
CHINESE CUSTOMARY LAW IN HONG KONG

Introduction

a. Hong Kong

The areas which form the territory of Hong Kong¹, namely the island of Hong Kong, the territorial waters, Kowloon, and the New Territories, came under the administration of the colony of Hong Kong at different times from 1841 onwards. In that year, the island of Hong Kong was ceded to Britain. Then, at the end of the Second Anglo-Chinese War (1856-1858) perpetual leases of the Kowloon Peninsula up to Boundary Street, and of Stonecutter's Island, were granted to Britain. By the Convention of Peking in 1860 these leases were ceded outright. The area known as the 'New Territories' [being the land north of Boundary Street on the Kowloon Peninsula up to the Shum Chun River and 235 islands] was leased to Britain in 1898 by the Second Convention of Peking for 99 years up to 30 June 1997. From 1 July 1997 the People's Republic of China resumed sovereignty over the whole of Hong Kong; Hong Kong is now known as the Special Administrative Region of the People's Republic of China.

Despite uncertainties as to the nature of the title to issue for land in Hong Kong from the earliest land sales in 1841, land in Hong Kong,

¹The *Interpretation and General Clauses Ordinance* (Cap 1) as amended by the *Hong Kong Reunification Ordinance* (No 110 of 1997) defines the lands and waters which make up 'Hong Kong'.

The *Hong Kong Reunification Ordinance* No 110 of 1997 also provides for a change in various colonial terms; thus a *Crown lease* has become a *Government lease*. The colonial terms in the text, and of the titles, of legislation dealing with land will be changed when the *Adaptation of Laws (Crown Land) Bill* 1998 is enacted.

apart from the land on which St John's Cathedral is situated, is held by way of Government leasehold. Under the Joint Declaration,² generally existing leases will last until 30 June 2047.

Dealings in land are affected in accordance with the principles of the deeds system under which title must be checked back for at least 15 years: section 13 of the *Conveyancing and Property Ordinance* (Cap 219). Title passes on the execution of the Assignment, and a legal estate is created by execution of the appropriate instrument, for example a charge where a statutory mortgage is being effected. Registration under the terms of the *Land Registration Ordinance* (Cap 128), of the contract of sale, of the Assignment, and any other documents evidencing transactions in the land, is voluntary and provides only notice and priority. However, local practice has tended to make registration compulsory³, so that it is usual to refer to the owner as 'the registered owner'. But the principles of conveyancing are strictly those of a deeds system, although there is currently a long-standing working party which is considering the introduction of a registration of title system.

b. The New Territories and land

In 1898, land in the New Territories was held under Chinese customary tenure in accordance with the principles of Ch'ng dynasty laws. For centuries large tracts of land in the New Territories had been occupied by Chinese farmers who held title from the Emperor. The incidents of customary tenure were those associated with the form of title under which the occupier on payment of land tax, and the performance of labour services⁴ to the Emperor [or his representatives], received a title in perpetuity which was heritable and assignable; this title was not subject to any restrictions on building or user. Title to

²The Joint Declaration of the Government of the United Kingdom and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong: 1985: Annex III deals with land.

³See *Yeung Shu v Alfred Lau & Co* [1997] 2 HKC 153.

⁴Eventually this personal service was converted into a payment.

waste land could be obtained by occupation, cultivation and continued occupation and cultivation; title so gained became similar to that of alienated land but subject to the ever-present right of the Emperor to resume the land if it was no longer being occupied and cultivated. Title to land could also be obtained by purchase or by inheritance; however, land descended in the male line only.⁵

The Canton Magistracy had been the registering office for New Territories land, and for dealings in that land. Deeds evidencing transactions in land were required to be registered there also to ensure that the transaction would have legal effect, and be officially recognised. However, over the centuries, land holders had effected irregular forms of transactions which had not been registered; one reason for this being the distance to travel from the New Territories to Canton. Title deeds were referred to either as red deeds [those which had been registered and bore an official red seal] or white deeds [unregistered and without the official red seal]. A purchaser, receiving a white deed from the vendor, had the right to register his purchase and thereby obtain a red deed, but, rarely did so. As the Imperial Chinese Government recognized only red deeds for the purposes of the imposition of tax and ownership information, purchasers taking by way of white deeds were required to undertake to reimburse the 'registered' owner for all Government taxes.

As much land was held by clans, there was not a great number of dealings with land, with the result that land remained in the ownership of the same families or clans for generations. The reason for this was

⁵The usual form of succession was by intestacy. However, the Court of Appeal held in *Re Tse Lai-chiu* [1969] HKLR 159 that there was no Chinese custom or law which prevented Chinese people making wills in accordance with English Law as enforced in Hong Kong; see also *Tse Moon Sak v Tse Hung* [1946]-[1972] HKC 160 and the *Chinese Wills Validation Ordinance* No 1 of 1856.

Neither of these decisions was in respect of landowners in the New Territories, but the principles would have been applicable to wills made by indigenous people after 1898. A will made before that date may not have been a will for the purposes of Hong Kong law. Even had Ch'ng law provided for general testamentary powers, they would have been under-exercised in the New Territories simply because much land was owned by clans rather than individuals.

that clan land could only be sold out of the clan, where no clan member was interested in buying it.⁶

Freehold land could be owned by individuals, by families or clans. Unless the land was subject to a traditional Chinese customary trust, a *tong* or *t'so*, it could be dealt with in the usual way by sale, mortgage, leasing, and so on. *T'ong* or *T'so* land was able to be held under trust for various purposes, for example for a temple for a particular idol, or for ancestor worship. *Temple* land was that devoted to the support and upkeep of a temple for a particular idol through profits realised in renting the land; those providing funds for the purchase of the land acted as trustees. Land could be held by *associations* having various objects; the land is purchased with subscriptions of those interested and the profits were used in accordance with the expressed objects, such as the assistance of the emigration of members of the association. *Ancestral* land was set aside for ancestral worship by members of a clan. Rents of this land went towards the up-keep of the ancestral temple, education of male members of the clan, worship rites, charity to clan members in need, and similar expenses. The land was held in the name of the ancestor; it could not be alienated without the consent of the representatives of the clan.

