



RIGHTS OF WAY AND LONG USER: THE ENGLISH RESTRICTION AND THE IRISH RULE

■
*Malcolm Merry**

Is it possible in Hong Kong to acquire a right of way by long, open and uninterrupted usage? One might have expected this question, fundamental and of practical importance, to have been settled authoritatively. The answer has instead divided Hong Kong's judges. Although the weight of recent opinion seems to be in favour of allowing such a right, the basis of doing so is not at all clear. It will be the gravamen of this article that the courts should no longer entertain any doubts upon the matter. Acquisition of such rights by usage is possible. The basis for recognition of such rights will be suggested and is, perhaps surprisingly, straightforward, but it is not the basis that has sometimes been suggested.

Introduction – the Practical Problem

The higher courts of Hong Kong have yet to decide whether it is possible to acquire a right of way by long, open and interrupted usage. The reason for this must be attributable at least in part to the method of landholding and the type of premises prevalent in this jurisdiction. The main type of private premises is a flat (domestic or otherwise) in a building in multiple occupation, usually of many storeys. The legal arrangement which prevails for this style of premises is the tenancy in common, with each flat-owner having an undivided share in the land, that land being held from the government on long lease. The owners' right to exclusive possession of their respective flats is secured by agreement between the owners through deed,¹ the covenants running with the land to bind successors. The parts of the building and land which are for common use are stipulated in the deed or, failing that, by legislation.² Those parts include passages and accesses, so rights of way within the building and the land are secured not by easement but by common ownership³ and binding covenant (which may be described as quasi-easements

* Barrister; Associate Professor, Faculty of Law, University of Hong Kong. The author is grateful for the comments upon drafts of this article by Professor Hudson Janisch, Mr Fergal Sweeney and an anonymous referee.

¹ The deed is usually entitled a Deed of Mutual Covenant(s).

² Building Management Ordinance, Cap 344, s 2 and first schedule.

³ *Chu Shu Choi v Merrilong Dyeing Works Ltd* [1990] 1 HKLR 385, CA.

or even loosely as easements⁴). Rights of access to the building usually will have been secured by the design of the building by the developer, the buildings or their land commonly abutting onto a public street or road.

This arrangement predominates in the built-up areas: the urban parts of Kowloon and Hong Kong Island and the new towns which were developed in parts of the New Territories during the final three decades of the twentieth century. A different type of building development took place in other areas of the New Territories during those years, however, and it has brought the acquisition of rights of way by long use into focus. This is the new small house, the building of which in and around New Territories' villages became encouraged by government policy.⁵

That policy permits an indigenous male from a recognised village the grant of a plot of land from the government at a reduced price in order to build a house of stipulated maximum dimensions free of normal building controls.⁶ The grant is made on the condition that the land is not sold by the villager within a certain time, although that restriction may be lifted on payment of a premium. The villager has to arrange and pay for construction of the house, which of course may be an obstacle. Once the policy had been established it did not take long for builders and businessmen to see an opportunity: with the help of their lawyers, they arranged with the villager to construct the house on his behalf and then to sell it or part of it, the buyer providing the money to meet the construction costs (plus builders' and agent's profit) and the premium for waiver of the restriction upon alienation.

So it was that during the last 30 or so years there has been a boom in the construction of houses of three stories, 27 feet in height with 700 square feet of floor space, in the rural New Territories.⁷ These may be clustered in designated "expansion areas" on the periphery of a village, or erected on odd, individual lots, or gathered together by a developer and surrounded by

⁴ As they were by the Court of Final Appeal in *Jumbo King v Faithful Properties* (1999) 2 HKCFAR 279; [1999] 3 HKLRD 757; [1999] 4 HKC 707.

⁵ The Small House Policy, instituted in 1972, for which see Lands Department, "The New Territories Small House Policy – How to Apply for a Small Home Grant" (2001); Hayes, "The Great Difference, Hong Kong's New Territories and Its People 1898–2004" (Hong Kong University Press, 2006), pp 108–110; and *Treasure Spot Finance Co Ltd v Director of Lands* HCLAL No 72 of 2004. The government maintains a list of some 636 villages to which the policy applies. To be indigenous, a villager must be descended through the male line from a resident of the village in 1898: he need not have been born in the village or even live there, provided that he declares that he intends to return to it.

⁶ The dimensions are in the schedule to the Buildings Ordinance (Application to the New Territories) Ordinance, Cap 121. Also a villager may build on land that he already owns within the village environs. Outside recognised villages, small houses may be erected by anyone.

⁷ It has been estimated that by 2002 there were more than 28,000 such houses with another 14,000 applications outstanding: Civic Exchange, "Rethinking the Small House Policy" (2003), pp 13 and 14.

walls and gates as a discrete estate. There has not always been concomitant increment in minor roads leading to these houses, however.

Village houses have not been the only productive use to which formerly agricultural land has been put. The opening of China, which began in 1979, and the associated expansion of Hong Kong's container port and trunk road connections were soon followed by the discovery that land held under block Crown lease (that is, almost all private rural land) was not restricted by the terms of that lease to use for agricultural purposes.⁸ This coincidence, and the absence of planning legislation, led to the haphazard proliferation of container storage yards and lorry parking lots in the northern New Territories. Away from the border, conversion to open storage was concentrated more upon building materials and equipment, old cars and metal scrap.

These developments all require access, including vehicular access, which may impinge upon somebody else's land. They also require security, which leads to the erection of fences, which may impede a route previously enjoyed by others. So disputes have arisen and will continue to arise in which one party relies upon his long use of a way.

The Legal Problems

The principal obstacle which has been perceived to allowing acquisition of rights of way by usage is the rule of English common law that a limited owner may not prescribe for an easement. Only the owner of the fee simple may do so. Since, as every second-year law student knows, virtually all the land in Hong Kong is leasehold, granted by the government to "owners" on long leases or to tenants on short-term tenancies, application of this rule would mean that in the Hong Kong Special Administrative Region (SAR) no one could acquire an easement simply by length of user. The rule has a counterpart: that an easement cannot be prescribed for against a limited owner; which of course makes application of the law of acquisition of easements by prescription doubly impossible. These two rules together may be called "the English restriction".⁹

The English restriction is only the greatest of a number of problems. Another, just as basic, is that prescription at common law requires the use to have continued from time immemorial, which is more than 800 years ago.¹⁰ The common law began in Hong Kong only in 1843, and in the New

⁸ *Attorney General v Malhado Investments Ltd* [1983] HKLR 327; see also *Winfat Enterprise (HK) Co Ltd v Attorney General* [1985] 1 AC 783; [1988] 1 HKLR 5 (PC) and *Niceboard Development Ltd v China Light & Power Co Ltd* [1994] HKDCLR 69, 93.

⁹ Reyes J's shortform in *Kong Sau Ching v Kong Pak Yan* [2004] 1 HKC 119.

¹⁰ The accession of King Richard I of England in 1189.

Territories in 1900, so it might be argued that the time of legal memory there is those years, but Hong Kong courts have assumed that the relevant date is the same as in England. Proof going back to 1843 and to 1900 is unlikely and proof from the twelfth century is certainly impractical. The latter difficulty was overcome in England by the provisions of the Prescription Act 1832 which in effect shortened the period for proof of use of a way to 20 years. The salient parts of this “strange and perplexing statute”¹¹ were specifically applied to Hong Kong, notwithstanding its leasehold system of landholding, by the Application of English Law Ordinance (AELO) in 1967.¹² But, and here is the next problem, the Prescription Act no longer applies in Hong Kong. It was swept away in June 1997 along with the AELO.¹³

That is not to say that the Prescription Act is entirely irrelevant, for there is a concern as to whether the Act replaced, or merely supplemented, the common law concerning acquisition of easements by long usage. If it replaced the common law, no acquisition would have been possible except under its terms, at least during the period that it applied in Hong Kong. Now that the Prescription Act has gone, is the common law resurrected, if not by the disapplication of the Act then by the enactment of the Basic Law which says that the common law shall continue to apply here?¹⁴ Or did application of the Act abolish common law prescription and the disapplication of the Act abolish statutory prescription without restoring the pre-existing common law?

Assuming that the common law is restored, or never ceased to apply, what is the scope of the relevant common law? Is it confined to common law prescription strictly so-called (ie use from time immemorial giving rise to a presumption of grant), or does it also embrace lost modern grant? The latter is the doctrine under which the court deduces from long user that an actual grant must have been made in recent times.¹⁵ Perhaps the doctrine is not strictly part of common law prescription but is nevertheless part of the common law of acquisition of easements and so is applicable in Hong Kong. Or if it is not part of the common law, it is nevertheless a recognised manner of creating an easement, being a species of express grant.

Then there is the question of the nature of the common law. Before July 1997 it was English common law that applied in Hong Kong. Now, under

¹¹ Cockburn CJ in *Angus v Dalton* (1877) 3 QBD 85 at 118.

¹² AELO, Cap 88, s 4(1) and schedule, item 60, made ss 1–8 inclusive of the 1832 Act, as amended by the Statute Law Revision Act 1888 (No 2) applicable to Hong Kong.

¹³ That at least is the prevailing judicial view as to the effect of the Decision of the Standing Committee of the National People’s Congress on Treatment of the Laws Previously in Force in Hong Kong in accordance with Art 160 of the Basic Law, 27.2.97.

¹⁴ Basic Law, Art 8; also Hong Kong Reunification Ordinance, Cap 2600, s 7.

¹⁵ The history and development of lost modern grant is dealt with later in this article.

the Basic Law, it is the common law in general, which opens up the possibility of applying, or adapting, rules from other jurisdictions. As this article will show, that is particularly pertinent here.

This is separate from, although associated with, another complication which is that prior to July 1997 the stipulation that English law was to apply in Hong Kong was qualified by a proviso that it was to do so only in so far as it “may be applicable to the circumstances of Hong Kong or its inhabitants and subject to such modifications thereto as circumstances may require”.¹⁶ So it would have been possible not to apply aspects of English law, such as the restriction concerning acquisition of easements, if local conditions dictated this.

Finally, there is the allure of necessity. It is a natural reaction for an owner who has enjoyed access to and from his or her land over the land of another and whose land is otherwise landlocked to say that it is necessary for the owner to have a right of way. The trouble with this is that an easement of necessity can arise only as a term implied into an actual grant. It therefore requires that the dominant land served by the easement has at some stage been in common ownership with the servient land over which the easement runs and that there has been a deed by the common owner granting the dominant land to the owner of that land or the owner’s predecessors.¹⁷ The implied easement binds the common owner and also the successors-in-title to the servient land. To put the point another way, there can be no easement of necessity against a stranger. This is of course a severe limitation, for in practice there will rarely have been a common owner of the two pieces of land, other than the government.¹⁸

A similar restriction inhibits use of the rule in *Wheeldon v Burrows*,¹⁹ the doctrine that holds that upon the grant of part of a tenement there passes to the grantee as easements all quasi-easements over the land retained which were continuous and apparent or were necessary to the reasonable enjoyment of the land granted and which, in either instance, had been and were at the time of the grant, used by the grantor for the benefit of the part granted. This rule is wider than the law of easements of necessity since with the latter the easement must be necessary, rather than merely reasonable or convenient or continuous and apparent, but the rule still suffers from the requirements of a grant and of common ownership. It has been suggested²⁰ that the rule provides the means by which the court may do justice in cases

¹⁶ AELO, s 3.

¹⁷ Halsbury’s Laws of Hong Kong, Vol 16, para 230.0582.

¹⁸ But perhaps the government constitutes the common owner for purposes of easements of necessity.

¹⁹ *Wheeldon v Burrows* (1879) 12 Ch D 31, applied in *Loyal Luck Trading Ltd v Tam Chun Wah* [2007] 4 HKC 468.

