

ANALYSIS



An Unsolved Problem for Adverse Possessors of New Territories Land

Introduction

The doctrine of acquisition of title to land by adverse possession has long been criticised¹ and the policy considerations which are supposed to be the pillars of the doctrine doubted.² Nevertheless, this archaic and precarious mode of acquiring title to land receives statutory recognition in England and the Commonwealth³ and, of course, Hong Kong, which has inherited the English legal system.⁴

Just like many local statutes which originate from their predecessors in England, the Limitation Ordinance is modelled on the Limitation Act 1939 and many of its sections are derived from their English equivalents. The ordinance has been successfully applied in numerous cases to resolve disputes concerning claims of possessory title to land in different parts of the colony until recently when a series of controversial decisions concerning land in the New Territories aroused widespread social concern.

This article aims to highlight the crux of the main issue in these decisions and the shift in the judicial approach to such an issue by analysing four recent cases — *Lam Kee-on v Lam Hing*,⁵ *Tang Shu-tin v Tang Kin-kwok*,⁶ *Lam Island Development Co Ltd v Lai Moon-hung*,⁷ and *Fu Mei-ling, Mary (Administratrix of the Estate of Fu Tong, Deceased) v Yeung Kong*.⁸ The first three decisions were decided by the same judge, Mr Justice Godfrey, sitting as a High Court judge. His Lordship was also a judge in the fourth case where he sat as a member of the

¹ See eg J C W Wylie, 'Adverse Possession: An Ailing Concept?' (1965) 16 NILQ 467.

² Two aims are traditionally attributed to the doctrine of adverse possession: (a) to encourage property owners to assert their title against unlawful intruders, and to penalise those who fail to do so; and (b) to prevent hardship to persons in actual possession of land, and to protect such persons from stale claims (Law Reform Committee, 21st report, *Final Report on Limitation of Actions* (1977; Cmnd 6923), para 1.7). It has been suggested that there is a third aim, namely to ensure that a person may feel confident, after the lapse of a given period of time, that an incident which might have led to a claim against him is finally closed (*Cholmondeley v Clinton* (1820) 2 Jac & W 139). This is, in fact, no more than a corollary of the second aim. For a sceptical view of these aims, see M Dockray, 'Why Do We Need Adverse Possession?' [1985] Conv 272.

³ The English Limitation Act 1980 can be traced back to the Limitation Act 1623. Statutes in similar terms can also be found in different provinces in Canada and Australia, though the limitation periods vary from one place to another.

⁴ The first statute of limitation in Hong Kong was Ordinance No 31 of 1965. The latest amendment to the Limitation Ordinance was made in 1991 when the limitation period for recovery of land was reduced from twenty years to twelve years. See also note 12 below.

⁵ [1992] 2 HKC 317.

⁶ [1994] 2 HKC 727.

⁷ [1994] 1 HKC 613. The decision of the Court of Appeal is reported at [1994] 2 HKC 11 under the name *Lai Moon-hung v Lam Island Development Co Ltd*.

⁸ [1994] 2 HKC 1.

Court of Appeal. These cases are worth studying because in the last case his Lordship took a drastic step in overruling his own previous decisions. In the following discussion, the original and later approaches will be explained and compared after the basic facts of the cases are outlined.

Background

In all four cases, the plaintiffs, or those through whom they claim, have not been in possession or have discontinued their possession of the disputed land⁹ since the defendants and their predecessors-in-title commenced possession of the same,¹⁰ such possession being admittedly adverse¹¹ to the plaintiff or plaintiffs in each case and continuous for more than twenty years, the period fixed by the Limitation Ordinance for recovery of land.¹² Hence the plaintiffs' right of action should have been barred for a long time. Nevertheless, they initiated proceedings for recovery of their land in the early years of the present decade: Lam Kee-on on 23 July 1991, Tang Shu-tin on 6 October 1992, and Lam Island and Fu Mei-ling both on 10 June 1993. In fact, these are just a small portion of recent proceedings commenced against adverse possessors in the New Territories.¹³ One may ask: Is this pure coincidence? What accounts for such a boom of actions for recovery of land in various parts of the New Territories? Assistance may be sought from the common facts of these cases.

The plaintiffs in *Lam Kee-on*, *Tang Shu-tin* and *Fu Mei-ling* are all successors-in-title of lessees of the Crown under block Crown leases granted to their respective predecessors in 1905 for an initial term of 75 years from 1 July 1898 with a right of renewal for a further term of 24 years less three days. The block Crown lease in *Lam Island* was also granted to the original Crown lessee in 1905 for the same term with the same right of renewal, but the plaintiff in that case was a property development company which purchased the residue of the original term of the Crown lease on 19 March 1973, less than three months before its expiry date, 30 June 1973.

⁹ The disputed land is at Sha Tin and Sheung Shui in *Lam Kee-on* and *Lam Island* respectively, and at Yuen Long in both *Tang Shu-tin* and *Fu Mei-ling*.