The traditional Ch'ng system of ancestral land holding for the benefit of the male members of the family or clan which is managed by a *T'ong* and *T'so* manager continues today; the manager is required to be registered as such in the Land Office.⁷

c. The New Territories and custom

Any aspects of Chinese customary law, which still operate in Hong Kong, are mostly relevant only to the indigenous people of the the New Territories; there are four main areas where custom has applied in the past but where the emphasis is no longer as strong as before. In the case of two, those of succession and concubinage, the general law of Hong Kong now prevails. The four areas are:

⁶*Beautiglory Investment Ltd v Tang Yet Tai* [1993] 2 HKC 591.

⁷*Tang Kai Chung v Tang Chik-shang* [1970] HKLR 276; *Lai Chi Kok Amusement Park Co Ltd (No 2) v Tsang Tin-sun* [1966] HKLR 124.

1. the ownership of land. Apart from the fact that formerly freehold land is now held on a Government lease, whether owned as an individual lease or as a Scheduled interest under a Block Government lease, much land is held in the name of a clan, family, tong or t'so rather than by an individual.

Certain rights are given to indigenous male members of New Territory clans such as land given to males over the age of 18 years under the Small House Policy. This right is not a customary right *per se* but is an exercise of Government policy from the 1970s and is only for the benefit of indigenous males. There is no similar policy for the benefit of indigenous women in the New Territories.

The policy of the Government 'paying' for the resumption of land by the issuance of Letters A and B certificates applied only to indigenous land owners.

Ch'ng custom is patriarchal in that primarily only males owned land, succeeded on intestacy to property, and were the beneficiaries of customary trusts. Whilst a woman was entitled to limited maintenance from her father or from the estate of her deceased husband yet generally a woman was not recognized as the owner of land for her own benefit.

New Territories land which was regulated by Part II of the *New Territories Ordinance* gave the owner certain advantages not only in respect of intestate succession, but also by permitting the owner to use the land in accordance with the use scheduled in the Block Government lease; in most cases this was a customary use and was merely descriptive rather than mandatory. Further, until 1987 (in respect of the *Buildings Ordinance* (Cap 123)) and 1991 (in respect of the *Town Planning Ordinance* (Cap 131)) there was almost no regulation of building or land use.

2. succession of property amongst indigenous people. Succession has increasingly become a matter for the general law of Hong Kong with the result that custom has been considerably weakened: in particular the *New Territories Land (Exemption) Ordinance* (Cap 452). Prior to the enactment of that ordinance in 1993 (but with general effect from 24 June 1994), succession in the New Territories mostly followed the custom, that is it was by way of intes-

tacy, and a custom under which only males were entitled to succeed. Section 17 of the *New Territories Ordinance* made provision for the registration of the heir with a minimum of formalities.

The *New Territories Land (Exemption) Ordinance* repealed section 17 and now provides that the general law of Hong Kong, which does not discriminate between males and females, operates on intestacy.⁸

3. customary Chinese trusts. These trusts, the *tong* and the *t'so*, are protected by the *New Territories Ordinance* and remain in widespread use for the benefit of male members of clans in the New Territories.
4. concubinage and customary adoptions. Under concubinage, a man could have more than one legal wife. The concubines were referred to as *tsip*; each *tsip* had rights within the family structure and in respect of family property. Her children were regarded as legitimate in the same way as the children of the wife. A woman was a *tsip* if the man intended to take her as a *tsip*, the wife accepted her as such, and she was so recognised by the man's family. Concubinage was abolished in 1971.

Customary adoptions, posthumous of the father, were used to provide a male heir where the husband had died without leaving a son. His widow was under a customary obligation to adopt a son to have the same surname as the deceased husband and to maintain the male line. Customary adoptions were abolished in 1972.

Regulation of land in the New Territories from 1898

When the then Colony of Hong Kong commenced administration in the New Territories in 1898, there were many problems with land tenure there:

⁸see *Lau Wong Fat v Attorney General* (1997) 7 HKPLR 307 where the Court of Appeal held that the exemption ordinance did not infringe the *Hong Kong Bill of Rights Ordinance* (Cap 383).

1. land had never been surveyed officially, and indeed in many cases had never been surveyed at all; the result was that boundaries of lots were uncertain;
2. there were more white deeds than red deeds in circulation. This made extremely difficult the task of ascertaining the identity of the true owner;
3. much land was subject to customary trusts which meant that the land was not freely alienable;
4. land, formerly waste land, was held by way of possessory rights for which there was no official (a red deed) or unofficial document of title (a white deed);
5. much land was not owned by individuals but by families or clans with prohibitions on alienation except subject to certain safeguards;
6. there was a multiplicity of claims to the same lots of land; and
7. initial rumours indicated, quite uncorrectly, that the British would resume land without compensation.

The first step in regulating land tenure was for the Government of Hong Kong to assume title to all land. This was later deemed to have occurred from 23 July 1900.⁹ But as the Government's title could not last beyond 30 June 1997, any regulation of land holding in the New Territories resulted in the replacement of previously held freehold title with that of leasehold.

In the rest of Hong Kong, the British Government held the land in perpetuity, but land was alienated by way of leasehold; in 1898 these leases were generally for 75 or 99 years, some of which were renewable for a further term, whilst others were 'non-renewable'.

As the Government was uncertain how to deal with the various problems of land tenure, a Land Court was established by the *New Territories Land Court Ordinance*¹⁰ to settle claims to land. After the various claims had been adjudicated, the court would then decide what form title would take. The first step for the court was to undertake supervision of the survey and demarcation of the lands. This largely

⁹See section 8 of the *New Territories Ordinance [NTO]*.

¹⁰[No 18 of 1900].

was done by surveyors brought in from India, but linguistic problems delayed the task because the local inhabitants spoke only Cantonese and the surveyors spoke English or Tamil or Hindi eventually local Chinese demarcators were trained to assist the Indian surveyors.

The ordinance required the court to investigate claims and then to alienate to successful claimants either by way of Government Lease, other title, or by licence; any title was to reflect the former ownership of the land in the hands of the successful claimant. But if it was considered inexpedient that a title should issue, then compensation would be awarded instead. The court also had to up-date the rent roll to enable land revenue collection.