²⁰ By Jerome Chan DJ sitting as a deputy judge in *Tang Tim Fat v Chan Fok Kei* [1992] 2 HKC 623.

of long user of a way, the requirement of a grant by a common owner being met by the government grant, so that the effects of the English restriction can be circumvented. It is by no means clear that this is correct, however.²¹

All these problems are nevertheless peripheral to the central question of whether or not lessees may prescribe for an easement. If they may not, the complications outlined above do not arise. This article will now return to that central question.

The Bar to Acquisition By and Against Limited Owners

The rule that a limited owner may not prescribe for an easement has been judicially criticised²² and has received disapproval from textbook writers.²³ Nevertheless, it is entrenched in English law. How did this come about and what is the justification for it?

The rule is generally taken to stem from *Bright v Walker* in 1834.²⁴ Bright held land, comprising a wharf on the River Severn with two meadows, on lease from the Bishop of Worcester. His neighbour, Walker, was a tenant from the same landlord of land lying between Bright's meadows and a public road. Bright had used a route to that road over Walker's land but Walker built a gate barring the route. Bright claimed a right of way. It was found as a fact by the jury that the landlord had not granted any such right but that Bright and his predecessor-in-title (who had built a brick works on one of the meadows) had actually used the way without interruption for more than 20 years. Bright claimed that, although the landlord might not be bound, his tenant Walker was bound under the then new Prescription Act 1832, by virtue of the 20 years' enjoyment. The Court of Exchequer concluded that no prescriptive title could be obtained by a user which did not bind the freehold, although it expressed "considerable difficulty" in coming to that conclusion. Since the jury had ruled out an actual grant, the question of acquisition of a right of way under the law of lost modern grant did not arise. The decision was entirely upon the question of acquisition of a right of way under the Act, that is to say by prescription through use since time immemorial, reduced to 20 years by section 2 of the Act. However, Parke B observed that before the Act possession for 20 years would have been

²¹ See further below.

²² For example, by Godfrey and Mortimer JJA in *Cheung Yeung Hung v Law Man Ha* [1997] 2 HKC 406 at 409D and 413F.

²³ Megarry and Wade, *The Law of Real Property* (Sweet and Maxwell, 6th edn, 2003), p 1123; Sparkes, *A New Land Law* (Hart Publishing, 1999), p 661; Roger Smith, *Property Law* (Longman, 4th edn, 2003), pp 520–521.

²⁴ *Bright v Walker* (1834) 1 Cr M&R 211.

evidence to support a claim by a non-existing grant from one tenant to the other but that since the Act such a right was not given.²⁵ This observation, which if correct would mean that the law of lost modern grant had been abolished by the Act, was *obiter dictum* and was a misinterpretation of the statute which contains no provision abolishing or (on one view) even amending the law of lost modern grant.²⁶

The restriction concerning lessees was nevertheless referred to without criticism by the English Court of Appeal 45 years later in *Sturgess v Bridgman*²⁷ and the approach in *Bright v Walker* was adopted by the English Court of Appeal a further 14 years later in *Wheaton v Maple & Co.*²⁸ The plaintiff in the latter case complained about interruption of his light by the erection of buildings on neighbouring land. That land was held by the defendants on lease from the Crown. Strictly, the decision concerned section 3 of the Prescription Act 1832: it was held that the section did not bind the Crown as a reversioner. In his judgment Lindley LJ observed, however, that the whole theory of prescription at common law was against presuming a grant or covenant not to interrupt by or with anyone except an owner in fee.²⁹ He explained that a right claimed by prescription must be made as appendant or appurtenant to land, and not as annexed to it for a term of years.

It is unclear whether, when referring to prescription, Lindley LJ meant user since time immemorial alone or was including user sufficient to give rise to a presumption of lost grant. If the former, his remarks are unexceptional since it can readily be appreciated that a claim based on use going back to 1189 must affect the freeholder. But if he meant to include lost grant, the matter is contentious. It seems that he may have meant the former because he remarked as a prelude to dealing separately with prescription at common law: "I am not aware of any authority for presuming, as a matter of law, a lost grant by a lessee for years in the case of ordinary easements ... and I am certainly not prepared to introduce another fiction to support a claim for another prescriptive right".³⁰ The position of this dictum implies that he regarded lost grant as not part of prescription at common law. But the content of the dictum suggests that he considered the law of lost grant inapplicable to lessees anyway. There was in fact authority in Ireland, of which Lindley LJ was evidently unaware, that lost grant was indeed

²⁵ *Ibid.*, at 221.

²⁶ Cockburn CJ in *Angus v Dalton* (1877) 3 QBD at 118 and 119; Mellish LJ in *Aynsley v Glover* LR 10 Ch 285; *Hanna v Pollock* [1900] 2 IR 664 at 704.

²⁷ (1879) 11 ChD 852; Jessel MR at 855–856 called it a technical ground.

²⁸ [1893] 3 Ch 48.

²⁹ *Ibid.*, at 63

³⁰ *Ibid.*; but it is possible to interpret the paragraph as dealing collectively with lost grant and user since time immemorial, both being types of prescription at common law in the wide sense.

applicable to lessees and *Bright v Walker* itself is authority that lost grant was capable of applying to lessees before the Act.

Lindley LJ's *obiter dicta*, which were relied upon heavily in one of the Hong Kong cases,³¹ formed the basis of the decision of the same court in *Kilgour v Gaddes*³² early in the twentieth century that no form of prescription applies between lessees of the same lessor.³³ The parties to that case were each fixed-term tenants of the same landlord in Cumberland, northern England. Gaddes was accustomed to going onto Kilgour's land to take water from a pump. When Kilgour sued him for trespass, Gaddes claimed a prescriptive title to use the pump arising from 40 years' user, under section 2 of the Prescription Act 1832. Collins MR said that it appeared to him that a right under section 2 could not be acquired merely by one tenant as against another tenant but must be acquired by the owner of the fee of the one (ie dominant) tenement as against the owner of the fee of the other tenement.³⁴

The justification for "the rule in *Kilgour v Gaddes*" is that the theory of prescription presumes that a permanent right has been properly created at some unspecified time in the past. Since it is a permanent right, the fee simple owner will be bound by it and so must have been in a position to contest the user for it to be valid. If the owner has leased the land to a tenant who permits the long user by another, the fee simple owner, not being in actual possession and maybe even not knowing of the other's user, cannot prevent the user.³⁵

A variation on this theme is that there must be a dominant and a servient tenement for an easement to be possible and that where the estates in fee simple are both in common ownership, there is unity of possession and therefore only one tenement. Consequently, tenants of the owner cannot prescribe one against the other for easements.³⁶ This applies where the tenants are both lessees of the same landlord but not where the tenements have separate landlords. Since in Hong Kong there is only one "landlord" (the government) of all tenements, this justification would always apply.

Another explanation is that lessees could not prescribe at common law because in 1189, the year from which the putative grant must have run,

³¹ *Tang Tim Fat v Chan Fok Kei* [1992] 2 HKC 623 at 630.

³² [1904] 1 KB 457.

³³ The rule was followed in subsequent cases: *Derry v Saunders* [1919] 1 KB 223; *Cory v Davies* [1923] 2 Ch 95, 101.

³⁴ [1904] 1 KB 457 at 460.

³⁵ If the prescription period began before the lease was granted and whilst the freeholder was in possession, however, prescription is possible because the freeholder had the opportunity to object to the use.

³⁶ Godfrey J in *Pang Kwan Lung v Ma Choi Hop* [1989] 2 HKC 449; Lord Cairns in *Gayford v Moffatt* (1868) 4 Ch App 135; Collins MR in *Kilgour v Gaddes* [1904] 1 KB 457 at 460–461.

lessees were not recognised as having an interest in land.³⁷ Moreover, the tenancy in fee (or fee simple) was the only continuing estate and accordingly was the only one sufficiently permanent to have existed at the beginning of common law and the dawn of legal memory in 1189 and therefore to support a prescriptive right.³⁸

These justifications make three assumptions. First, that easements deriving from long user arise only by virtue of use since time immemorial. Second, that the easement to be deduced is permanent and not for a term of years. Third, that the unity of possession necessary to constitute a tenement means possession as a freeholder or sovereign. None of these assumptions is inevitable, however, and each rather begs the question.

Nevertheless, these justifications and the English restriction to which they give rise have been readily accepted. So it was that when, in the early 1950s, the owner of a building on the corner of Duddell Street in the central district of Hong Kong sought to prevent the erection of a new, replacement building next to it on grounds that the new building would obstruct the light to his building (both buildings being held on long fixed terms from the government), the Full Court stated, “The easement of light ... is an absolute and indefeasible right and cannot be acquired for a term of years by prescription”.³⁹ That would seem to be conclusive, but was it?

The Modern Hong Kong Cases

The first decision in which it was suggested that it might be possible for one leaseholder to prescribe for an easement against another was *Pang Kwan Lung v Ma Choi Hop*.⁴⁰ It could be no more than a suggestion of a possibility because the decision was made on an application for an interlocutory injunction, as cases about rights of way often are. The applicant plaintiffs were required to show at that stage as a pre-requisite for such an injunction only that they had an arguable case.⁴¹ Their land was at Pang Ka Tsuen, a village to the north of Kam Tin Road in the Pat Heung area of the New Territories. The way from their land to the road had been used for many years. Originally it was a dyke. In 1966 the way had been made up as part of a village development scheme with money and materials provided by the

³⁷ Kiralfy (1948) 13 Conv (NS) 104, 107.

³⁸ *Hanna v Pollock* [1900] 2 IR 664 at 693 and 701.

³⁹ *Foo Kam Shing v Local Printing Press Ltd* (1953) 37 HKLR 201; hereinafter *Foo Kam Shing*. See also *Kneebone* (1977) 7 HKLJ 373 (casenote).

⁴⁰ [1989] 2 HKC 449; hereinafter *Pang Kwan Lung*.

⁴¹ More exactly, that there is a serious issue to be tried: see RHC, Order 29, r 1, and *American Cyanamid Ltd v Ethicon Ltd* [1975] AC 796.

District Office. However, the way crossed land, adjoining the road, which belonged to the defendant who had let that land to a tenant who wished to operate a container yard there. The tenant fenced off the land, and thus the entrance to the way, from Kam Tin Road. Faced no doubt with protests, the tenant removed the fence. The plaintiffs applied for an injunction against re-erection of the fence pending trial. They said that there was a public right of way and also a private right of way by prescription. They also relied upon proprietary estoppel.⁴² Godfrey J said that there was an arguable case on all three of these causes of action. There was a factual basis for a claim for an easement by prescription, if not from time immemorial then under the doctrine of lost modern grant and under the Prescription Act so far as applicable to Hong Kong. The judge pointed out that the Application of English Law Ordinance provided that the common law shall be in force in Hong Kong subject to such modifications as the circumstances of Hong Kong may require and also that the Ordinance applied the Prescription Act 1832 to Hong Kong, therefore it must have been intended that the Act should have some effect here despite the English restriction. He added that all the common law principles relating to prescription may also apply.

This point “of difficulty and of importance”⁴³ was therefore left open to be decided at trial. The trial came in a different case, *Tang Tim Fat v Chan Fok Kei*,⁴⁴ which fell to the then Jerome Chan DJ, sitting as a deputy high court judge, to decide. The plaintiffs and the defendants were owners (Crown lessees) and their tenants of neighbouring lots near Yuen Long in the north-west New Territories. The plaintiffs claimed that the defendants had trespassed by vehicle over a strip at the south-western corner of the plaintiffs’ land (pedestrian way was conceded). The defendants had traversed the strip for many years. They asserted a right of way for vehicular traffic by prescription or by presumption of a lost modern grant, an easement by necessity and also dedication of the way to the public. The evidence accepted by the judge was that the way had been used on foot and by vehicle without permission, force, interruption and secrecy and as if by right from at least 1961 until 1988.