¹⁰ Adverse possession was commenced in 1949 in both *Lam Kee-on* and *Fu Mei-ling*, in 1959 in *Tang Shu-tin*, and 'some time between 1st July 1953 and 10th June 1973' in *Lam Island* (no date was specified in this case because the precise date was held to be immaterial so long as it fell within this period).

¹¹ For an explanation of the term 'adverse possession' see *Powell v McFarlane* (1977) 38 P & CR 452, 470 per Slade J.

¹² Limitation Ordinance, s 7(2): 'No action shall be brought by any other person to recover any land after the expiration of 20 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.' The limitation period was reduced to twelve years in 1991 (see Limitation (Amendment) Ordinance 1991, s 5), but this shorter period does not apply to rights of action which accrued before 1 July 1991 and therefore is not applicable in the cases under consideration.

¹³ A list of eight such cases can be found in the judgment of *Ho Yee-ming Theresa v Chung Loi-tai* [1994] 1 HKC 618. This is a decision of another judge of the High Court and is therefore not discussed in the present article. Amongst the eight cases are *Lam Kee-on*, *Tang Shu-tin*, and *Lam Island*, but *Fu Mei-ling* is not included because it was not yet heard when *Ho Yee-ming* was decided.

In *Lam Kee-on, Tang Shu-tin, and Lam Island*, Godfrey J, sitting as a High Court judge, held that the commencement date of the further term, that is, 1 July 1973, was the starting point for computing the limitation period, and the twenty-year limitation period would not expire until 30 June 1993. Such an approach, which was first adopted by the same judge in *Lam Kee-on*, was so widely accepted that people holding land in other parts of the New Territories under Crown leases with the same right of renewal were alerted, and those of such land holders who had consulted their legal advisers tried their best to commence proceedings before 30 June 1993 to recover possession from persons in adverse possession of their land. Hence the sudden increase in the number of actions for recovery of land in the New Territories.

Nature of the problem

The defendants in all four cases based their defence on the doctrine of acquisition of title to land by adverse possession. The main issue canvassed in each case was whether the limitation period for recovery of the disputed land had run. This in turn depended upon the answer to a related question: when did the right of action accrue to the plaintiffs or their predecessors-in-title?

These are simple questions the answers to which require no more than a literal application of the relevant provisions of the Limitation Ordinance, in particular ss 8(1) and 13(1). According to these two sections, the right of action for recovery of land should have been deemed to have accrued to the plaintiffs on the date when their possession was discontinued¹⁴ and adverse possession commenced,¹⁵ and their title should have been extinguished twenty years after that date.¹⁶

However, such a straightforward approach did not win the favour of Godfrey J and other judges of the High Court, who instead treated the problem as one concerning renewal of Crown leases, and decided to solve it by applying another piece of legislation, the New Territories (Renewable Crown Leases) Ordinance, Cap 152. This approach, which may be referred to as the 'High Court approach,' was adopted by Godfrey J in the three High Court cases to be considered, namely, *Lam Kee-on, Tang Shu-tin, and Lam Island*. It is submitted

¹⁴ Section 8(1) of the Limitation Ordinance provides that the right of action shall be deemed to have accrued on the date of dispossession or discontinuance of possession. Dispossession occurs when a landowner is driven out by another, usually but not necessarily the adverse possessor against whom the action is brought (in some cases there may be more than one adverse possessor and the periods of adverse possession may then be aggregated). Dispossession and adverse possession are regarded by some as two ways of viewing the same thing. (See, eg, *Treloar v Nute* [1976] 1 WLR 1295, 1300 per Sir John Pennycuik.) Hence both s 8(1) and s 13(1) will be satisfied by establishing that exclusive possession has been assumed by the adverse possessor. Alternatively, if discontinuance of possession is alleged under s 8(1), adverse possession will have to be proved separately in order to comply with s 13(1).

¹⁵ Limitation Ordinance, s 13(1).

¹⁶ *Ibid*, s 17.

that this approach failed to resolve the dispute in these cases in a satisfactory manner and that the decision of the Court of Appeal in *Fu Mei-ling* is to be preferred.

High Court approach

The essence of the High Court approach is summarised in the following passage from Godfrey J's judgment in *Lam Kee-on*:

But for the statutory exercise of the option to renew contained in the original lease, and the statutory grant of a new lease for a term commencing immediately after the expiration of the term created by the original lease, the plaintiff would not, on 23rd July 1991, have had any cause of action against the defendant, *not because of any limitation point, but because the plaintiff's own title to and interest in the disputed land would have come to an end on 30th June 1973, when the term created by the original lease came to an end by effluxion of time [emphasis added].*

In his Lordship's opinion, the 'original lease' and 'new lease' are separate and different interests in the same piece of land and therefore the plaintiff's title should also be split into two — the 'new title' is not to be affected by the 'original title' which has already been terminated together with the 'original lease' by effluxion of time.