But the main task of the court was that of investigation of the validity of claims to land and granting title to successful claimants. Various forms for this title were suggested, including a Torrens title or the 'Torrens' form of title supposedly¹¹ issued in the Strait Settlement of Malacca. This was on the basis that that form of title would be appropriate because it would give the landholder only an extract from the Register rather than a Government Lease. However plans for the Torrens system did not progress; an enactment was passed but lingered without implementation for the best part of a year before being repealed: this was the *New Territories Titles Ordinance* No 47 of 1902.

The solution reached by the court was to issue Crown Leases, but not in the usual form; instead *Block Crown leases* were to issue.

Block Crown Leases [now Block Government Leases]

The Land Court decided that the New Territories was to be divided into *Demarcation Districts* which were then subdivided into *Blocks*. A

¹¹The title referred to in Government papers was described as that of the *Malacca Lands Ordinance* No IX of 1886 and the *Malacca Customary Lands Transfer Ordinance* No VII of 1900. However this was inapt as the Malaccan customary titles were not at that stage subject to the Torrens system: Sihombing JE *Torrens title in the New Territories* (1984) 14 HKLJ 291; Sihombing JE *Commentary on the National Land Code* (3rd ed: Butterworths 1997) chapters 1 to 3.

Block Crown Lease (now Block Government Lease) was issued for each Block.¹² The Lease detailed the number of lots within the Block; these lots, in most cases, were owned by the traditional owners either as an individual or collectively by a clan, a family or a *tong* or *t'so*. Each Block Crown Lease contained a Schedule detailing the separate ownership of the individual lots, together with the user to which the land was put at the date of the survey, and the amount of tax payable at that time.¹³ Block Crown Leases to 354,000 lots were issued. Unoccupied land was vested in the Government.

Until 1961, the administration of the New Territories was carried out by District Officers who also became responsible for registering transactions in land within their district; thus dealings in land held under the Block Crown Lease were registered at the District Office rather than at the central Land Office. In 1961 the District Court and the High Court [now the Court of First instance] were empowered to hear matters relating to custom in the New Territories: sections 12 and 13 of the *New Territories Ordinance* and the District Officer no longer had jurisdiction in this regard. In 1982 the Registrar General assumed responsibility for land registration in the New Territories; to facilitate registration, regional land offices were opened in the larger New Territories towns. However, all records now have been computerized in a central registry.

Block Crown Leases (now the Block Government Lease) and Chinese Custom

Land held under a Block Crown Leases (the Block Government Lease) was subject not only to the *Crown Leases Ordinance* (now the *Government Leases Ordinance*) but also to Chinese customary tenure. Chinese custom was formally preserved by the enactment, in 1910, of the *New Territories Ordinance* under which Part II provided that several

¹²*Wintak Enterprise (HK) Co Ltd v AG* [1985] 1 AC 733.

¹³*Lintock Co Ltd v AG* [1985] 2 HKC 555.

of the incidents of customary law were to continue to apply to land in the New Territories unless and until the land was excluded from the provisions of Part II. This could be done on the application of the landowner or by the Government, in the cases of the alienation of waste land or of resumed land.¹⁴

By amendment to section 13 of the *New Territories Ordinance* in 1961, the powers of the District Officers were to be exercised by the High Court [now the Court of First Instance] or the District Court which 'shall have power to recognise and enforce any Chinese custom or customary right affecting any land' in the New Territories. By then the most usual incidents of customary law which applied were those of the Chinese customary trust, the *tong* or the *t'so*, and the devolution of land by intestate succession in the male line. A more recent amendment, in 1994 by the *New Territories Land (Exemption) Ordinance*, resulted in the abolition of existing statutory protection and recognition of succession rights on intestacy in the male line. The customary trust, in the form of the *t'ong* or *t'so*, continues to be enforced.

When the Land Court was considering the form of title, no provision was made for the effect of the termination of the British lease over the New Territories in respect of the ownership of land. Indeed, many leases granted by the Government were to last for 75 years only, until 1973, whilst other were for 99 years less the last 3 days. The 99 year lease was clearly unable to be renewed. The 75 year lease was referred to as non-renewable. In the 1960s the matter of the non-renewable leases was dealt with by the *New Territories (Renewable Crown Leases) Ordinance*¹⁵ which automatically extended leases for a further term of 24 years less the last three days. Later the Joint Declaration, and now Art 120 of the *Basic Law of the Hong Kong*

¹⁴As land is held on leasehold in Hong Kong, there is no compulsory purchase of land when the Government needs alienated land for public purposes; instead land is resumed on the payment of compensation: see the *Lands Resumption Ordinance* (Cap 124) formerly the *Crown Lands Resumption Ordinance*. For land which has been acquired by adverse possession against the Government after 60 years, the *Land Acquisition (Possessory Titles) Ordinance* (Cap 130) provides for compulsory purchase rather than resumption. However, it would seem that there is no such land in Hong Kong.

¹⁵Now called the *New Territories (Renewable Government Leases) Ordinance*.

Special Administrative Region of the People's Republic of China automatically extended New Territories leases, due to expire by 30 June 1997, or before, for 50 years to 2047 on an annual payment of 3% of the rateable value of the land. However, the question of conversion from freehold to leasehold was not broached at that time, and the time has now passed for this to be considered.

In *Winfat Enterprise (HK) Ltd v AG*¹⁶ the power of the Hong Kong Government to resume New Territories land for public purposes under the *Crown Lands Resumption Ordinance* [now the *Lands Resumption Ordinance*] was considered where the landowner claimed that resumption would be in breach of the 1898 Peking Convention because that treaty had preserved the rights of the landowner as

successors in title to the Chinese inhabitants of the New Territories at the time of the cession, upon the same common or customary Chinese tenure as those Chinese inhabitants had themselves held it, that is to say a perpetual interest, heritable and assignable and free from any restriction upon building on the land. [at 9]

However, the Privy Council said that the British Government was 'sovereign for the duration of the cession'¹⁷ so the municipal law of Hong Kong applies to the New Territories. Under that law, in particular the terms of the *New Territories Land Court Ordinance*

ss 14 and 17 make it plain that it is for the Governor to determine what form of title is appropriate; while s 15 with its express reference not only to the land in the New Territories being the property of the Crown for the ninety-nine year term of the Peking Convention, but also to all persons in occupation of any land being deemed trespassers as against the Crown unless their occupation is authorised by grant from the Crown, reinforces the provisions of ss 14 and 17 that the only form of title to land in the New Territories that will exist in the New Territories after the Land Court has completed its work, is in such form as is directed by the Governor...