Prescription at common law by user since time immemorial was out of the question, the judge held, “in view of the history of the territory, and also the fact that British rule only commenced less than 100 years ago” in the New Territories.⁴⁵ As for the Prescription Act 1832, the judge accepted that the Act applied to Hong Kong with modifications but said that

⁴² Custom was pleaded as well.

⁴³ *Pang Kwan Lung* at 451H. In *Re Anthony Ralph Porten* QC HCMP No 466 of 2005, Ma CJHC called it an “interesting and important” point.

⁴⁴ [1992] 2 HKC 623; hereinafter *Tang Tim Fat*.

⁴⁵ *Ibid.*, at 629G.

these modifications had no bearing on the present case. He felt that “the mere fact that as a matter of history only one piece of land in Hong Kong was granted by the Crown in fee simple was not sufficient to justify such a drastic departure from the common law under the disguise⁴⁶ of modification permissible by the Application of English Law Ordinance”.⁴⁷ Relying on *Wheaton v Maple* the judge held that the doctrine of lost grant can exist between fee simple owners only. His attention was drawn to cases from Ireland which indicated the contrary but he “was not convinced of the reasons or necessity for the divergence”.⁴⁸ Nor was he convinced that it would be appropriate to modify the English common law to allow the presumption of a lost modern grant to arise between lessees of a common landlord, declaring that such “an extended presumption violates the very foundation of the doctrine itself, ie the fiction of a servient owner making a grant to a dominant owner”.⁴⁹ However, the judge thought that a solution was at hand: the rule in *Wheeldon v Burrows* which would have applied upon the statutory renewal of New Territories leases in 1973. But that rule had not been relied upon, so the defendants’ claim to a right of way by vehicles failed.

The judge went on to express the view that in reality it was difficult to see how “such a matter” (presumably meaning the need for a vehicular right of way) could ever become a real problem. This was because all Crown leases in the New Territories were for agricultural use and could be used profitably for other uses with special permission of the Crown only, so it was difficult to see how a servient lessee would not readily consent to a modification of the right of way for agricultural use over his land to more profitable uses if he himself was seeking a waiver for similar profitable uses for his own land.

There are considerable difficulties with the reasoning in this part of the *Tang Tim Fat* judgment,⁵⁰ certain of which will be alluded to later. Judge Jerome Chan’s sentiment that there was no real problem has not been borne out by events. This is not just because he was incorrect in his assertion that all New Territories land under government lease is restricted to agricultural use⁵¹ and in his belief that servient owners would act generously to their neighbours, but also because the problem was not one of modification of the right of way. Rather, the problem was of the very existence of a right.

⁴⁶ Guise?

⁴⁷ *Ibid.*, at 631I–632A.

⁴⁸ *Ibid* at 631H.

⁴⁹ *Ibid* at 632H.

⁵⁰ See Reyes J in *Kong Sau Ching v Kong Pak Yuen* [2004] 1 HKC 119 at 150D–151A.

⁵¹ See *Attorney General v Melhado Investments Ltd* [1983] HKLR 327; also *Winfat Enterprise (HK) Co Ltd v Attorney General* [1988] 1 AC 733, [1988] 1 HKLR 5, PC.

The reality of the problem of rights of way in the New Territories, and their economic importance, is evident from the facts of *Cheung Yeung Hung v Law Man Ha*.⁵² This was an appeal, heard in early June 1997, by the plaintiffs against the refusal to grant an interlocutory injunction to prevent obstruction of a road leading to land occupied by them⁵³ at Ku Tung, a rural district to the west of Sheung Shui in the northern New Territories. The road went across land rented by the defendants from the government and was the only means of access to the public road. The plaintiffs' case was that they had used the road for more than 20 years (since about 1951) and had acquired an easement of way by prescription.⁵⁴ The defendants said that this was not possible because the plaintiffs had no estate in fee simple. The Court of Appeal held that the plaintiffs' claim to an easement by prescription was arguable.

The principal judgment was given by Godfrey JA, who eight years earlier in *Pang Kwan Leung* had held as a judge of first instance that the point was arguable.⁵⁵ He observed that although it was not possible in England for a limited owner to prescribe for an easement against another limited owner, it was possible in Ireland and that the Irish rule was more rational for there was no good reason that prescription should be allowed against land occupied by an owner in fee simple but not against land occupied by a limited owner. The Irish courts had been mindful that different conditions affected land tenure there than in England; in Hong Kong conditions were similarly materially different from England since all land in private ownership was held by Crown lessees or those claiming under them. Godfrey JA said that the concept of prescription, if limited to prescription by and against owners in fee simple, would be, to all intents and purposes, completely meaningless; yet the AELO provided that the law of England, including the Prescription Act 1832, should be enforced in Hong Kong, subject to modification as Hong Kong's circumstances may require.⁵⁶ The views of Mortimer JA, the only other judge to deal expressly with the point, were to similar effect. He felt that although the English rule had the attraction of certainty, modification of it to allow leaseholders to acquire rights from long user would be beneficial. The different law had caused no disarray in Ireland and was arguably more sensible and practical.⁵⁷

⁵² [1997] 2 HKC 406; hereinafter *Cheung Yeung Hung*.

⁵³ As squatters: whether a trespasser could acquire a right of way by long usage was a separate issue.

⁵⁴ Proprietary estoppel was also relied upon.

⁵⁵ See above.

⁵⁶ [1997] 2 HKC 406 at 409. The AELO, s 8, actually referred to the common law but s 3 of the Interpretation and General Clauses Ordinance defined this as the common law of England.

⁵⁷ *Ibid.*, at 413–414.

How did the Court of Appeal deal with the obstacles of *Tang Tim Fat* and of *Foo Kam Shing*,⁵⁸ the Full Court decision on the right to light at Duddell Street mentioned earlier? *Tang Tim Fat* was dismissed by Godfrey JA as not binding and its correctness was doubted by Mortimer JA. *Foo Kam Shing* was explained as not being binding; in addition, it was distinguished on the basis that the AELO had not been in force at the time of that decision.

However, a few weeks after the Court of Appeal's ruling, the AELO ceased to be law. That was not the only change of potential relevance to prescriptive easements brought about by the handover. The Basic Law came into effect, Article 8 of which provides that the law previously in force, including the common law, shall be maintained.⁵⁹ The land of Hong Kong became vested in the State, with the government of the SAR its manager.⁶⁰ So legal circumstances had changed when the next claim to a prescriptive right of way reached court in the autumn of 2003.

This was *Kong Sau Ching v Kong Pak Yan*,⁶¹ a judgment of Reyes J after a five-day trial, concerning road access to houses at Hang Tau, another village near Sheung Shui. The only route into the village for vehicles entered from the north⁶² and ran over private lots before forking, one branch continuing to the west and south, the other to the south and east.⁶³ Part of the latter, a narrow passage consisting in 1995 of concrete and dirt, passed over land of the defendants, who included indigenous villagers. The plaintiffs, who also included indigenous villagers⁶⁴ and a developer who had built an estate of village-type houses next to the road and had improved the road in the autumn of 1997 at the request of some villagers, claimed a right of way for vehicles. The defendants conceded a way on foot only. One of them obstructed the way, causing the plaintiffs to apply successfully for an interlocutory injunction.

After trial, Reyes J continued the injunction and made declarations in favour of the plaintiffs. The primary basis for doing so was that a public right of way had been established: the way had been used for motor vehicles since the 1950s and had been dedicated to the public, and the government

⁵⁸ *Foo Kam Shing v Local Printing Press Ltd* (1953) 37 HKLR 201.

⁵⁹ Except of course for any law that contravenes the Basic Law: that was presumably the basis for abolishing the AELO, although a view held by certain constitutional scholars is that the AELO was abolished because it had become redundant in that English law, including statutes scheduled to the AELO, had been accepted into Hong Kong law as part of the law previously in force and as part of the common law.

⁶⁰ Basic Law, Art 7.

⁶¹ [2004] 1 HKC 119; hereinafter *Kong*.

⁶² The judgment suggests that this road, Hang Tau Road, originates at the Castle Peak Road but this is approximate at best since there are two other roads in between.

⁶³ That is according to the lot index plan attached to the judgment and the author's visits to Hang Tau; the judgment says that the branches run, respectively, south and east.

⁶⁴ Resident mainly in England, as is often the case with indigenous villagers.

as reversioner had consented to this. It was therefore strictly not necessary for Reyes J to consider the plaintiffs' fallback contention that they had private rights of way, but "in deference to counsel" he did so. We must be grateful that he did, for the result is by far the most detailed and illuminating Hong Kong judicial consideration of easements by prescription.

The judge prefaced his examination of the subject by saying that it "involves difficult questions of law";⁶⁵ this is, if anything, an understatement. He identified "the English restriction" concerning leaseholders.⁶⁶ He went on to consider the local cases dealt with above. He noted that *Foo Kam Shing* (the Full Court's decision concerning Duddell Street) and *Tang Tim Fat* (the decision of Judge Jerome Chan) had in effect been overruled by the Court of Appeal in *Cheung Yeung Hung*. But the judge identified a difficulty about simply following the last. This was because the Court of Appeal's method of distinguishing *Foo Kam Shing*, by reasoning that the AELO with its admonition to adopt the English law to local circumstances had come into being since *Foo Kam Shing*, was doubtful and because the AELO was no longer law.⁶⁷

The doubt arose because, although it was true that the AELO had been passed in 1966 which was a dozen or so years after *Foo Kam Shing*, section 3 of the AELO had replaced an earlier enactment, in section 5 of the Supreme Court Ordinance,⁶⁸ which had been to the effect that the laws of England which existed in 1843⁶⁹ would be in force "except so far as the said laws are inapplicable to the local circumstances of the Colony or of its inhabitants". Hence, although the AELO had not existed when *Foo Kam Shing* was considered by the Full Court, the law at that time had been in effect the same.

Despite these doubts, it is suggested that the Full Court's decision in *Foo Kam Shing* is questionable. First because, as Reyes J pointed out, the Full Court gave no consideration to section 5 of the Supreme Court Ordinance and whether local circumstances made a difference to the law concerning easements by prescription, the matter which the Court of Appeal thought made it arguable that limited owners might prescribe for an easement. Secondly because the Full Court's decisions are anyway not binding upon the Court of Appeal: this was an additional reason given by Mortimer JA in *Cheung Yeung Hung* for not following *Foo Kam Shing*. Thirdly because a

⁶⁵ [2004] 1 HKC at 139D.

⁶⁶ *Ibid.*, at 139F.

⁶⁷ *Ibid.*, at 143 C–E and 146 B–D.

⁶⁸ Cap 4. There had in fact been four Supreme Court Ordinances, passed in respectively 1844, 1845, 1846 and 1873: see Wesley-Smith, "The Reception of English Law in Hong Kong" (1988) 13 *HKLJ* 183.

⁶⁹ To be precise, on 5 April 1843, the day on which the colony obtained a legislature.

right to light, the subject matter of *Foo Kam Shing*, is a negative (and largely urban) easement: that is to say, it involves no interference with the enjoyment of the servient property, the servient owner simply uses his or her own land and is not aware of, or capable of stopping, the “easement” until he or she seeks to alter the land in a way which brings complaint from the dominant owner.⁷⁰ By contrast, a positive or active (and generally rustic) easement, such as a right of way, does involve interference with the servient land and therefore is immediately noticeable and actionable by the servient owner.