It was held in *Lam Kee-on* that this new title provided the plaintiff with a new right of action, which accrued on 1 July 1973 and would not be barred by virtue of s 7(2)¹⁷ of the Limitation Ordinance until 30 June 1993. Since the plaintiff issued his writ on 23 July 1991, his claim was not yet time-barred and the limitation point raised by the defendant was held to be a bad one.

Godfrey J reached such a conclusion by applying s 4(2) of the New Territories (Renewable Crown Leases) Ordinance, which was enacted in 1969 to 'make provision for the renewal of certain Crown leases of land in the New Territories.'¹⁸ According to this section, the right of renewal contained in an existing Crown lease of a lot which had been divided into sections before 1 July 1973 shall be 'deemed to have been exercised by the person entitled to that right,' and at the same time 'a new Crown lease' shall be deemed to be granted to such person. Section 4(1) is a similar deeming provision, but deals with lots which have not been so divided.

In his Lordship's opinion, the grant of this new lease had a two-fold relevance for the decision in *Lam Kee-on*: first, the *plaintiff's* right of action against the defendant was deemed to have accrued on the commencement of

¹⁷ See note 12 above.

¹⁸ See preamble to the ordinance.

this new lease, that is to say, 1 July 1973; second, the *defendant's* attempt to resist the plaintiff's claim by relying on the period of adverse possession between 1949 and 1 July 1973 was held to be unsuccessful, even though the period was longer than that prescribed by the Limitation Ordinance. The title which had already been extinguished by this period of adverse possession was conferred by virtue of the original lease on the plaintiff, but this title was held to be distinct from the 'new title' on which the present action was said to be based. Besides, this period could not be aggregated with any period commencing on 1 July 1973 to bar the plaintiff's action because, according to Godfrey J, everything should start afresh with the commencement of the new lease.

Apart from s 4(2) of the New Territories (Renewable Crown Leases) Ordinance, which was held to have the above effect on the plaintiff's claim and the defendant's plea of limitation respectively, Godfrey J also referred to s 4(4) of the same ordinance, which provides (so far as is material) as follows:

'4(4) Every new Crown lease and the land thereby deemed to be demised shall be deemed to be subject to such of the following encumbrances and interests as the land and the existing Crown lease relating thereto were subject to immediately before the 1st day of July 1973 — ...

(c) any other rights, easements, tenancies or other burdens or encumbrances of whatsoever kind or nature, except such as were created by an instrument and were not thereby expressed to continue after the 30th day of June 1973.

It is beyond dispute that certain rights are enjoyed by adverse possessors, even before the statutory period has expired.¹⁹ It is therefore not unreasonable to regard the word 'rights' in s 4(4)(c) as wide enough to include such 'rights' of adverse possessors. Godfrey J, however, holds a different view in *Lam Kee-on*. In his Lordship's opinion, 'the "rights" of a squatter against a tenant do not survive the end of the term created by the tenant's lease.' As a result, s 4(4)(c) was held to be of no assistance to the furtherance of the defendant's case.²⁰

This approach was also adopted by Godfrey J in *Tang Shu-tin* and *Lam Island*. It is interesting to note the way in which the High Court approach was nurtured in these cases. In *Tang Shu-tin*, Godfrey J quoted lengthy passages from his own speeches in *Lam Kee-on* with approval; in *Lam Island*, he reached his conclusion unaided by authority because 'there are a number of decisions of this court

¹⁹ See K Gray, *Elements of Land Law* (London: Butterworths, 2nd ed 1993), pp 290–1. This point will be dealt with in greater depth in the following discussion.

²⁰ See also *Lam Island* (note 7 above), in which Godfrey J rejected the defendants' contention that the possessory titles which they had acquired or were in the course of acquiring by 30 June 1993 were to be treated as 'rights' for the purposes of s 4(4). According to Godfrey J, 'the legislature was concerned, in s 4(4), to preserve rights which qualified existing titles, not rights, which if established, would operate to defeat those titles altogether.'

(including two of my own) consistent with the conclusion to which I have come. I do not think it necessary for me to review those decisions in this judgment.' The same approach was also adopted by other judges of the High Court in cases decided after *Lam Kee-on*.²¹ It is to be observed that by the time *Lam Island* was decided, the approach discussed above had come to be regarded by the High Court as the proper one to the issue of the running of the limitation period in respect of adverse possession in the New Territories.

Appraisal of the High Court approach

Despite the enthusiasm with which the approach described above was advocated by Godfrey J and endorsed by other judges of the High Court, it is submitted that the approach is not flawless. In fact, some of its shortcomings were admitted by Godfrey JA himself when he sat as a member of the Court of Appeal in *Fu Mei-ling*.

Before analysing this Court of Appeal decision, certain comments can be made of the High Court approach.