¹⁶[1988] HKLR 5.

¹⁷*Ibid*, Lord Diplock at 9.

The title which the Governor directed should be granted was leasehold tenure for the term of ninety-nine years less three days from 1st July 1898. The form of grant adopted was that of Block Crown Leases with their accompanying schedules. [at 12].

The customary right of a 'perpetual interest, heritable and assignable and free from any restriction upon building on the land' thus lost many of its features; by 1997 the question of the perpetual nature of the customary right was a moot point.

Land can be exempted from the provisions of Part II either on alienation of the land, or in the case of pre-existing ownership then at the request of the owner. The result of exclusion from Part II is that traditional Chinese custom no longer applies and dealings with land follow the general law of Hong Kong.¹⁸ One consequence of the exemption of land from the provisions of Part II which was of significance in the development of land in the New Territories was that that land became subject to general planning legislation regulated by the *Town Planning Ordinance* and the *Building Ordinance* so that traditional Chinese custom no longer applied.¹⁹

Until 1987, [in the case of regulation of construction] and 1991 [in the case of planning regulation], Part II land was not subject to general planning legislation: the *Town Planning Ordinance* and the *Building Ordinance*.²⁰ Thus traditional land holders felt that they could use the land as they wished because the 'user' restriction in the Block Crown Lease [BCL] was merely a description of the use of the land at the end of the nineteenth century rather than a mandatory obligation to continue to use the land in the manner noted on the BCL.²¹

¹⁸*Lo Chun-tak v Chan Foon-tan* [1992] HKDCLR 47.

¹⁹*Wong On v Lam Shi Enterprises Ltd.* (1995) MP No 2549/95; *Lo Chun-tak v Chan Foon-tan* [1992] HKDCLR 47.

²⁰*Wong On v Lam Shi Enterprises Ltd.*, *ibid.*

²¹*Winfat Enterprise (HK) Co Ltd v AG*, *supra* n.16.

Chinese customary law trusts over land

A basic principle of Chinese customary law is that of the maintenance and preservation of family property in the male line. Perhaps the clearest example of this patrilineal system is that of the customary trust over land, the *t'so* or *t'ong* which have now been preserved in section 15 of the *New Territories Ordinance*. The elements which make up the trust are:

- (1) land is held for the benefit of the clan or lineage:
- (2) males have a lifetime interest in the land:
- (3) the interest is that of a perpetual entail:
- (4) no member of the clan or lineage has rights of succession:
- (5) the members, or beneficiaries, of the trust are the direct male descendants of the ancestor:
- (6) the interest is an inalienable, indivisible and perpetual one which however can be sold in limited circumstances to a purchaser who is not a member of the clan or lineage.

Although these two customary trusts are discrete transactions, yet the terms are often used interchangeably. More precisely the *t'so* was a trust where land was held for the benefit of the clan or the lineage and was created posthumously by the heirs of the deceased land owner for various purposes, but particularly for ancestral worship; whereas a *t'ong* was considered to have been created by the landowner *inter vivos* with the intention to ensure that the land was held by the clan in perpetuity for various purposes including education, business, and social purposes.²²

Custom required a manager to be appointed to deal with the trust property. The ordinance requires registration of that manager, and consent of the land officer for any transactions with the land.²³ In the

²²*Chu Tak-hing v Chu Chan-Chueng Kiu* [1968] HKLR 542; see also *Tang Yau Yi v Tang Mou Shau Tso* [1996] 2 HKC 471 where a *t'so* purchased a share of an interest in land by providing a contribution to a *yuen*, which is another form of a *tong*.

²³Section 15 *New Territories Ordinance*.

Chu Tak-hing case the court also looked at the manner of creation of the tong and related it to the common law trust. It was held that there two essential features of the customary trust, similarly to the common law trust, were the the grantor must have the intention to create the trust, and that the grantor had done everything necessary to perfect the trust.

The *T'so* was referred to in *Tang Kai-chung v Tang Chik-shang*²⁴ as

a tso may be shortly described as an ancient Chinese institution of ancestral land-holding, whereby land derived from a common ancestor is enjoyed by his male descendants for the time being, living, for their lifetimes and so from generation to generation indefinitely. Thus every male descendant of the common ancestor automatically becomes entitled at birth to an interest in the land for his lifetime; on his death his interest merges so as automatically to enlarge the interests of the surviving male descendants; thus his interest at any given moment during his lifetime depends on the number of male descendants then living and on his death it forms no part of his estate... A tso ... is formed not by the common ancestor but his son or sons on or after his death and as a matter, it would seem, of filial duty in accordance with Confucian tradition for the purpose of veneration of the common ancestor.²⁵

Generally the *T'ong* has many forms and have wider functions and responsibilities than *T'sos*. The function and duties of the *T'ong* manager were referred to in *Lai Chi Kok Amusement Park Co Ltd (No 2) v Tsang Tin-sun*²⁶ The case also dealt with the role of the District Officer in the administration of New Territories land, until that role was taken over by the CNTA. In his judgment, Briggs J, at 130-131 noted that

²⁴[1970] HKLR 276.

²⁵Mills-Owens J at 320; see also *Kan Fat Tat v Fan Yin Tat* (1986) HCA No 865/82.