Although the last distinction does not expressly feature in the judgments of the Court of Appeal in *Cheung Yeung Hung* and of Reyes J in *Kong*, a sense of it seems to inform Reyes J’s conclusion that the Full Court should not be read as putting forward any definitive view of the general applicability of the English restriction in Hong Kong and that their decision should probably be read narrowly as confined to its facts.⁷¹ At most, Reyes J said, *Foo Kam Shing* should be regarded as authority for the proposition that in the urban area a limited owner cannot obtain a right to light by prescription against another limited owner.⁷²

Reyes J then turned his attention to Judge Jerome Chan’s suggestion that *Wheeldon v Burrows* provided the answer to the dilemma as to how to give legal effect to long-established uses and that consideration of modification of the law to local circumstances was therefore unnecessary.⁷³ Reyes J concluded that this was a distraction from and an irrelevance to the greater question of whether rights of way may be acquired by leaseholders by long usage as a consequence of modification of the English common law as received in Hong Kong. The provisions allowing for that modification⁷⁴ had been in force long before 1973 (when, on Judge Chan’s analysis, *Wheeldon v Burrows* would have applied) and so the issue of modification was to be answered as at a much earlier date.⁷⁵ Reyes J politely concluded that Judge Chan’s analysis of the effect of local circumstances on the English restriction “might have gone further” and that *Tang Tim Fat* did not constrain a first instance judge from holding that under local circumstances a limited owner may acquire a right of way by prescription against another limited owner.⁷⁶

⁷⁰ Another example of a negative easement is a right to support for a building.

⁷¹ *Kong*, n 61 above, at 143H.

⁷² *Ibid.*, at 144A.

⁷³ This is considered further below.

⁷⁴ That is, s 3 of the AELO and its predecessor s 5 of the Supreme Court Ordinance.

⁷⁵ *Kong*, n 61 above, at 144I–145H.

⁷⁶ *Ibid.*, at 145I–146A.

The next question for Reyes J was what effect the abolition of the AELO had upon the position. The Court of Appeal in *Cheung Yeung Hung* had relied heavily upon the express application of the Prescription Act 1832 and existence of the power to modify common law to local circumstances in the AELO as a basis for doubting the application of the English restriction to Hong Kong. The provisions for application of the 1832 Act and for that power no longer existed.

It seems to this writer that the disapplication of the Prescription Act 1832 need cause no concern. The Court of Appeal's point about the application of the 1832 Act was that it showed that the legislature intended that there should be a law for prescription of easements in Hong Kong despite the system of leasehold landholding. This point is still good; it is unaffected by the later disapplication of the Act. The abolition of the AELO does mean that the provisions of the Act (essentially the reduction of the prescriptive period for rights of way from the number of years since 1189 to 20 years) are no longer part of Hong Kong law (at least not by virtue of the AELO) but it does not mean that there can be no acquisition of rights of way by long user. This is because, as Reyes J pointed out, there was and is common law on the subject and, by Article 8 of the Basic Law, the common law remains part of Hong Kong law.⁷⁷ Indeed, although it was initially thought that the Act replaced the common law and it is still sometimes said that there is a separate type of prescription and cause of action under the Act, the correct way of putting it is that the Act supplemented the common law. The common law has two strands, user since time immemorial and lost modern grant.⁷⁸ The Act affected the former but since that strand is of little practical use and may never have been capable of application in Hong Kong, the loss of the Act is of no real consequence. Developments in the law of lost modern grant since 1832 have made that strand more potent. It remains available and of use in Hong Kong.

Reyes J recognised the potential for application of the law of lost modern grant. This was, he pointed out, part of the common law which would have been received into Hong Kong in 1843, possibly with modification to local circumstances.⁷⁹ He did not accept Judge Chan's assertion in *Tang Tim Fat* that it would be inappropriate to modify the law so as to remove the English restriction. Although stating that ideally he would have liked to have heard argument on the Irish cases, Reyes J thought that, given that from the start of British government in Hong Kong it had been envisaged

⁷⁷ 146D–G.

⁷⁸ Lost modern grant is sometimes loosely referred to as a kind of prescription but strictly it is separate, being a form of (fictional) express grant: see further below.

⁷⁹ *Kong*, n 61 above, at 151B–D.

that land would be predominantly held on a leasehold basis, it would be odd if prescription of rights of way under the 1832 Act or under the doctrine of lost modern grant had been received here subject to the English restriction. "It would have been more commensurate with ordinary expectation for a law of prescription capable of practical application to have been received in Hong Kong generally."⁸⁰ So he held that, had he not found in the plaintiffs' favour that there was a public right of way, he would have found that they had acquired easements of way by prescription.

Since the *Kong* decision, the question of prescriptive easements has been mentioned four times in Hong Kong courts, although not in any consequential manner. *Sun Honest Development Ltd v Appeal Tribunal (Buildings)*⁸¹ was an application for judicial review of a decision concerning redevelopment of Wang Fung Terrace near Tai Hang Road. The Building Authority had rejected the developer's plans because, amongst other reasons, they had not deducted from the land available for calculation of the plot ratio the area occupied by a lane between buildings. This lane had been used for access since at least 1958 and was described on old plans as a right of way, but no formal grant of such a right could be found. The Buildings Appeal Tribunal had felt constrained by *Tang Tim Fat* to say that there could be no easements by prescription in Hong Kong so there was no right of way. Apparently the tribunal's attention had not been directed to *Chung Yeung Hung* or *Kong*. On the basis of those decisions Chung J said that if it had been necessary to decide the point, he would have been inclined to agree that such rights can exist; but it was not necessary to decide it since he was able to determine the case on other grounds and he preferred to hear fuller argument on the point.

The Court of Appeal reversed Chung J's decision, but not on the point about right of way, and remitted the matter to the Building Appeal Tribunal which again rejected the developer's case, this time on the right of way as well as another issue. A second judicial review, of that decision and of another concerning redevelopment of Wang Fung Terrace, was heard by Saunders J.⁸² He reviewed the Hong Kong cases, held that *Foo Kam Shing*

⁸⁰ *Ibid.*, at 152C–E.

⁸¹ [2004] 3 HKC 652, overturned by the Court of Appeal on another point.

⁸² *China Field Ltd v Appeal Tribunal (Buildings)* HCAL No 2 of 2007 and *Sun Honest Development Ltd v Appeal Tribunal (Buildings)* HCAL No 3 of 2007; 31 July 2007.

no longer stated the law⁸³ and agreed with Reyes J in *Kong* that a limited owner can obtain a right of way by prescription in Hong Kong.⁸⁴

Saunders J also considered the main Irish decisions but concluded that they “do not assist in the determination of the issue in Hong Kong”.⁸⁵ In this he appears to be at odds with the view of Godfrey J in *Pang Kwan Leung*. As will be shown later, the Irish cases are indeed of great assistance in articulating the basis upon which the Hong Kong courts may recognise rights arising from long user.

The fuller argument desired by Chung J came to be addressed to him in September 2006 when he had to determine *Chan Tin Yau v Tsang Kwok Kay*,⁸⁶ a dispute between New Territories villagers concerning a right of way at Shui Tsan Tin Tsuen, a community just to the south of Kam Sheung Road in the Pat Heung area between Shek Kong and Yuen Long. The way was a branch road that led to the bottom of the village, where the plaintiffs lived, from the main route into the village from Kam Sheung Road. This passed over a strip along the northern side of the defendant’s land. The issues were much the same as those in *Kong*: whether there had been long user by vehicles and without permission, whether there had been dedication to the public, whether there could be an easement by prescription or by lost modern grant, and whether the defendant was estopped. The outcome of the first two issues depended upon an assessment of the credibility and reliability of the witnesses. The judge favoured the plaintiffs’ witnesses, finding that there had been long user by vehicles and without permission, and that the way had been dedicated to the public. As to acquisition of easements by prescription, the judge agreed with Reyes J in *Kong*, in turn agreeing with Judge Jerome Chan, that user since time immemorial had little practical application in Hong Kong.

On lost modern grant, Chung J was again in agreement with Reyes J in *Kong* in concluding that the doctrine applied in this jurisdiction and in questioning Judge Jerome Chan’s conclusion to the contrary. Chung J

⁸³ *Ibid.*, at paras 80–81; but the judge’s justification for this conclusion, that the SCO is in quite different terms from the AELO, is doubtful, for their effect is similar (as Reyes J pointed out in *Kong*) and the AELO has gone. The better justification is that the Full Court failed to consider the possibility of adaptation of the law to local circumstances under the SCO.

⁸⁴ *Ibid.*, at paras 70–79. Saunders J’s decision in *China Field* (n 82 above) was cited with approval by the Lands Tribunal in *Tsan Luk Yuk Lin v Secretary for the Environment, Transport & Works*, LDMR No 3 of 2005 (20 Nov 2007) where it was held that there was a public right of way by long user of a footpath across land resumed for road building at Tai O.

⁸⁵ *Ibid.*, at para 76.

⁸⁶ HCA No 21228 of 1998; hereinafter *Chan Tin Yau*.

expressed no additional views on the matter, simply concluding that the plaintiffs had established this part of their case.⁸⁷

Finally, in *Yau Yuk Ming v Chan Yuk Lin*,⁸⁸ the plaintiff sought an injunction to prevent the defendants from trespassing on his land, a paved, lighted and gated road at Man King Terrace, which led from his properties to the main Clearwater Bay Road in the Sai Kung area of the New Territories. The defendants occupied the ground floor of a village house nearby and had been using the plaintiffs' road for access to the main road after an alternative route, extant at the time of the government grant to the plaintiffs' predecessors, had been fenced and walled off by owners of a neighbouring house. The defendants had pleaded a way by prescription and estoppel but did not pursue these when the plaintiff sought summary judgment, instead arguing, unsuccessfully, that there was a way of necessity and a public right of way. Since the defendants' house had been built in the 1990s and the evidence was that their predecessors' use of the plaintiff's road had been with his permission in exchange for payment, abandonment of the prescription argument and absence of any claim to a lost grant were understandable.

The sum of the Hong Kong authorities may therefore be said to be that there are two, one from the Full Court and another at first instance,⁸⁹ which suggest that the English restriction does apply, whilst there are six which suggest the contrary. Of those six, two (one by the Court of Appeal, the other at first instance⁹⁰) concerned interlocutory injunctions and therefore could decide no more than that the question was arguable. The other four were by judges of the Court of First Instance, two⁹¹ after trial and the other two⁹² on appeal from a tribunal. However, in all four the reflections upon the questions of acquisition of rights of way by prescription and by lost grant were *obiter dicta*, in two of them the judges expressed the desire to have the matter more fully argued and the third and fourth were effectively adoptions of the reasoning in the first.⁹³

If the question arises for adjudication in the future, is there anything additional to that appearing in the previous Hong Kong judgments which might assist the court? There are certainly two areas which might do so. One is the Irish cases which Reyes J would have liked to have considered

⁸⁷ *Ibid.*, para 87. Chung J did not think that proprietary estoppel had been established, although he thought that there might be some strength in the plea of easement by necessity: paras 90–91 and 84; cf paras 88–89.

⁸⁸ DCCJ No 4900 of 2006.

⁸⁹ Respectively, *Foo Kam Shing* (1953) 37 HKLR 201 and *Tang Tim Fat* [1992] 2 HKC 623.

⁹⁰ *Cheung Yeung Hung* [1997] 2 HKC 406 and *Pang Kwan Lung* [1989] 2 HKC 449.

⁹¹ *Kong* [2004] 1 HKC 119 and *Chan Tin Yau* HCA No 21228 of 1998.