Plaintiffs' title: effect of renewal

It was forcefully contended by the defendants in *Lam Island* that the 'new lease' which was deemed to have been granted to the plaintiff's predecessors-in-title by virtue of s 4(2) of the New Territories (Renewable Crown Leases) Ordinance was 'not a totally new lease separate and distinct from the original lease.' Two reasons were suggested: first, the so-called 'new lease' came into existence solely because of the right of renewal contained in the original lease; second, the intention of the legislature was to postpone the expiration of the term created by the original lease.

The first reason was rejected by Godfrey J, who treated the renewal of a Crown lease as similar to the exercise of an option to renew contained in other types of lease. An English case *Rider v Ford*²² was cited in support of this proposition. As regards the intention of the legislature, his Lordship was of the opinion that the words it chose to use in s 4 were 'clear and unambiguous and operated to create a new Crown lease commencing on 1 July 1973.'

With respect, it is submitted that the English case that was referred to in *Lam Island* was not directly relevant to the issue. *Rider v Ford* was concerned with the rule against perpetuities and what was said in that case about the effect of exercising an option to renew a lease was merely obiter.²³ Besides, the lease in

²¹ To name just a few, Mayo J in *Chui Shui-on v Lam Hing* [1992] 2 HKC 317; Deputy Judge Yam in *Fortune Year Development Ltd v Mui Shu-huen* (13 July 1993, unreported); and Barnett J in *Birkenhead Properties v Leung Fai* (7 February 1994, unreported).

²² [1923] 1 Ch 541.

²³ *Ibid*, p 547 per Russell J: 'The right to renew is a right to call for a fresh lease ... Even if all the provisions in the fresh lease were the same as in the old lease it would non the less be a fresh demise, and a fresh term with fresh covenants.' Remarks to the same effect were made by Godfrey J in *Lam Island*.

that case was an ordinary lease which differed in many ways from Crown leases in Hong Kong. Hence, the reference to *Rider v Ford* was distracting and blurred the whole picture.

Furthermore, the right of renewal contained in a Crown lease²⁴ should not be construed restrictively. The fact that the total number of years (75 years followed by 24 years less three days, totalling 99 years less three days) for which the Crown lessees or their successors-in-title can enjoy the land is just three days less than that for which the New Territories is leased to the British Government²⁵ cannot be pure coincidence. It is not unreasonable to assume that the 99-year term of the lease of the New Territories was one of the considerations in determining the expiry date of block Crown leases over land in the New Territories. On that assumption, the so-called 'new lease' should be regarded as a continuation of the original lease, as was argued by the defendants in *Lam Island*. There should be one Crown lease and one single title only.

Such analysis of the right of renewal may appear inconsistent with s 4 of the New Territories (Renewable Crown Leases) Ordinance, as interpreted by the judge. With respect, it is submitted that, contrary to Godfrey J's suggestion, the reference to a 'new lease' in this section should not be taken at face value. The right to use and enjoy the land for a further term was not *granted*, but only confirmed or recognised, by this section, the purpose of which was to obviate administrative inconvenience.²⁶ Had it been intended to alter the substantive rights and liabilities of the Crown and/or Crown lessees or their successors-in-title, s 4(4)(c) would not have been included in the ordinance. It is submitted that this paragraph is designed to maintain the status quo, that is, one Crown lease and one title, as suggested above. There is such an essential link between s 4 and the existing Crown leases to which the section relates that the real meaning of the section could not be unveiled without reference to the terms of the Crown leases. Regrettably, this was not done by Godfrey J, who decided to adopt a literal approach instead.

Defendants' adverse possession: from when?

The relevant dates under the High Court approach may be represented in a diagrammatical form:

²⁴ The standard clause is in the following terms: 'Provided also, and it is hereby further agreed and declared that each lessee shall, in such cases, where the premises are demised for a term of 75 years be entitled on the expiration of the said term of 75 years to a renewed lease of the premises respectively demised to him or her for a further term of 24 years less three days without payment of any fine or premium therefor and at the rent hereinafter mentioned ...'

²⁵ Second Convention of Peking 1898.

²⁶ *Ho Yee-ming Theresa v Chung Loi-tai* (note 13 above), p 621 per Kaplan J: 'It is clear that many persons in the New Territories were entitled to avail themselves of this provision [option for renewal in the block Crown lease] and thus the New Territories (Renewable Crown Leases) Ordinance was passed, presumably to obviate the administrative inconvenience which would be caused by numerous applications for renewal of leases.'