²⁶[1966] HKI R 124.

the position of the Land Officer carries with it a deep significance in the eyes of the people of the New Territories: he is not only a Government official but he is regarded by them as the paterfamilias of every clan, family or t'ong. It may therefore be said that his consent to the transaction is to be given in that capacity as paterfamilias as much as it is given in his capacity as a Government official. The mischief envisaged by the section is this: land held by a t'ong could in the usual way be conveyed only if the conveyance were executed by all the members of the t'ong. That would as time went on become increasingly difficult, if not practically impossible. The object of the Ordinance of 1905 was to facilitate transactions relating to land. It may well be in the interest of the t'ong that the land should be leased or sold and a convenient means of effecting the conveyances was sought. This was found in the appointment of managers, but at the same time it was necessary to protect members of the t'ong against malpractice on the part of the managers. For this the personal supervision of any transaction entered into by the manager was desirable. Such personal supervision would be ensured if every instrument relating to the land had to be executed and signed by the manager in the presence of the Land Officer. At the same time the attestation by the Land Officer would be conclusive proof of his having consented.

Rigby J added, at 139, that

it was not the practice of the Land Officer to witness the execution of instruments relating to land. The procedure followed was that after the Land Officer has given his consent to the disposition, instructions are given to the clerk in the Land Registry to prepare the document: the parties are identified to the clerk and they execute the document before him: the document is then brought before the Land Officer and he signs a memorandum endorsed upon the document to the effect that it has been registered.

Originally the District Officer was the official concerned with registration and execution; now it is the Land Officer.

The necessity to observe the terms of registration under section 15 for the *t'so* or *t'ong*, especially in obtaining the consent of the Land Officer, can cause difficulties where the manager has sold to a bona fide purchaser for value *prior* to approval of the appointment, or reg-

istration as managers, and especially where the consent has not been obtained prior to the sale.²⁷ The effect of the legislation is to make any sale entered into by the unregistered manager at the most a conditional sale.

The terms of section 15 of the *New Territories Ordinance* are mandatory in requiring:

1. the notification to the land officer of the appointment of the manager;
2. the registration of the manager;
3. the consent of the land officer to dealings with the land; and
4. execution of relevant documents in the presence of the land officer.

The manager can then dispose of the land as if he was the sole owner subject to:

1. the consent of the Land Officer;
2. the consent of all members of the clan. This will be inferred if they, having had notice of the sale, have not objected; and
3. the instrument of assignment is executed in front of the Land Officer.

Failure to take any of these steps would inhibit any purchaser obtaining good title to the land because the transaction would be considered to be null and void. Where the only step lacking is that of the transaction having been executed before the land officer, then it might be possible to salvage the transaction if the land officer subsequently consents on the basis that the transaction was one which would have received consent - had that consent been requested.²⁸ But the absence of the other steps will not allow retrospective validation. Any docu-

²⁷*Beautiglory Investment Limited v Tang Yet Tai Tong et al* [1993] 2 HKC 591; *Enway Development Ltd v Light Ocean Investments Ltd* [1994] 3 HKC 31.

²⁸*Tang Yau Yi v Tang Mou Shau Tso* [1996] 2 HKC 471.

ment executed contrary to the terms of section 15 probably would be treated as being null and void.

Women are not the beneficiaries of *t'ong* or *t'so*. However, in rare cases a woman can be a manager of a *t'ong* or *t'so*, perhaps only however for a limited time and most certainly for a specific purpose only; and more particularly *not* in her own right or for her own benefit. In *Li Tang-shi v Li Wai-kwong*²⁹ a man had died without leaving a male heir; his widow was registered as trustee pending adoption of an heir. At that time, and until 1971, it was common for a male heir to be adopted by husband and wife [although as here it would have been a posthumous adoption on the part of the deceased husband]. Customary adoptions were not permitted after 1971.³⁰ In rare cases also a widow may receive the share of her husband from distribution of *t'so* assets but only if that distribution amounts to maintenance to which she is entitled from the husband's estate, or, if there is no male heir, until she adopts a male heir.³¹

Another example of customary law is that of the right of a minor male to succeed to land, and the appointment and registration of a trustee for that minor: section 18 of that ordinance.

Custom and the New Territories Ordinance

Part II of the *New Territories Ordinance* (Cap 97) provides for several of the incidents of customary law to be applied to land in the New Territories so long as that land has not been exempted from the provisions of Part II.³²

The main provisions of the *New Territories Ordinance* for land which has not been exempt are:

1. section 7 (2) which provides for the exemption of land from the terms of the Ordinance. Where a new Town Lease is to issue in

²⁹[1969] HKLR 367.

³⁰See the *Adoption Ordinance* (Cap 290).

³¹*Tang Choy Hong v Tang Shing Mo* [1949] HKLR 58.

³²*Lo Chun-tak v Chan Foon-tan* [1992] HKDCLR 47.

lieu of the existing title, the present owner has to surrender the existing lease for a new lease, unless the value of the land surrendered is minimal: section 7 (3).

2. section 12: which gives jurisdiction in the High [now the Court of First Instance] Court and District Court to hear and determine land matters in respect of New Territories land.
3. section 13: power is given to the High Court [now the Court of First Instance] and the District Court to enforce Chinese customary law and rights. But the *Inheritance (Provisions for Family and Dependants) Ordinance* now amends custom somewhat by empowering the court to make provision from the estate of a deceased person for certain dependants; the *Intestates' Estate Ordinance* also now applied to New Territories land, exempt or non-exempt.
4. section 15: then manager of a *tong* or *t'so* is to be registered as such; the section also deals with the cancellation of the registration of the manager.
5. section 16: provides for exemption of a registered *tong* or *t'so* from the provisions of the *Companies Ordinance* [Cap 32]
6. section 18: provides for the registration of a trustee during the minority of a person who is entitled to land.

Prior to 24th June 1994, section 17 had enabled the name of a male entitled by intestacy to hold land in succession to the deceased owner registered to be as owner. From that date, the *New Territories Land (Exemption) Ordinance* amended the *New Territories Ordinance*; amendment was considered necessary to prevent Chinese customary law on intestacy being applied to non-indigenous owners of land in the New Territories which had not been exempted from Part II.