⁹² *Sun Honest Development Ltd v Appeal Tribunal (Buildings)* [2004] 3 HKC 652 and *China Field Ltd v Appeal Tribunal (Buildings)* HCAL No 2 of 2007.

⁹³ That is, of the reasoning in *Kong*.

but did not have available and which Judge Jerome Chan and Saunders J did have but said little about. The other is the role and development of the doctrine of lost modern grant.

The Position in Ireland

Ireland in the nineteenth century was an overwhelmingly agrarian society. The country did not undergo the industrialisation and urbanisation that transformed Great Britain in that century, nor did it experience the advances in agriculture (such as mechanisation, crop rotation and stock breeding) which improved farm production in England. In 1841 only 20 per cent of the Irish population of 8.2 million lived in towns.⁹⁴ What little industry there was, mainly in the north and east, could not compare with that of England.

Land was the predominant feature of the Irish economy but land was owned by relatively few people. In 1870 there were about 20,000 landowners out of a population which had been reduced by famine and migration to 5.4 million, with the 302 largest proprietors owning more than a third of all the land and half the country in the hands of 750 families.⁹⁵ These landlords, who were nearly all Anglo-Irish Protestants,⁹⁶ were freeholders. Few of them farmed the land themselves; they rented it out to tenant farmers. In 1870 about 97 per cent of land in Ireland was let in this way. Many of the landlords were absentees and engaged a land agent or steward to look after their estates.⁹⁷

The tenant farmers were men of local standing and wealth. According to the 1841 census in Ireland, there were then 453,000 of them. They were termors: they held their land on long lease of fixed term from the freeholder. Frequently they underlet part or all of their land to smaller farmers.

The custom was that this underletting was oral and annual. In 1841 there were 408,000 such smallholders, 65 per cent of them having less than one acre. Smallholdings were particularly prevalent in the north-east and north-west of Ireland.⁹⁸ Although these tenancies were unwritten and there

⁹⁴ "Towns" being defined somewhat generously as centres with 20 or more houses. Figures in this section are drawn from the decennial census conducted in Ireland.

⁹⁵ "Land-holding in Ireland 1760–1880" and "Agricultural Conditions in Ireland 1760–1880", Dr M. Bloy, available in "A Web of English History", at <http://www.historyhome.co.uk>.

⁹⁶ In the 17th and 18th centuries the British government had confiscated land from Catholics and enacted laws restricting land ownership to Protestants.

⁹⁷ It is commonly asserted that they all lived in England or Dublin but about half the country was owned by men who lived on or near their estates; most absentee landlords lived on other estates they owned elsewhere in Ireland: see Bloy, n 95 above.

⁹⁸ Ulster and West Munster.

was no security of tenure⁹⁹ beyond one year, the practice in parts of the country was that so long as the smallholder paid the rent punctually, the tenancy would be extended for a further year and, if tenants chose to leave, they would be compensated by the incoming tenant for the interest and for improvements made. This "Ulster custom", which gave farmers a stake in and encouraged them to care for the land, was eventually put into legislation and extended to the whole country.¹⁰⁰ Consequently many tenants from year-to-year enjoyed a long period of possession of their small farms.

Below the smallholders on the farming and social scale were the cottiers. These were effectively poor, landless, agricultural labourers who lived in one-room cabins and occupied very small plots on a yearly, monthly or weekly basis. Their tenancy was oral and they paid their rent partly or wholly in services, by providing labour to their landlord. Their plots were so small that they grew just one crop, invariably potato, which was used to feed their families and could be sold to supplement their income.¹⁰¹ In 1841 there were 596,000 cottiers but their work was already under threat from the shift from arable to more profitable pastoral farming (which required fewer labourers) when their numbers were devastated by the consequences of the notorious potato blight of the late 1840s. In 1845 and 1846 the staple crop failed, infected by fungus. In 1847 it did not fail but cholera and other diseases broke out in the towns to which the rural poor had fled in search of food. In 1848 the crop failed again. It has been estimated that about a million people died of starvation during this period and that a similar number emigrated. The population of Ireland, thought to be about 8.5 million at its peak in 1845, was 6.5 million by 1851. Much of this reduction must have come from the cottier tenants and their families and the humbler of the smallholders and their families.

One reason for the proliferation of small agricultural tenants was that Catholics, the overwhelming majority of the population, by law could not own land so had to rent it and could not afford to rent much. By the time that they were allowed to buy land in mid-century, few could afford to do so because of the depredations of the famine. Another reason was that the law of primogeniture did not apply to Catholics in Ireland. Consequently when a Catholic tenant died, the tenancy did not pass to the eldest son but was instead divided between all sons.¹⁰²

⁹⁹ Or "fixity of tenure", as it was called in Ireland.

¹⁰⁰ Irish Land Acts of 1870 and 1881.

¹⁰¹ This system was known as *conacre*. Potato was the most efficient crop for such small allotments but the varieties of potato which were the easiest to grow were susceptible to blight.

¹⁰² The effect is illustrated by the estate of Trinity College, Dublin, which in 1843 was occupied by 12,529 tenants, only 1% of whom paid rent directly to the college. The other occupiers were sub-tenants or under-tenants of sub-tenants and so on. See Bloy, n 95 above.

Ironically, the 1840s was a time of general prosperity for agriculture in Ireland. Tenant farmers had changed from growing crops to raising cattle and sheep. These were profitably exported, principally to England. This option of course had not been available to most of the smallholders or to the cottiers. The prosperity lasted until the mid-1870s when farming suffered a depression in prices and the potato crop failed again in the west. There was however a recovery with a surge in economic growth during the 1890s.

So the background to the consideration by the Irish courts towards the end of the nineteenth century of whether to follow the English restriction as to the acquisition of easements by long usage against and by leaseholders was that farming dominated the economy, nearly all land was held by its occupiers on lease which was either fixed-term or periodic but subject to security of tenure, there was a proliferation of smaller farms (although not as many little plots as previously) and farmers were enjoying good returns from their land. It is easy to see that in these circumstances access to farms and to water might often depend upon custom or practice and upon the goodwill or cooperation of a neighbour and that, where those were lacking, disputes would break out. Until the 1870s the influence of the freeholder and the agent was important in regulating these matters. In cases of dispute between farmers, land agents could conciliate and arbitrate a solution, their position being underpinned by the power not to renew the tenancy and the absence of any obligation to pay compensation to the tenant when doing so.¹⁰³ The bestowal of security of tenure, however, removed this sanction and diminished the agent's influence. The courts were accordingly asked to decide more such disputes and by the 1880s they were of frequent occurrence.¹⁰⁴

The Irish Cases

The observations in *Bright v Walker* upon the effect of the Prescription Act 1832 in creating a new means of acquiring easements by long user which replaced all previous methods thus rendering it impossible to claim a lost grant by one tenant to another¹⁰⁵ proved to be exceedingly unhelpful in Ireland. The Act did not apply there until 1859¹⁰⁶ so until then Irish judges were able to regard *Bright v Walker* as irrelevant. After that, there opened an "intensely interesting chapter in the law" in Ireland.¹⁰⁷

¹⁰³ Per Dodd J in *Flynn v Harte* [1913] 2 IR 322 at 324.

¹⁰⁴ Palles CB in *Timmons v Hewitt* (1888) 12 Ir CLR 627 at 632.

¹⁰⁵ (1834) 1 Cr M&R 211 at 221. See above.

¹⁰⁶ Under the Prescription (Ireland) Act 1858 (21 & 22 Vict. c.42).

¹⁰⁷ Per Dodd J in *Flynn v Harte* [1913] 2 IR 322 at 323.

The trial in *Deeble v Linehan*¹⁰⁸ took place shortly before the Act became law. Deeble, a tenant farmer, operated a mill on his land near Cork. Since 1826 the mill stream had been fed by a new watercourse (replacing the previous natural stream) which passed over nearby land occupied by tenants of Linehan, an under-tenant of the feeholder. In 1853 Linehan obstructed the watercourse with a dam. Deeble entered and removed the obstruction. When sued for trespass, Deeble claimed a right to the water by grant. The trial judge instructed the jury that they must be satisfied that a grant had in fact been made. On appeal, the Exchequer Chamber said that this was wrong, for a non-existent grant might be presumed. However, the court held that there was no evidence to be left to the jury for a presumed lost grant. Nevertheless, the decision confirmed that, prior to the Prescription Act at least, a right could be presumed under the doctrine of lost modern grant.

In *Wilson v Stanley*,¹⁰⁹ another case about the impeding of a watercourse which fed a mill, and which was decided in 1861 after the Act had become law in Ireland, Pigot CB criticised the dicta in *Bright v Walker*. He thought it inconsistent with the purpose of the Act, which was to ameliorate the law in favour of claimants to rights based on user, to hold that rights based upon long user had been abolished or diminished by the Act.¹¹⁰ His opinion was that the law as expounded in *Bright v Walker* was unsatisfactory for Ireland and needed reconsideration.¹¹¹ But he would have felt obliged to follow the English decision had the case not been disposed of on other grounds.

The Irish courts continued to show dexterity towards *Bright v Walker*, apparently disregarding it where it could not be avoided.¹¹² During the 1870s they preserved a long-established way to a road for one yearly-tenant farmer against another by holding that it was part of the demise by the tenants' common landlord to the first tenant,¹¹³ upheld a right of way under the Prescription Act in favour of a tenant farmer of one landlord over land of a tenant farmer of another landlord on the basis that the way had been used for more than 40 years and that *Bright v Walker* had been concerned with a claim based on 20 years' user only¹¹⁴ and did the same between fixed-term tenant farmers of the same landlord in respect of a way that had been used

¹⁰⁸ 12 Ir CLR 1.

¹⁰⁹ (1861) 12 Ir CLR 345.

¹¹⁰ *Ibid.*, at 357.

¹¹¹ *Ibid* at 350, 357 and 361.

¹¹² See Holmes LJ in *Hanna v Pollock* [1900] 2 IR 664 at 708.

¹¹³ *Clancy v Byrne* Ir R CL 355 (June 1877).

¹¹⁴ *Beggan v McDonald* 2 LR Ir 560, CA (Ir).

for more than 40 years.¹¹⁵ The outcome of none of those cases relied upon the finding of a lost grant.

The first consideration by the Irish Court of Appeal of the application of prescription and lost grant to and between leaseholders under the post-Act law came in *Timmons v Hewitt*,¹¹⁶ an action by Mary Timmons, the widow of a smallholder, for obstruction of a way used by her and her late husband and their predecessor for more than 40 years over Hewitt's farm for access from their land to the road between Armagh and Portadown in Ulster. Both she and Hewitt were tenants from year-to-year of a Mrs Bacon. The point was taken that there could be no rights of way by prescription between tenants. In the Exchequer Division, Palles CB declared that where two parcels of land were held under a common landlord by tenancies each of which had existed for upwards of 20 years, it was competent for the jury to infer an easement by grant by deed from one tenant to the other from 20 years' enjoyment as of right and without interruption.¹¹⁷ In other words, the doctrine of lost modern grant could apply, it being a question of fact to be decided by the jury as to whether to deduce such a grant. The jury had deduced such a grant. The Court of Appeal refused to interfere, saying that there was sufficient evidence for the jury's verdict and implicitly recognising that the fact that the parties were both tenants constituted no obstacle to the inference of such a grant.

The question did not come back to the Irish Court of Appeal for more than a decade when in 1899 *Hanna v Pollock*¹¹⁸ was decided. The parties in this case were fixed-term tenants of adjoining farms on the same estate.¹¹⁹ In 1861 Hanna's predecessor, Hamilton, had cut a watercourse to drain his land with a branch conduit to a tank on Pollock's land. In 1896 Hanna altered the course and removed the conduit. Pollock entered Hanna's land and restored the conduit. Hanna sued for trespass. Pollock defended, relying upon lost grant and prescription. The jury found a lost grant. The question was raised as to whether there could be a lost grant between termors.