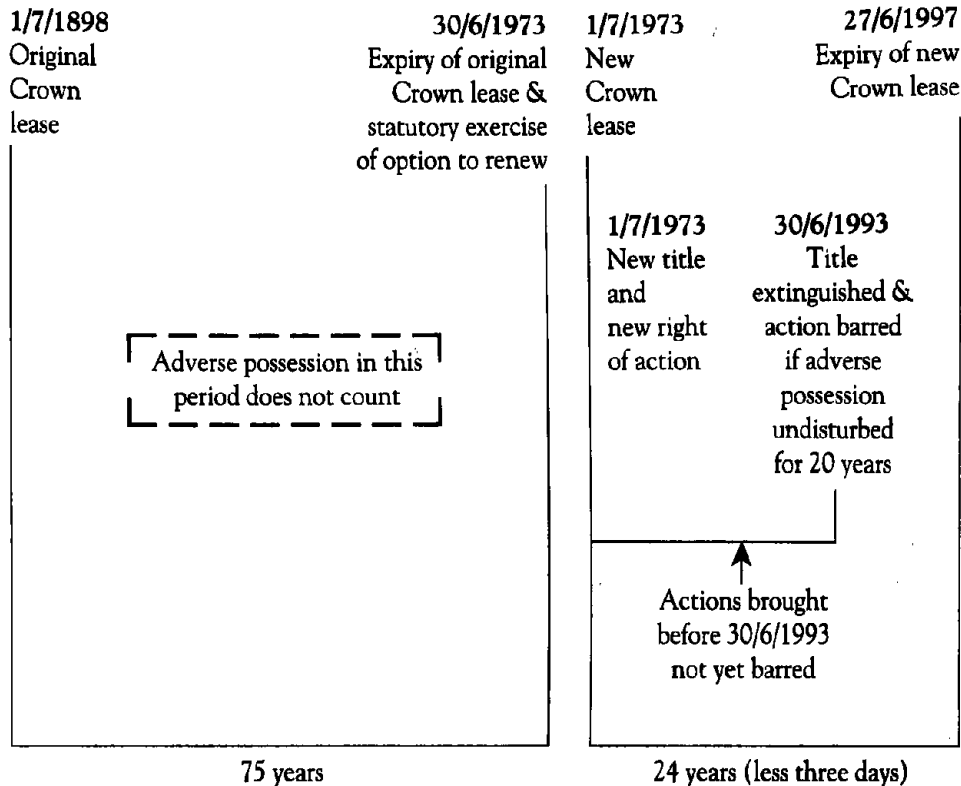


Diagram 1

It can be seen from Diagram 1 that the High Court approach reduces the adverse possessors' chances of success. However long the period of adverse possession was before 1 July 1973, according to this approach, it was to be completely disregarded in deciding whether the plaintiffs' right of action was statute-barred.

One of the objectives of the doctrine of adverse possession is to avoid hardship which might be caused to persons in long and undisturbed possession of land by an old claim to recover the property.²⁷ The High Court approach is, however, contrary to this objective so far as it pays no regard to the hardship suffered by the adverse possessors.

In *Lam Kee-on*, Godfrey J did consider the effect, or lack of effect, of this approach on the defendant in the following words:

The position of the defendant is exactly the same, no better and no worse, than it would have been if the Crown on 1 July 1973 had granted a new lease of the disputed land, not to the plaintiff, but to somebody else altogether.

²⁷ Law Reform Committee (note 2 above). See also *A'Court v Cross* (1825) 130 ER 540, 541, where Best CJ said that a Statute of Limitation is 'an act of peace. Long dormant claims have often more of cruelty than of justice in them.'

Nevertheless, what his Lordship said would not be of any comfort to the defendant in that case, or to the defendants in other cases under discussion. Hardship can take different forms. It may arise if a person, under the mistaken belief that he or she is the owner of certain land, invests time and money in improving or developing the land which turns out to be another's property. Even the ejectment of a long possessor of land gives rise to hardship, simply on the ground of disappointment of settled expectations.²⁸ The failure of his Lordship to pay attention to such hardship could result in a virtual abandonment of the doctrine of adverse possession. It is suggested that a more direct and open attack on the doctrine would be a better way to limit its scope, if that is the purpose of Godfrey J and other judges. Statutory amendment or reform is, of course, the best means to achieve such a goal.

Moreover, the suggestion of the Crown granting a new lease to someone other than the plaintiff is unrealistic because the plaintiff, as a successor-in-title of the original Crown lessee, is 'entitled to' the further term, as provided in the Crown lease itself.²⁹ An option to renew a lease is an interest in land.³⁰ If the person to whom the option is granted elects to exercise the option, the grantor will have no power to prevent him or her from doing so. In fact, the Crown has so far never tried to interfere with any purported exercise of such an option to renew.

Limitation Ordinance or New Territories (Renewable Crown Leases) Ordinance?
Another criticism that can be made of the High Court approach is that it hits the wrong target. In the High Court cases being considered, there are two separate and independent questions:³¹ (1) Have the adverse possessors acquired a possessory title to land belonging to others? (2) What interest is granted to the Crown lessees or their successors-in-title when there is a statutory renewal of the Crown lease from which they derive their title?

To answer question (1), reference must be made to the concept of relativity of title. In English and Hong Kong law, the basis of title to land is possession. Possession of land by itself gives a title to the land good against the whole world except a person with a better right to possession.³² So question (1) may be put in this way: Is the adverse possessors' title better than that of the original owners? And what is required is a comparison between these two titles.

