<sup>64</sup> When the High Court handed down its judgment, the

<sup>64</sup> For adverse possession, see for instance *Cholmondeley v Clinton* (1820) 2 Jac & W 139 and *A'Court v Cross* (1825) 2 Bing 329. For proprietary estoppel, the more well-known older cases include *Dillwyn v Llewelyn* (1862) 4 De GF & J 517 and *Ramsden v Dyson* (1866) LR 1 HL 129.

*Lam Island* appeal was still pending, so whether the notional renewal under the New Territories (Renewable Crown Leases) Ordinance would start the limitation period afresh remained uncertain. As to proprietary estoppel, despite the fact that *Taylor's Fashions* has already purified the doctrine by laying down a broader formulation based on the notion of unconscionability, the judge in *Kung Wong Sau-hin* (HC) still applied the archaic five probanda as if they were binding requirements.

In fact, somewhat unfortunately, such a tendency to revert to the old law seems to be universal. In a recent English case, *Matharu v Matharu*,<sup>65</sup> the majority of the Court of Appeal also applied the five probanda as the requirements for proprietary estoppel. The majority reasoning has been criticised by many commentators<sup>66</sup> as a retrograde step in the development of proprietary estoppel, yet such criticisms cannot guard against any further regression. Old habits die hard; it may take a long time for the judges who are used to the five-probanda approach to adapt to the change. So, in the meantime, if other defences such as adverse possession are available, a litigant may be advised to discard proprietary estoppel which should be pleaded only when all other possibilities have been exhausted.

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### A Plea for Certainty: Legal and Practical Problems in the Presentation of Non-negotiable Bills of Lading

Fundamental to all maritime transport is the performance of a carrier's obligation to deliver the cargo to the party entitled to its possession at the port of discharge. Traditionally, the carrier has honoured this obligation by ensuring delivery at the port of discharge on presentation of the bill of lading. The unique characteristic of the bill of lading is that delivery of the goods has to be made against surrender of the document. On the one hand, it protects the holder of the bill as it is a basic term of the contract of carriage that the carrier must only deliver the goods against presentation of the bill of lading. On the other hand, such delivery serves to discharge the carrier from further obligations under the contract of carriage.

<sup>65</sup> (1994) 68 P & CR 93 (CA).

<sup>66</sup> See eg Welstead [1995] Conv 61 and Battersby (1995) 7 CFLQ 59.

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