This had the result that recent alienation of land in the new towns had unwittingly subjected that land to the terms of the ordinance; in particular the former section 17 operated to restrict intestate succession rights in favour of males only. In many cases, land had been alienated for large scale development under which the 'owner'³³ of a unit in a

³³The term 'owner' is used in practice; although at law the person merely holds a Government lease.

multi-storey building held that interest as co-owner with a spouse, and this often by way of tenancy in common. In some cases the matrimonial home was held only by the husband with the expectation that general Hong Kong law on intestacy would apply on his death. Most of these owners were not indigenous owners. It would have been a simple matter for the Government to have exempted that land at the time of granting the Government lease. But this had been overlooked, probably because the general approach was to assume the ordinance applied only to indigenous villagers. But it was found that the *New Territories Ordinance* is based on territorial factors rather than on the personal law factors by reference to the identity of the owner of land with the result that the non-indigenous owners of undivided shares in the Government lease were subject to customary succession rights on intestacy. This meant that where the husband had been the registered owner of the land, or where he had held as tenant in common with his wife, then on his death the wife and daughters were excluded from succession.

As the Government had not exempted the land on alienation, the matter could have been left in the hands of landowners to apply for exemption. However, land tenure in Hong Kong is complicated that the Government lease is usually held by many tenants in common in undivided shares because most residential flats are in multi-storey buildings.³⁴ That did present a difficulty because all co-owners would have had to apply. In practice it had been found to be impossible to obtain the unanimous consent of all tenants in common to the application for exemption. The result has been that when an 'owner' of

³⁴There is no Strata titles legislation in Hong Kong although most residential, commercial and industrial buildings are 'owned' by more than one party. Building schemes are rare. The usual practice is for the Government lease of the land to be held by all owners of units in the building on the land as tenants in common; each owner will then have an exclusive right to possession to, or occupation of, his particular unit, and also will have rights as tenant in common over the parts of the land held in common. It is difficult to get all owners to agree to apply due to the number of owners in large buildings, most are of at least 20 storeys, where many owners are absentee landlords, or are companies, and like problems.

such land died intestate, his widow and daughters were not entitled to any share of his property on intestacy or under any other general legislation, such as *Deceased's Family Maintenance Ordinance*.

To remedy this, the *New Territories Land (Exemption) Ordinance* was enacted in 1994.

The *New Territories Land (Exemption) Ordinance* distinguished between rural and non-rural land. Retrospective amendment was made in respect of non-rural land, so that it is assumed always from the time of grant of the Government Lease to have been land exempted from the operation of Part II for the purposes of succession. This means that land held by a male who dies on or after that date, will be treated in the same way as all other land in Hong Kong for the purposes of intestate succession. Under that general law there are no restrictions on succession merely because the party seeking to succeed is a female.

The amendment applied to rural land only from 24th June 1994, thereby making rural land after that date subject to the general law on succession. Certain transitional provisions have enabled a successor to rural land, under Chinese custom law who had not, prior to 24th June 1994, been registered as successor to be so registered under section 17; from that date section 17 has been repealed. Other transitional sections preserve Chinese customary law in respect of transactions entered into but not perfected prior to 24th June 1994, and in respect of transactions concerning deceased estates before that date.

Further, the *Inheritance (Provisions for Family and Dependents) Ordinance*³⁵ came into operation to empower the court to make provision from the estate of a deceased person for certain dependants. Section 27 of that ordinance ensures that it applies to estates in the New Territories; this application had been foreshadowed by the terms of section 9 of the *New Territories Land (Exemption) Ordinance*. Similarly, the *Intestates' Estate (Amendment) Ordinance*³⁶ amended the parent ordinance³⁷ by repealing section 11; the result has been that the ordinance now applies to New Territories land as if it had been exempted from the terms of Part II of the *New Territories Ordinance*.

³⁵No 58 of 1995.

³⁶No 57 of 1995.

³⁷Cap 73.

This amendment too had been foreshadowed by section 8 of the *New Territories Land (Exemption) Ordinance*.

There has been much criticism by certain New Territories residents of the 1994 ordinance, and the subsequent application of the *Intestates' Estates Ordinance* and the *Inheritance (Family and Dependents) Ordinance* to New Territories land. That criticism was taken to court in *Lau Wong Fat v AG*³⁸ where an indigenous inhabitant of the New Territories sought to prevent enforcement of the 1994 ordinance on the basis that it, by amending Chinese custom, was inconsistent with the *Bill of Rights Ordinance* (Cap 383) [BORO]. The plaintiff had sought to rely on article 15 of BORO, which protects freedom of thought, conscience and religion, and on article 23 which protects minorities and ultimately to have the legislation repealed as being in breach of BORO.

However, the Court of Appeal held that the writ disclosed no cause of action. In his judgment, Godfrey JA doubted whether an indigenous inhabitant of the New Territories was an 'ethnic minority'; but even if the plaintiff succeeded on this point, yet the *New Territories Land (Exemption) Ordinance*

does not prevent an indigenous inhabitant from making a will in favour of his male descendants to the exclusion of his female descendants, and so preserving the custom himself. All the Ordinance does is to accord to women the same rights in relation to the inheritance of land anywhere in Hong Kong as are enjoyed by men.³⁹

From time to time, suggestions are made, by certain groups, that attempts to repeal the legislation will continue.

User restrictions in Block Crown Leases

The question of whether the user restriction, in the Block Crown Lease or that in the Schedule, continues to apply to New Territories land has

³⁸[1997] HKLRD 533.

³⁹*Ibid* at 535-536.

arisen especially in cases where the landholder has sought to rely on custom to enter into transactions which do not conform to the user restriction, and which would be in breach of general planning laws were the planning legislation to apply to the New Territories. In other words, the landholders have said that the fact that the land is held under a Block Crown lease does not interfere with their right to use the land in any way custom would have permitted.

By contrast with Part II land, land in the rest of Hong Kong has long been subject to the *Buildings Ordinance*⁴⁰; in respect of construction the following provision apply

- a. building plans must be approved by the Building Authority [the Director of Buildings]: see sections 2 and 14 of the ordinance;
- b. construction cannot commence until the Building Authority has consented: sections 14 (1) (b) and 40 (1). That consent cannot be granted retrospectively and any construction commenced contrary to section 14 (1) (b) would constitute an 'illegal structure';
- c. the building can only be occupied when an Occupation Permit has been issued: section 21; and
- d. a Certificate of Compliance with the building legislation will be issued after the Occupation Permit indicating that the landowner has complied with the conditions contained in the Government lease, and the legislation. This Certificate forms part of the title deeds by which a good title is shown by the landowner when he sells the land.