Question (2) is entirely unrelated to question (1). It concerns the relationship between the Crown on the one hand and Crown lessees or their successors-in-title ('owners' in a loose but practical sense) on the other. The content of this

²⁸ For further illustrations, see Dockray (note 2 above), p 275.

²⁹ See note 24 above.

³⁰ *Markfaith Investment Ltd v Chiap Hua Flashlights Ltd* [1990] 2 HKLR 84.

³¹ For the sake of simplicity, the plural is used in these questions, though there is only one plaintiff and one defendant in *Lam Kee-on*.

³² *Asher v Whitlock* (1865) LR 1 QB 1.

relationship was set out in two places — the Crown lease, regarding the initial 75-year term, and s 4(4) of the New Territories (Renewable Crown Leases) Ordinance, in respect of the further term of 24 years less three days.

It is submitted that question (1) is the real issue in the cases being discussed because the dispute therein is between the *owners* and *adverse possessors*. There is no natural connection between questions (1) and (2), and hence the application of the New Territories (Renewable Crown Leases) Ordinance in these cases is, with respect, inappropriate. A more relevant ordinance is the Limitation Ordinance. The time charts in Diagram 2 show the outcome that would have been reached in the High Court cases discussed above if the relevant provisions, viz ss 7(2), 8(1), 13(1), and 17 of the Limitation Ordinance, had been applied to solve the real problem in these cases.

Had the four sections of the Limitation Ordinance been more directly and straightforwardly³³ applied in *Lam Kee-on*, *Tang Shu-tin*, and *Lam Island*, the plaintiffs' action would have been barred long before the proceedings were commenced.

Fu Mei-ling: different interpretation of 'rights' of adverse possessors

Although decisions of the High Court are not binding on itself, the epoch-making decision in *Lam Kee-on* was followed in succeeding cases of the High Court, two of which being decisions of the same judge, Godfrey J. If anything is to be done to call a halt to such a practice, it must be the task of a higher court. As Godfrey J himself remarked at the end of the judgment in *Lam Island*, the failure of adverse possessors in the New Territories to have their expectations fulfilled may have 'severe and undesirable' social consequences, and '[i]f that is so, it would clearly be desirable for these matters to be submitted for the consideration of the Court of Appeal and (possibly) the Privy Council.' The order for possession which was granted to the plaintiff in this case was therefore stayed so as to give the defendants and their legal advisers time to consider whether or not to appeal. A positive decision was made by the defendants, but before their appeal was heard by the Court of Appeal, Godfrey J had an opportunity to 'change his mind' (in his own words) when he and other members of the appellate court considered another case relating to adverse possession in the New Territories.

The facts of *Fu Mei-ling* are not dissimilar to those of the High Court cases: uninterrupted adverse possession since 1949, statutory renewal of the block Crown lease in 1973, and present action for recovery of land brought in 1993. The appellants (defendants) were, however, much more fortunate than the

³³ Only s 7(2) was mentioned in *Lam Kee-on* and *Lam Island*. Sections 7(2), 8(1), and 17 or their material parts were reproduced, but not discussed, in *Tang Shu-tin*.