This question was answered in the positive by the Irish Court of Appeal, although with a difference of view as to how lost grant operated after the Prescription Act. Fitzgibbon LJ, protesting that the court's views on the question were "only an exercitation"¹²⁰ because the defendants had failed on an issue of fact, held that the presumption of a lost grant arose

¹¹⁵ *Fahey v Dwyer* 4 LR Ir 271 (1879). A later instance of the trial judge ignoring *Bright v Walker* seems to have been *O'Kane v O'Kane* 30 LR Ir 489.

¹¹⁶ (1888) 22 LR Ir 627.

¹¹⁷ (1888) 12 Ir CLR 627 at 637.

¹¹⁸ [1900] 2 IR 664.

¹¹⁹ By the trial each of them had purchased the freehold under enabling legislation but the question of acquisition of easement related to the period in which they had been tenants.

¹²⁰ That is, *obiter dicta*.

independently of the Prescription Act and could therefore legitimately be pleaded but that the effect of the Act was to make 40 years the minimum period of user where the presumption was based on user alone: he took this to be the effect of *Timmons v Hewitt*. Walker and Holmes LJ thought that the Act was entirely irrelevant to lost grant, so that there was no requirement of 40 years user, and agreed that an easement could exist by virtue of grant between two tenants holding under the same landlord. All the judges drew a distinction between lost grant and prescription proper. In the case of the latter, only those whose interests were sufficiently permanent (the holder of the fee) could prescribe but no such restriction applied to lost grant.

In the event, the court decided that the easement could not be found to have been granted to Hanna. There was evidence that the origin of the conduit in 1861 lay in operations by Hamilton to drain his own land of excess water and it would have been inconsistent with this intention for him to grant to Pollock a right which would render him unable to alter his own drain, as would a right to water in favour of Pollock. Accordingly, the arrangement between Hamilton and Pollock had been temporary and permissive only.¹²¹

The observations in *Hanna v Pollock* on the availability of the doctrine of lost grant between tenants are therefore *obiter dicta* but they were made after exhaustive consideration of the authorities and with an anxious awareness of the importance of the issue in Ireland. Consequently they came to be regarded by Irish judges as settling the law there and as being effectively binding.¹²² So what might be called “the Irish rule” (except that, as will be seen, this rule was for a time accepted as law in England) is that as between leaseholders an easement may be acquired by long enjoyment under the fiction that it has been a granted in modern times but has been lost. This mode of creation is separate from acquisition under the Prescription Act or, more accurately, under the common law of prescription (by use since time immemorial) as modified by that Act.

The scope of the Irish rule was explored in *Macnaghten v Baird*¹²³ which concerned a right to enter land to take water from a pump at a well. Lord Macnaghten, the freeholder of lands near Londonderry, in 1875 orally let land on one side of a road to Gilfillan from year to year,¹²⁴ retaining possession of land on the other side of the road on which the well was situate. On Gilfillan’s side there was a barn which in 1878 was converted into a dwelling and let weekly to cottiers, first Perry and thereafter Baird, who

¹²¹ [1900] 2 IR 664 at 669 and 690.

¹²² *Tisdall v McArthur & Co* [1951] 1 IR 228, 240 (Kingsmill Moore J).

¹²³ [1903] 2 IR 731.

¹²⁴ Gilfillan had security of tenure as a result of the reforms in the Land Act (Ireland) 1881.

habitually entered the retained land and took water from the well, as had previous occupiers of their land before it had been let to Gilfillan. Macnaghten rented the retained land on a weekly basis to his fellow plaintiff Moore, a cottier. When sued by them in trespass for entering and taking the water, Baird claimed a right to do so by virtue of an implied term of the tenancy between Macnaghten and Gilfillan or of a lost grant. Baird succeeded at first instance but the judge stated a case on issues of law. The divisional court ruled against Baird by a majority. This was upheld on appeal, the court holding that there could be no term implied into the tenancy and no lost grant.

The Court of Appeal observed that it might have been possible to find a lost grant by Moore, the tenant of the allegedly servient land, in favour of Baird, the tenant of the dominant land, had Moore been in occupation for more than 20 years, but he had not been. This possibility was despite Moore's being a mere weekly tenant. The implication of this was that the Irish rule is not confined to long fixed-term tenancies but depends instead upon the period of possession of the tenant.

Any lost deed would therefore have been between the landlord, Lord Macnaghten, and Gilfillan. Applying *Gayford v Moffatt*¹²⁵ in which it had been held that a tenant could not acquire a right over an adjoining close belonging to the landlord, the court held that the doctrine of lost grant cannot apply in favour of a tenant against the landlord even in respect of an easement over land which is not the subject of the tenancy. Any presumed grant would in this case have been made at about the time of the granting of the tenancy and it would have been violent to presume a grant by deed at the time of a letting which was from year to year and oral.¹²⁶ Walker LJ pointed out¹²⁷ that he and the other judges in *Hanna v Pollock* had been careful to say that the fictional grant was between tenants and not between a landlord and his tenant.

The possibility of extending the Irish rule in favour of a short periodic tenant against another tenant that had been recognised in *MacNaghten v Baird* became reality in *Tallon v Ennis*.¹²⁸ The plaintiff there was the longstanding weekly tenant of a cottage owned by the local government authority, Dublin Corporation. She had long used a route at the back of her cottage, through a gate and yard and over adjoining land also belonging to the corporation to a road, for the purpose of carrying away waste

¹²⁵ *Gayford v Moffat* (1868) 4 Ch App 135.

¹²⁶ This point had been made also by Lawson J in *Clancy v Byrne* Ir R 11 CL 355 where the court found that a right of way was part of the letting (presumably an implied term) rather than a separate grant.

¹²⁷ [1903] 2 IR 731 at 745.

¹²⁸ [1937] IR 549.

from her outdoor water closet by horse and cart.¹²⁹ The defendant, who had been granted a building lease of the adjoining land by the corporation, had blocked the route with buildings. The plaintiff claimed an injunction on the basis that she had a right of way by 40 years' user. The defendant urged that a weekly tenant could not claim a right of way against another tenant of the same landlord without joining the landlord. Gavan Duffy J said that the defendant was too late "for the contrary is now firmly established in Ireland, where a tenant from year to year is concerned, and a weekly tenant of long standing like the plaintiff can in principle be in no worse position".¹³⁰

So, to summarise the position in Ireland, an easement, or at least an active easement such as one of way or water, may be acquired by long usage by one tenant against another. The tenants may be tenants of one landlord or of different landlords. The tenancies may be of fixed term or periodic. The easement may not however be acquired by a tenant against his or her own landlord. The basis of acquisition is lost modern grant.

Justification for the Irish Rule

Why did the judges in Ireland depart from the views expressed by the English Court of Exchequer in *Bright v Walker* that the Prescription Act had created a new method of acquiring rights by long user that superseded all other methods and that such rights could not apply between leaseholders? The reasons are relevant because they would illuminate any future consideration of the law in Hong Kong. It may safely be said that the Irish judges would have been reluctant to make such a departure. At that time Ireland was a common law jurisdiction (as are both Irish jurisdictions now) and part of the United Kingdom and the British Empire. There were firm ties between the Bar and the Bench in Dublin and in London. The circumstances which motivated the departure would have to have been compelling.

The reasons seem to boil down to the wide occurrence of the leasehold in the vital agricultural sector and the potential for social disruption if long-practice was not recognised by law. When they went into the country on circuit the judges frequently encountered disputes between farmers over

¹²⁹ Gavan Duffy J described it as "deposition of the colluvies".

¹³⁰ [1937] IR 549 at 553. Since the defendant had only recently been granted a lease of the land neighbouring the plaintiff's land, there had been no long enjoyment of the way as against the defendant. Presumably it is for that reason that the judge went on to base his decision in favour of the plaintiff upon the right of way being included in the original letting by the corporation to the plaintiff's father: *ibid.*, at 554.

rights of way and rights to water.¹³¹ Hence Pigot CB in *Wilson v Stanley*¹³² observed that different circumstances prevailed in Ireland and Holmes LJ stated in *Hanna v Pollock* that in Ireland “either from the mode in which land is held, or from the character of the people, there is probably more litigation about easements than in any other part of the empire”.¹³³ Consequently Holmes LJ felt that to follow *Bright v Walker* would have led to inconvenience and confusion. This was why the decision was disregarded in practice, lower court judges preferring to leave matters to the jury rather than to make a ruling on the law.

In *Wilson v Stanley* Pigot CB declared that in Ireland, “in which a large proportion of the land is held under leases for lives renewable for ever ... and for long terms of years ... it was most important” that rights to water and other incorporeal privileges “should be capable of being proved by evidence of long enjoyment, not only against the owners of the fee in possession, but against owners of derivative interests which in some instances are of little less value than the fee”.¹³⁴ Walker LJ in *Hanna v Pollock* recognised that the importance went beyond long fixed terms: “In this country, where long leases are so common, and even tenancies from year-to-year have become almost perpetuities, the importance of a decision adverse to the possible existence of such a right cannot be exaggerated.”¹³⁵

Lost Modern Grant

The law of lost grant is based on a fiction invented by judges, and disguised behind the portentous designation as a “doctrine”, to do justice in cases of long user of land and bring the law into line with the expectations of mankind, or give the moral claim legality. Despite its appellation, this law is by no means recent. Its origin lies in the eighteenth century and its development really began in the nineteenth century.

It has been said that the two methods of establishing an easement, under the doctrine of lost modern grant and under prescription at common law, differ in their origin, character and incidents.¹³⁶ This, however, is an exaggeration. The origin of the doctrine is linked to prescription in that the

¹³¹ See the observations of Palles CB in *Timmons v Hewitt* (1888) 12 Ir CLR 627 at 632 and of Holmes LJ in *Hanna v Pollock* [1900] 2 IR 664 at 708.

¹³² 12 ICLR 345.

¹³³ [1900] 2 IR 664 at 708. Disputes concerning rights of way might continue for years, being “inherited” by the son and grandson of the farmer and by the son and grandson of the barrister representing the farmer: information from Mr Fergal Sweeney of the Irish Bar.

¹³⁴ 12 Ir CLR 345 at 356.

¹³⁵ [1900] 2 IR 664 at 690; see also at 688 and Holmes LJ at 700.

¹³⁶ By Holmes LJ in *Hanna v Pollock* [1900] 2 IR 664 at 702.

doctrine was brought into existence to circumvent the difficulty, indeed the absurdity, of the requirement in common law prescription of proving that a use had continued since 1189.¹³⁷ Even in cases in which the use could be shown to have continued for a very long time indeed, proof back to 1189 was wanting; and even after the courts began to presume that, if the use could be established as far back as living witnesses could speak, the use had existed since time immemorial, often there was a circumstance (such as a record as to the age of a building) which negated the presumption.

Both the doctrine and prescription required that the user relied upon should have been without secrecy, force or permission.¹³⁸ Just as the common law of prescription presumed the existence of a grant where user since time immemorial could be established, so the new doctrine employed the device of a presumed grant, but a grant made more recently than before 1189, where a lengthy period of use could be shown.¹³⁹ The difficulty that any deed of grant relied upon should be produced as proof was overcome by a further presumption, that it had been lost,¹⁴⁰ but that there had been a grant was still only a presumption, so could be rebutted by contrary evidence.¹⁴¹ Gradually, however, during the nineteenth century it came to be accepted that the presumption was irrebuttable or at least difficult to dislodge¹⁴² and that it was not therefore necessary to plead the contents of the lost deed.¹⁴³ Juries, who in the nineteenth and early twentieth centuries were the deciders of fact in civil trials, were initially directed that they might presume the existence of a deed from long enjoyment; later they were told that a grant might be presumed, even if no such grant ever existed; later still they were instructed that they ought to find such a grant in accordance with the user.¹⁴⁴ Hence the presumption evolved into a fiction.