Thereafter any alteration to, or removal of, the construction will constitute an illegal structure. Where that illegal structure breaches a covenant in the Government lease, the Government can forfeit the lease and re-enter the land without compensation. Action can be taken in the alternative by the Building Authority who

⁴⁰Building regulation was introduced from the earliest days of the Colony which was founded in 1843, but the modern form of the legislation, namely the *Buildings Ordinance* (Cap 123) was enacted in 1956.

- a. serve notice for the demolition or alteration of illegal structures on the owner of the land:
- b. in default of compliance, will carry out the work itself and demand payment from the owner: and
- c. in default of payment, will register a first charge against the land.

In most cases, the Building Authority will take action on default, rather than the Government.

Historically there would seem to be some factual basis for the claim that New Territories land was to be considered differently from other land in Hong Kong because

- a. when the *Town Planning Ordinance* was enacted in 1939 it did not apply to New Territories land, except that exempted from Part II; very little land had been exempted. The ordinance also applied to waste land which had been Government land since 1898.

However, the ordinance does now apply to the New Territories, and has done so since 1991;⁴¹ section 23 (9) provides the circumstances when the ordinance will not apply.

- b. the *Building Ordinance* (Cap 123) did not apply until 1987: and even now it is possible to obtain a Certificate of Exemption from its provisions: see section 5 of the *Buildings Ordinance (Application to the New Territories) Ordinance* (Cap 121). The Certificate of Exemption is part of the title deeds which the vendor must produce to give a good title.
- c. the *Conveyancing and Property Ordinance* (Cap 219) was enacted in 1984 to regulate conveyancing matters, including provisions for agreement and deeds, the acquisition and holding of land, the implication of covenants into agreements and so on.

It was suggested that transactions under customary law did not have to comply with specific elements of the general law of Hong Kong; in particular section 3 of the *Conveyancing and Property Ordinance* which requires agreements relating to land to be in writing.

⁴¹The 1991 amendment had retrospective effect to the publication of Interim Development Permission Area [IDPA] plans published from 27 July 1990 onwards.

However, the Privy Council, in *Wu Koon Tai v Wu Yau Koi*⁴² agreeing with the Court of Appeal: *Wu Koon Tai v Wu Yau Loi*,⁴³ said that

[T]he devolution of title to land in the New Territories, whether by inter vivos transaction or on death, is regulated by the registration system and the general law of Hong Kong.⁴⁴

In support of this, his Lordship noted that

It is plain that, after the Peking Convention, the whole system of land tenure in the New Territories was fundamentally altered. Leases from the Crown were substituted for old titles under the pre-existing law. A system for deducing title to such leases was imposed, dependent upon the registration of deeds. To allow the customary land law to cut across and to trump the new system would be to defeat its whole purpose.

This view is supported by the provisions of sections 15, 16 and 17 ... which expressly modified the general system of registered conveyancing to take account of special Chinese institutions.⁴⁵ and

- d. Other legislation was claimed not to apply to New Territories land, for example the *Partition Ordinance* (Cap 352). However, it is considered that the decision in *Wu Koon Tai* has settled these problems also where no express exemption or application is provided for by statute: see for example, the *Partition Ordinance* (Cap 352) and *Beautiglory Investment Ltd v Tang Yet Tai Tong*⁴⁶ and the *Buildings Ordinance (Application to the New Territories) Ordinance* (Cap 121).

⁴²[1996] 3 WLR 778.

⁴³[1995] 3 HKC 732.

⁴⁴Lord Browne-Wilkinson delivering the judgment of the Board at 784.

⁴⁵*Ibid.*,

⁴⁶*Supra* at n.25

The usual user restriction for land in the Block Crown Lease was that the land could be used for residential purposes or agricultural only.⁴⁷ But the Government in enforcing this restriction gave a good deal of latitude by the granting of express Licences to enable the construction of buildings in accordance with the terms of the licence, or by Short Term renewable Waivers under which the Government has waived its rights of enforcement of the covenant in the Government Lease. In addition to the covenants in the Block Crown Lease, Notices in the Government Gazette, from time to time, have imposed additional conditions. But although large areas of the New Territories gradually were no longer used for the original purposes of agriculture, the original user restrictions were considered the only regulation of land use necessary. For example, when legislation was enacted, in 1939, for Town Planning in other parts of Hong Kong, the New Territories were not included in that legislation; this was largely because it was then evident that the land was still largely used only for agricultural and residential purposes. Large scale development had not become popular in the New Territories at that time, nor had there been much apparent use inconsistent with the user restrictions.

Special interests in the New Territories

Apart from the application of custom, there have been several special features of land tenure in the New Territories which are not found in other parts of Hong Kong, and which have been applied for the benefit of indigenous owners for the most part, and for males only also for the most part.

The first of these is the *Small House Policy*, introduced in the 1960s, under which indigenous male villagers, 18 years and over, are entitled to be given a piece of land by the Government within the area of a village on which to construct a house in accordance with building regulations; the grant is free of premium unless the land is disposed of within 5 years when the appropriate premium is then payable.

The second feature is that of the various 'Letters' or 'Certificates' issued by the Government, which form part of the chain of title to

⁴⁷*Lintock Co Ltd v AG*, [1985] 2 HKC 555.

some land in the New Territories. There is no discrimination in their issue as to whether the recipient is male or female. The absence of the Letters or Certificates in the chain of title, where necessary, will constitute defects in title. These include the Certificate of Exemption granted under the *Buildings Ordinance*⁴⁸; in the absence of such a certificate the owner of land is required to comply with the *Buildings Ordinance*, in particular not to construct an 'illegal structure'. The various documents issuing from the Building Authority will then become relevant in investigating title to the land, for example, the Occupation Permit. In some cases where there has been a breach of the *Buildings Ordinance* or of a covenant in the Crown lease, the Government will issue a Letter of Toleration and Compliance under which it is said that the breach has been excused by the Government on payment of a premium. Where the Government has agreed to an alteration in the covenants in the Crown Lease, it will issue a Letter of Modification indicating that no action will be taken for an existing breach or that the covenant is considered to have been altered.