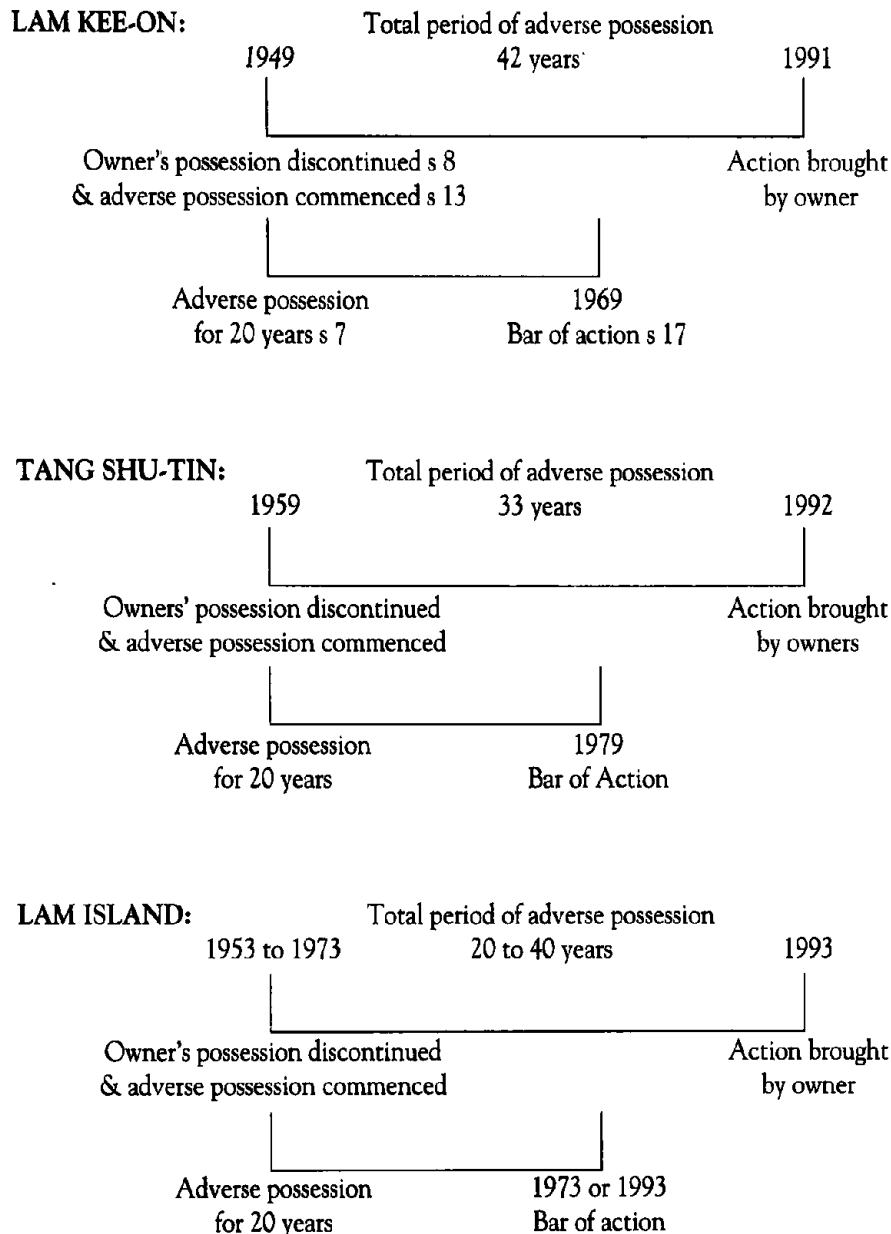


Diagram 2

defendants in previous cases because their counsel successfully persuaded members of the appellate court (including Godfrey JA) that the interpretation adopted by the High Court of s 4(4)(c) of the New Territories (Renewable Crown Leases) Ordinance in *Lam Kee-on* and *Lam Island*, which were cited and relied upon by the respondents (plaintiffs), was incorrect.

In considering whether rights alleged to have been acquired by the appellants as adverse possessors fell within the scope of s 4(4)(c), Godfrey JA accepted the 'attractive argument' of counsel for the appellants that 'the

purpose of Cap 152 [New Territories (Renewable Crown Leases) Ordinance] was to provide for a statutory renewal of certain block Crown leases so as to avoid the necessity of each lessee giving notice exercising its right of renewal,' and agreed that 'it would be an unexpected consequence if Cap 152, by its mechanism of automatic renewal, had indirectly and fortuitously deprived a considerable number of possessory title owners of their interests in the properties which they might have occupied for over the statutory period of twenty years.' The learned judge therefore held that the word 'rights' as used in s 4(4)(c) of cap 152 was wide enough to include and preserve 'rights acquired or in the course of being acquired under the Limitation Ordinance' (emphasis added), and expressly overruled all earlier decisions at first instance to the contrary.

Although the Court of Appeal was unanimous in allowing the appeal, the other two members of the court, Mortimer JA and Leonard J, did not state their rulings in terms wide enough to cover rights 'in the course of being acquired' by adverse possessors. In the words of Mortimer JA, '[i]f the defendants had not been in adverse possession of the land for twenty years before 1st July 1973, I entertain doubt whether they would have any rights under the "existing" lease to which the new lease was subject, but I prefer to express no view and to leave the matter open for future determination.'

Albeit the wide and general propositions put forward by Godfrey JA in this case may not have been necessary for deciding the appeal, they are nevertheless supported by a wealth of authorities, although none of them is referred to in the judgment. The strength and value of the rights of adverse possessors, even before the expiry of the requisite statutory period, have long been recognised.³⁴ An adverse possessor is, for instance, fully competent to assign his rights *inter vivos* or to dispose of them by will,³⁵ even before the paper owner becomes statute-barred from recovery of the land. Furthermore, the period of his possession may be 'tacked'³⁶ on to that of the next successive adverse possessor on the same piece of land so as to enable the latter to claim a possessory title by aggregating the two periods.

Not only is this approach authority-backed, it also has the advantage of directly addressing itself to the main issue of the case, namely, whether the plaintiffs' claim for possession of land is time-barred. It is to be preferred to the High Court approach discussed above because this new approach can do justice to the nature of adverse possessors' rights. Unless the doctrine of acquisition of title to land by adverse possession is to be abolished (and if this is to be done, it has to be by the legislature, of course), it should not be lightly by-passed in

³⁴ *Allen v Roughley* (1955) 94 CLR 98; *Newington v Windeyer* (1985) 3 NSWLR 555.

³⁵ *Asher v Whitlock* (note 32 above), p 6ff; *Mulcahy v Curramore Pty Ltd* [1974] 2 NSWLR 464, 476C.