The doctrine had an existence separate from common law prescription by use since time immemorial. It would have been received into Hong

¹³⁷ *Ibid.*, at 701.

¹³⁸ *Nec vi nec clam nec precario* to Latinists.

¹³⁹ *Dalton v Angus* (1881) 6 App Cas 740 at 811–812, Ld Blackburn. In *Hanna v Pollock*, n 136 above, Holmes LJ asserted, at 702, that the element of grant does not enter into the legal conception or definition of prescription; this though depends upon how one defines or conceives of prescription.

¹⁴⁰ *Read v Brookman* (1789) 3 TR 151 at 157.

¹⁴¹ *Darwin v Upton* (1786) 2 Wms Saund 175n(2).

¹⁴² The judges of various levels who decided *Dalton v Angus*, n 139 above, in 1877–1881 were divided about this and, as has been seen, the Irish Court of Appeal in *Hanna v Pollock* [1900] 2 IR 664 and *Macnaghten v Baird* [1903] 2 IR 731 seems to have regarded the presumption as rebuttable by circumstances. The history is sketched by Cockburn CJ in *Bryant v Foot* (1867) LR 2 QB 161 at 181 and by Delany in “Lessees and The Doctrine of Lost Grant” (1958) 74 LQR 82, 83–85.

¹⁴³ *Palmer v Guadagni* [1906] 2 Ch 494; *Gabriel Wade & English Ltd v Dixon & Cardus Ltd* [1937] 3 All ER 900.

¹⁴⁴ *Per* Dodd J in *Flynn v Harte* [1913] 2 IR 322 at 323.

Kong law as part of the common law of England extant in 1843.¹⁴⁵ The degree to which the doctrine was affected in England by the Prescription Act 1832 is debateable.¹⁴⁶ The better and prevailing view is that it was unaffected by the Act.¹⁴⁷ In any event, even if the Act applied to the doctrine, it is apparent from its long title¹⁴⁸ that the Act only modified and ameliorated the doctrine and any other means of acquiring easements to which it applied and did not abolish the doctrine or any means of acquiring easements at common law. Nor did it create a new mode of acquiring an easement: it simply built upon certain of the existing modes.

Despite the amelioration of the rules of common law prescription by the 1832 Act and questions about the legitimacy of the doctrine,¹⁴⁹ lost grant continued to serve a purpose and to evolve. It was confirmed as part of the common law in that judicial epic, *Dalton v Angus*.¹⁵⁰ The doctrine shares elements with common law prescription in that it depends upon long user and from it the supposition of a grant. This has led to its being regarded as a form of prescription, or as part of prescription in its wider sense.¹⁵¹ However, the doctrine is not part of common law prescription strictly so called¹⁵² and its jurisprudential basis differs in that (as ultimately explained) it is a fiction of an actual and more recent grant, rather than a presumption or implication of grant. The doctrine can be said to be a species of express grant rather than a prescriptive grant.¹⁵³

The theoretical foundation of the doctrine has been variously described as lying in acquiescence and laches,¹⁵⁴ estoppel,¹⁵⁵ and freedom of

¹⁴⁵ The Prescription Act 1832 was not part of the common law and so would not have been received into Hong Kong law until expressly applied by local ordinance, as it was by the AELO.

¹⁴⁶ Section 2 of the Act applies to claims to any easement “made at the common law, by custom, prescription, or grant”: the words might seem to embrace lost grant as a mode of acquisition at common law by means of grant, but perhaps “grant” here means express grant. See Holmes LJ in *Hanna v Pollock* [1900] 2 IR 664 at 703–704.

¹⁴⁷ *Aynsley v Glover* (1875) 10 Ch App 283, 285; *Angus v Dalton* (1877) 3 QBD 85, 119; (1878) 4 QBD 162, 171, 185; (1881) 6 App Cas 814; *Hanna v Pollock* [1900] 2 IR 664, 704; *Hulbert v Dale* [1909] 2 Ch 570. Parke B’s dictum in *Bright v Walker* (n 24 above) puts the contrary view.

¹⁴⁸ “An Act for shortening the time for prescription in certain cases.” According to its preamble, the mischief at which the Act was directed was the inconvenience arising from the legal meaning of “time immemorial” whereby title to what had been long enjoyed was sometimes destroyed by showing that commencement of such enjoyment had occurred since 1189.

¹⁴⁹ For example, it was described as a very questionable theory by Cockburn CJ in *Bryant v Foot* (n 142 above).

¹⁵⁰ (1881) 6 App Cas 740. The case was considered by 18 different judges at four tiers of court, the House of Lords’ decision alone being the result of the views of 12 judges. In *Wheaton v Maple* [1893] 3 Ch 48, 67 Lopes LJ said the doctrine was a “patient and accommodating fiction”.

¹⁵¹ Thesiger LJ thought it an extension of common law prescription: (1878) 4 QBD 162 at 171.

¹⁵² *Simmons v Dobson* [1991] 1 WLR 720.

¹⁵³ Delany, n 142 above, at pp 85–86.

¹⁵⁴ Thesiger LJ in *Sturges v Bridgman* (1879) 11 ChD 852, 863; Fry J in *Dalton v Angus* [1881] 6 App Cas 740, 773–774 and Lord Blackburn *ibid.*, 818.

¹⁵⁵ A kind of proprietary estoppel dependant upon unconscionableness.

movement.¹⁵⁶ More prosaically, the doctrine has been explained as pragmatic¹⁵⁷ and “convenient and workeable”.¹⁵⁸ It may be justified in terms of economic efficiency.¹⁵⁹ All these points may also be made in favour of common law prescription. However prescription alone may be justified on the basis that uses which were (or are presumed to have been) in existence at the beginning of the common law should be recognised as having a legal origin.

That lost modern grant was indeed different from prescription can be seen from its continued use and development after the 1832 Act. That it was not a kind of prescription but a kind of express grant can be seen from the early willingness of judges to employ it for and against lessees. Whilst the concept of prescription was said to require that an owner in fee be bound by, and an owner in fee benefit from, the easement, no such restriction was initially accepted in respect of lost grant. This was rational, for if there has been an express but lost grant, the question of whether a leaseholder alone is bound by it, or whether another leaseholder has the benefit of it, depends upon the terms of that express grant, not upon some supposed restriction inherent in the concept of prescription.

Parting of the Ways

At the beginning of the twentieth century the divergence between English and Irish law concerning the acquisition of easements by long user would not have been obvious. This is because the unnecessary assertion by Parke B in *Bright v Walker* that the Prescription Act had abolished acquisition by lost grant had been corrected in *Angus v Dalton* in 1877–1878 by judicial observations to the effect that the Act had not changed the previous law and that lost modern grant still existed. In Ireland by 1888 it had been held that lost modern grant could still apply.¹⁶⁰ The *dicta* to the contrary five years later by Lindley LJ in *Wheaton v Maple* were *obiter* and made without reference to relevant contrary authority. At the end of the 1890s the previous cases had been carefully analysed by the Irish Court of Appeal in *Hanna v Pollock* which had concluded, albeit *obiter*, that lost grant applied to leaseholders. In 1902 one English judge was certainly under the impression that

¹⁵⁶ Sara, “Prescription – What is it For?” [2004] Conv 13.

¹⁵⁷ Lord Blackburn in *Dalton v Angus* at 817–822.

¹⁵⁸ *Simmons v Dobson* [1991] 1 WLR 720, *per* Fox LJ.

¹⁵⁹ See Burns, “Prescriptive Easements in England and Legal ‘Climate Change’”, [2007] Conv 133 at 138.

¹⁶⁰ By Palles CB in *Timmons v Hewitt* (1888) 22 LR Ir 627.

lost grant (“a most useful doctrine”) had survived untouched by the Prescription Act and that it applied between termors.¹⁶¹

Then came *Kilgour v Gaddes* in which, as has been seen, the English Court of Appeal adopted the *Wheaton v Maple* approach to hold that no form of prescription applied between lessees of the same lessor. The court appreciated that the views expressed in *Bright v Walker* and *Wheaton v Maple* were *obiter dicta*. The leading Irish cases were cited but were circumvented by Collins MR.

There was still hope of reconciliation, however, because *Kilgour v Gaddes* was a decision upon section 2 of the Prescription Act, not lost modern grant. That hope was set back by *Derry v Saunders*¹⁶² in which the English Court of Appeal, applying *Kilgour v Gaddes*, confirmed that one tenant cannot acquire an easement by way of prescription against another tenant holding of the same landlord. Even so, that was a decision about prescription, not lost grant. Hopes were further set back, however, by *Cory v Davies* in which P.O. Lawrence J asserted¹⁶³ that it was well settled that a lessee could not acquire a right of way over the land of another lessee under the same lessor either by prescription at common law or under the doctrine of lost modern grant or under the Act. Nevertheless, the English, like the Irish, law was built on *obiter dicta*.

Hope was finally extinguished in *Simmons v Dobson*¹⁶⁴ where all the prior English cases were considered by the Court of Appeal and the question was addressed as to whether the restriction concerning limited owners applied to cases of lost modern grant, as distinct from prescription at common law and under the Act. Whilst recognising that it was difficult to see any serious objection to leaseholders prescribing against each other, the court accepted that the dicta were against allowing it and were very strong and long-standing and that the law was settled. Furthermore, the court thought lost modern grant to be merely a form of common law prescription, based on a fiction which was designed to meet a particular problem and that it would be anomalous to extend the fiction further by departing in relation to lost modern grant from the fundamental principle of common law prescription identified by Lindley LJ in *Wheaton v Maple*. These sentiments opened

¹⁶¹ Channell J in *East Stonehouse UDC v Willoughby Brothers, Ltd* [1902] 2 KB 316.

¹⁶² [1919] 1 KB 223; the Irish cases were not mentioned.

¹⁶³ [1923] 2 Ch 95 at 107. The case concerned three adjoining leasehold houses in Cardiff, built in accordance with plans, with a common driveway. The judge was able to give effect to expectations by implying into the leases from the circumstances a grant of right of way.

¹⁶⁴ [1991] 1 WLR 720; the leaseholder of a house claimed right of way over part of the garden of the next door house to reach a road at the rear. Harpum [1992] CLJ 222; Sparkes [1992] Conv 167.

a distinct and irreparable cleavage with the approach of the Irish Court of Appeal in *Hanna v Pollock*.¹⁶⁵

Way Forward for Hong Kong

There are three bases upon which rights of way and other easements arising out of long user might be recognised in Hong Kong. The first is through the rule in *Wheeldon v Burrows*. The second is by prescription at common law. The third is under the doctrine of lost modern grant. Which, if any, of them should be applied?

It will be recalled that in *Tang Tim Fat* Judge Jerome Chan had considered adaptation of the English restriction to local circumstances and had concluded that there was no basis for doing so, his main reason being that it was unnecessary because of the availability of the rule in *Wheeldon v Burrows*. This rule requires that both tenements have been in common ownership and that there has been a grant by the common owner. All quasi-easements which had been enjoyed by that owner and which are continuous and apparent are then conveyed by the grant. The requirement of a grant by a common landlord could be supplied, Judge Chan suggested, by the government grant and it might be presumed that upon the automatic simultaneous renewal of New Territories leases by statute¹⁶⁶ on 1 July 1973 any right of way enjoyed at that date would continue by implied grant from the Crown. The utility of this rule as a substitute for prescriptive easements, and of Judge Chan's application of the rule to circumstances in the New Territories, was examined by Reyes J in *Kong*. His view was that the rule covered different ground from the law of prescription and so it was unclear how the rule made prescription superfluous. He thought that Judge Chan's suggestion that the rule operated upon the statutory renewal to grant all quasi-easements then enjoyed over land as easements to those whose simultaneously re-granted land had been served by those quasi-easements involved a double, and therefore unacceptable, fiction.¹⁶⁷ But anyway, he pointed out, the mechanism did not account for any rights of way that

¹⁶⁵ Yet a limitation to the English restriction has been accepted where the tenant had a 2,000 year lease which could be enlarged into a fee simple: *Bosomworth v Faber* (1992) 69 P&CR 288.