³⁶ *Gray* (note 19 above), p 292. See also *Mount Carmel Investments Ltd v Peter Thurlow Ltd* [1988] 1 WLR 1078, 1087G-8B; *Mulcahy v Curramore* (note 35 above), p 476D-E.

the resolution of disputes between landowners and people in unauthorised possession of the former's land.

The substitution of this approach for the one adopted by the High Court in earlier decisions should therefore be applauded. When the decision of the Court of Appeal in *Fu Mei-ling* was made known to the public, it gave new hope to people in adverse possession of land in the New Territories. Among them were the defendants in *Lam Island*, whose appeal was being considered by Penlington JA and Liu and Keith JJ when three other members of the appellate court allowed the appeal in *Fu Mei-ling*.

However, the hope of the appellants in *Lam Island* turned out to be false because the differently composed Court of Appeal declined to follow the preceding decision of the same court, distinguishing *Fu Mei-ling* on the ground that appellants in the present case were unable to show that they had completed the twenty-year adverse possession of the disputed land *before* 1 July 1973. Instead, English authorities such as *Rider v Ford*³⁷ and *Fairweather v St Marylebone Company Limited*,³⁸ and s 4 of the New Territories (Renewable Crown Leases) Ordinance were regarded as directly relevant and were followed or applied by the Court of Appeal in *Lam Island*.

The differences between the lease in *Rider v Ford* and Crown leases in Hong Kong have already been considered. The House of Lords decision in *Fairweather*, the other English decision that was followed by the Court of Appeal, is notorious and even worse as an authority. The person who was dispossessed in that case was a fixed-term tenant of the disputed land and the statutory period for the tenant to bring action against the adverse possessor had already expired. Nevertheless, the lease had not yet expired and the tenant surrendered, or purported to surrender, the lease to the freeholder. The issue was whether the latter had a right to claim possession from the adverse possessor immediately after the surrender or whether he had to wait until the lease was terminated by effluxion of time.

The majority of the Law Lords held that the surrender was effective and that the lease had merged in the freehold. As a result, the freeholder had a right to claim immediate possession. Such a view was not shared by Lord Morris, who dissented,³⁹ and has been relentlessly criticised by some academic writers.⁴⁰ Even Godfrey J himself was aware of the criticisms directed to this case.⁴¹ It is therefore submitted that the authority of *Fairweather* is doubtful and that the

³⁷ Note 22 above.

³⁸ [1963] AC 510.

³⁹ The principle *nemo dat quod non habet* was regarded by Lord Morris as relevant: the tenant's right to immediate possession had already disappeared, so he had nothing to surrender to the freeholder.

⁴⁰ See eg H W R Wade, 'Landlord, Tenant and Squatter' (1962) 78 LQR 541.

⁴¹ In *Lam Kee-on* his Lordship referred to *Fairweather* and the criticism of the majority view, but did not regard such criticism as relevant to anything he had to decide in *Lam Kee-on* where the lease was not brought to a premature end by surrender but ran its full course.

majority view is not a safe foundation⁴² upon which to rest the decision of the Court of Appeal in *Lam Island*.

Another criticism which can be made of the decision of the Court of Appeal in *Lam Island* is that the New Territories (Renewable Crown Leases) Ordinance was applied by the Court of Appeal without any attempt to clarify the relationship between this ordinance and the Limitation Ordinance. Further, the court declined, without any good cause, to follow the interpretation of s 4(4)(c) in *Fu Mei-ling*.

It is respectfully submitted that the Court of Appeal in *Lam Island* made the same mistake as Godfrey J made in the three High Court cases. It also failed to provide any satisfactory explanation for its refusal to follow an earlier decision of another division of the same court.

Problem unsolved

The inharmonious judgments of the appellate court (*Fu Mei-ling* and *Lam Island*) only aggravate the position. In the hope of overturning the unfavourable decision of the Court of Appeal, the defendants in *Lam Island* have already launched a further appeal to the Privy Council. It is hoped that the prolonged controversy may soon be resolved.

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Deeds of Gift and Title to Immovable Property

Introduction

The 1992 decisions in *Ample Treasure Limited v Eight Gain Investments Limited*¹ (*Ample Treasure*) and *Lee Siu-man v Chu Chi-wing*² highlight the problems caused by the estate duty charge in relation to immovable property which has been the subject of a deed of gift. This article discusses this and other problems which a title investigator must consider whenever a deed of gift appears in the title chain. First, the article explains the conveyancing problems that are created by the estate duty charge. Second, it explains the effect of s 47 of the Bankruptcy Ordinance³ on gifts of immovable property. There is a brief

⁴² There are, of course, valuable observations on other matters in *Fairweather*. For instance, what Lord Radcliffe said about the negative effect of the extinguishment of the original owner's title has often been quoted.

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¹ (1992) HCt, MP No 973 of 1992.

² (1992) HCt, MP No 91 of 1992.