¹⁶⁶ That is, by the New Territories (Renewable Crown Leases) Ordinance, Cap 152. Not all New Territories leases were affected by this ordinance: since 1959 the government had been granting 99-year terms expiring in 1997 rather than 75-years with an option to renew. This is an additional reason to doubt that *Wheeldon v Burrows* renders a law of prescription unnecessary.

¹⁶⁷ Presumably the fictions are that the government had retaken possession and had continuously and apparently used the quasi-easement for a time before making the re-grants. It might be added that Judge Chan's suggestion would anyway be inapplicable to leases which did not expire in 1973 but did so in 1997.

would have already been acquired by long user by June 1973 (assuming that this was possible in Hong Kong), nor for easements in course of being acquired by user but not by then established.

It is suggested, with respect, that Reyes J's analysis is correct. The statutory renewal in 1973 was an administrative convenience which involved no actual retaking of possession by the Crown.¹⁶⁸ Therefore there could have been no use of any way or other quasi-easement by the landlord, let alone a continuous and apparent use. If fictions are to be resorted to, it is surely far better to leave a third party such as the government out of the picture and simply to imagine a grant directly by one lessee to another.

Prescription at common law presumes such a direct grant but on the basis of the use having continued since time immemorial. One of the few points of consensus between Judge Jerome Chan in *Tang Tim Fat* and Reyes J in *Kong* was that common law prescription of this sort has no role in Hong Kong. Chung J concurred in *Chan Tin Yau*. None of the judges really explains why this is. Judge Chan said, without elaboration, that it was because of the history of the territory and the fact that British rule began in the New Territories in 1898.¹⁶⁹

Presumably the thinking here is that the time of legal memory, 1189, is so long ago that it pre-dates the coming of the common law to the jurisdiction. However, if the time of legal memory is to be taken as contemporaneous with the coming of the common law to Hong Kong rather than to England, the application of prescription since time immemorial is not so impractical or absurd. The policy or concept behind prescription seems to be to recognise uses which were established by the time of the common law as having a legal origin. Consistent with that, it should be necessary for a tenant in the New Territories to establish that the usage existed, or probably existed, only in 1900. The possibility that this is the correct approach is fortified by the specific application of the Prescription Act to Hong Kong by the AELO: why apply it unless prescription at common law had some practical effect?¹⁷⁰ Recognition of a date for time immemorial different from 1189 might have been an example of adaptation of the common law to local circumstances.

Even if the relevant year is 1189, it is at least theoretically possible that a use could have continued since that time. Whether or not it has done so

¹⁶⁸ *Chung Ping Kwan v Lam Island Development Co Ltd* [1997] AC 38. There may of course be cases in which two pieces of land had at one time been in the hands of one leaseholder from the government, and *Wheeldon v Burrows* might apply to give rise to an implied grant of right of way, as occurred in *Loyal Luck Trading Ltd v Tam Chun Wah* [2007] 4 HKC 468.

¹⁶⁹ *Tang Tim Fat* at 629G.

¹⁷⁰ Of course the answer may be that it was a mistake, or that the draftsman thought that the Act applied to lost modern grant.

is a question of fact, aided by presumptions from long user, and is not dependant on the existence or application of the common law throughout the period of user, or on historical background such as who was ruling the territory.

In any event, the difficulties of proof of use since time immemorial were greatly reduced by the provisions of the Prescription Act 1832 during the period that it applied to Hong Kong. Leaving aside the complications of the English restriction, it would generally have been practicable to rely upon common law prescription during that period. It might be assumed that the Act is a complete dead letter now that it is no longer part of Hong Kong law. However, in *Kong* the court recognised the possibility¹⁷¹ of claims which straddle either side of 1 July 1997, pointing out that there may have been prescriptive claims under the 1832 Act which accrued prior to, but which were not litigated until after, the handover; and that there may have been claims in which the prescription period did not fully accrue until after the handover. In the former instance at least, there would have been an argument that the accrued property right, although inchoate (in the sense of not pursued or enforced) by 1997, had been preserved by the Basic Law¹⁷² and so the Prescription Act to that extent lived on. The argument would have come up against the complication that section 4 of the Act required the relevant period of user to be the period immediately prior to the bringing of suit.

Certainly, as 1997 recedes, reliance upon the Act has become less possible. Before 1832 courts were willing to treat evidence of long use as sufficient to raise a presumption that the use had originated before the time of legal memory, so giving some substance to common law prescription without the Act. However, that presumption was easily displaced if there was evidence to show that the use could not have existed in 1189. Moreover, there would be the objection that leasehold interests did not exist as far back as 1189 and that, in the New Territories, dominant and servient tenements had been united in the same ownership (the government's) in 1898.¹⁷³ In practical terms, therefore, the courts of Hong Kong are left with lost modern grant as the only means of giving legal recognition to long established uses.

¹⁷¹ *Kong*, n 61 above, at 146G–I. This is separate from the possibility that the 1832 Act may have passed into post-handover Hong Kong law by virtue of its being part of the laws previously in force and as part of the common law.

¹⁷² Articles 6 and 105 and 120.

¹⁷³ That ownership was fixed-term, expiring in 1997, and therefore analogous to a leasehold, although it is questionable whether it is appropriate to apply the domestic law concept of a lease to cession by international treaty.

It is tempting to say simply that under the Basic Law the common law applies in Hong Kong and the courts may refer to decisions from various common law jurisdictions¹⁷⁴ so that, since 1997, the courts can (and, it seems, do) simply look at the range of common law rules available from the various jurisdictions and, where there is conflict or inconsistency, choose between them. In this way, the Irish rule becomes available for selection in Hong Kong in preference to the English restriction. Yet the position is more subtle than that.

Since 1997 the common law “previously in force in Hong Kong” has continued by virtue of Article 8 of the Basic Law. As has been shown, the common law of lost grant with respect to leaseholds and easements split into two, the English branch and the Irish branch, in the early part of the twentieth century. The common law applicable in Hong Kong prior to the handover was that of England, which might suggest that the English branch was that previously in force. But the applicable English law was, by the AELO and before it the Supreme Court Ordinance, to be modified to local circumstances: this can be said to be the common law as applied in Hong Kong. Those ordinances are no longer law, but this is irrelevant since we are looking back to the position prior to 1 July 1997. The question is not whether the courts can and should modify the law today but whether they could and would have modified it before July 1997.

The pre-handover Court of Appeal certainly favoured a modification in the case of long use of a way. The court thought the modification would be justified because of the system of landholding and that the legislature had pointed to such a modification by its making the Prescription Act 1832 applicable to Hong Kong. But no final decision to that effect was ever made, so it seems that the post-handover courts will have to decide what was the common law previously applicable. They will have to decide whether the law would and should have been adapted to local circumstances by allowing one leaseholder to acquire against another an easement by long user: in short, to choose between the Irish rule and the English restriction.

The arguments in favour of following the Irish branch seem overwhelming. First and foremost there is the consideration of the leasehold system of landholding. This was the prime factor for the Irish courts, for so much of the land there was leasehold. In Hong Kong, where virtually all land is leasehold, the point is *a fortiori*. Moreover, the point is not just that leaseholders are ubiquitous but that in Hong Kong there is no freeholder. In Ireland there were freeholders, although small in number, between the sovereign and the leaseholders. Hence there was a possibility of the law having

¹⁷⁴ Basic Law, Arts 8 and 84.

some limited application there if the English restriction had been adopted. In Hong Kong there is practically no such possibility, since the person granting long leases is not a freeholder but is the government, the representative of the sovereign power. If the English restriction applied, there would be no effective law of prescription or long user at all.¹⁷⁵

It might be said that this would be no great loss and that other jurisdictions survive without such law.¹⁷⁶ The latter is true, but shows that the existence of a predominantly leasehold system is a necessary, although not a sufficient, consideration in favour of the Irish rule. Something more is required, and that is social or economic need for this law. In Ireland the social need was supplied by the number of small farms and plots and the propensity of farmers to quarrel over rights of way and of water. The economic need was supplied by the importance of agriculture there.

These needs have been very little discussed in the Hong Kong decisions, perhaps because it has been taken as read that social order demands that recognition be given to long usages. As Lord Hoffmann has said, "Any legal system must have rules of prescription which prevent the disturbance of long-established *de facto* enjoyment".¹⁷⁷ Similarly the reality is that "a society will not work unless there is reasonable accommodation of the needs of other landowners."¹⁷⁸ A commendable, if brief, attempt to address this aspect was made by Chung J in *Chan Tin Yau*¹⁷⁹ where the judge noted the social changes that had taken place in Hong Kong and the New Territories and cited supporting data.

The social and economic dimensions in Hong Kong are unremitting growth in population and numbers of households, movement of people out of the old urban areas, rapid and generally unplanned development of the New Territories outside the new towns, and, in the course of one generation, the metamorphosis of villages into what are in effect commuter suburbs or extensions of new towns and of vacant or agricultural land into storage yards. Allied to these are the paucity of access routes away from the

¹⁷⁵ Notoriously there is one fee simple in Hong Kong, created by s 6(1) of the Church of England Trust Ordinance, Cap 1014, over St John's Cathedral and its precincts for the purposes of a church. Since the land reverts to the government if it ceases to be used as a church for the purposes of divine worship, it is not thought that the cathedral trustees grant leases over any of this land, nor that they permit the lessees of adjoining land any private use of the land, although the public are permitted to cross that land. In *China Field Ltd v Appeal Tribunal (Buildings)* HCAL No 2 of 2007, Saunders J considered it unimaginable that the Prescription Act 1832 would have been applied to Hong Kong merely for use in relation to the Cathedral land.

¹⁷⁶ Most, if not all, of the places in which the Torrens system of registered title applies have abolished acquisition of easements by prescription. No such abolition is contained in Hong Kong's land titles legislation. In England a prescriptive easement is an overriding interest.

¹⁷⁷ *R v Oxfordshire CC ex p Sunningwell PC* [2000] 1 AC 335 at 349D.

¹⁷⁸ Burns, "Prescriptive Easements in England and Legal 'Climate Change'" [2007] Conv 133 at 145.

¹⁷⁹ HCA No 21228 of 1998, paras 17 and 18.

main roads and the potential for owners to be held to ransom where their property is landlocked and for the use of harassment, nuisance, violence or threats to enforce or frustrate perceived rights.¹⁸⁰ Important sectors of the economy are therefore involved.

These considerations would, it is suggested, have led to the English restriction being rejected in favour of the Irish rule had the matter come to a head before 1997. They are also considerations which, together with the almost exclusively leasehold manner in which private land is granted, would justify the Hong Kong courts in preferring the Irish rule now. Once that choice has been made, the way is open to deploy the doctrine of lost grant, which has always been part of the common law and thus part of Hong Kong's law, to recognise as lawful well-established ways.

¹⁸⁰ Examples are the *Kong* case, n 61 above, and, in the same village, *Trade Advisers Co Ltd v Silkart Ltd* [1999] 2 HKC 806.