A third feature is that of the Letters A and B or the Land Exchange Entitlements; again these were issued regardless of whether the person entitled was male or female. However, many would have been issued in respect of *tong* or *t'so* land in which only males may have interests. They were documents, often in roneod form, issued on the resumption of New Territories land, between 1960 and 1983, to enable the holder to a grant of land in an urban New Territories development area at some future time. The Letters were granted in lieu of cash compensation when the land-holder agreed to surrender his land to the Government for public purposes. In the case of Letters A, speedy resumption was required and the land-holder was prepared to take Letters A without the need for the Government to gazette the notice of resumption. Where notice of resumption had been gazetted, Letters B were issued in lieu of cash compensation where the land-holder agreed to accept the right to a grant of land in the future.

⁴⁸(Cap 123).

Both forms of Letters could be used to off-set the price of land purchased from the Government by auction or tender.⁴⁹ In the Court of Appeal,⁵⁰ it was said that:

When the Government of Hong Kong acquires land the owner of the land may agree to accept compensation in cash or to accept land to be offered by the Government at a price calculated by reference to land values prevailing at the date of acquisition of the owner's land. The agreement is embodied in a Letter issued by the Government. If the owner surrenders his land voluntarily he is issued with the Letter known as Letter A. If the Government compulsorily acquires the owner's land he is issued with a Letter known as Letter B. Since the chose in action, Letter B .. holds out the prospect of acquiring land in 1986 for a price calculated by reference to land values prevailing at the date of the Letter B it follows that Letter B is a valuable chose in action and that in times of inflation its value increases with the passage of time. Letters A and B are known as land exchange entitlements. The Government established a Commitment Transfer Register in the New Territories district offices "for the purchase of recording unredeemed land exchange entitlements, and sale and purchase agreements, changes in ownership and mortgages". ... [T]here are separate entries in the Register in respect of each parcel of land comprised in Letter B. The entries were divided into two parts. In the first part there were recorded the names of the legal owners for the time being of the chose in action constituted by the Letter B relating to a particular piece of land, the date but not description of the deed (of assignment) whereby the legal owner for the time being acquired ownership and the date of the registration of the deed of assignment. The second part recorded descriptions of documents such as declarations of trust and agreements for sale which created equitable and other interests in the chose in action constituted by the Letter B and to which the legal owner was subject, the names of the persons entitled to those interests and the date of registration.

⁴⁹See *Yau Fook Hong Co Ltd v AG* [1988] 1 HKLR 573 [PC].

⁵⁰[1986] HKLR 87.

Obviously as time has progressed these chose in action became more valuable as available land for development became scarcer; frequently many Letters A and B were bought up by the development hongs. In 1997 the *New Territories Land Exchange Entitlements (Redevelopment) Ordinance* No 70 of 1996 [with effect from 27 June 1997] converted the land exchange entitlement into entitlements for cash payments. The Schedule to the ordinance lists the redemption value of the Letters; these values were amended in 1997. Consequently Letters A and B are no longer able to be used as payment of the premium on the alienation of land.

Town Planning legislation and the New Territories

As noted above, it was not until 1991 that the *Town Planning Ordinance*⁵¹, which had been enacted in 1939, applied to exempted land, that is land in the New Territories which had been exempted from the terms of Part II of the *New Territories Ordinance*⁵². This meant that very little New Territories land was subject to planning regulation before 1991 when the *Town Planning (Amendment) Ordinance*⁵³ was enacted. That amending ordinance provided that any area in Hong Kong, and this included all New Territories land whether or not exempted, was to be treated as a development permission area [DPA] in which permission was required for any construction therein. Outline Zoning Plans [OZPs] would then replace the DPAs.

In particular, rural lands in the New Territories, whether or not still within the provisions of Part II, now came within an Interim Development Permission Area [IDPA]. Any development within the IDPA, contrary to the 'user' requirement in the Block Crown Lease (now the Block Government Lease) was prohibited.⁵⁴ The IDAPs were

⁵¹(Cap 131).

⁵²(Cap 197).

⁵³No 4 of 1991.

⁵⁴*R v Power Straight Ltd* [1995] 3 HKC 402; *R v Tang Ying-yip* [1995] 1 HKCLR 339.

later replaced by Development Permission Area Plans [DPAPs]. In turn the DPAPs were replaced by Rural Outline Zoning Plans [ROZP]s.

Prior to 1991, most decisions on planning in the New Territories had involved the determination of the effect of the restriction on user which had been contained in the Schedule to the Block Crown Lease.

In *Winfat Enterprise (HK) Co Ltd v AG*⁵⁵ land which originally had been held in perpetuity under common or customary Chinese tenure, since 1900 had been held under a Block Crown Lease for a term of 75 years with a right of renewal for 24 years less 3 days, subject to a building restriction; although the approval of the Crown Surveyor could be given to build contrary to the restriction. The present owners had sought permission to use part of the holding for housing development; this had been refused. Then the Government compulsorily resumed part of the land for public purposes, namely a housing development. By reference to section 12 of the *Crown Lands Resumption Ordinance* the developmental value of the land was irrelevant in assessing its value for resumption. The owners claimed this meant the resumption order was *ultra vires* because the Convention of Peking provided that there would be no expropriation except for a fair price. They also claimed that the retained land was held under common or customary Chinese tenure free from the building restrictions in the Block Crown Lease; therefore they could develop the property as they wished.

In delivering the opinion of the Board, Lord Diplock said

The land developers' claim does not lack boldness. At the time of the cession of the New Territories the greater part of the land was occupied by Chinese peasants and used for agricultural purposes.. Although nominally the property of the Emperor of China, to whom land tax was payable, the land was held by its occupiers upon common or customary Chinese tenure by individuals and families or clans. It... was a perpetual interest, heritable and assignable and subject to no restrictions upon building on the land.

⁵⁵[1985] 1 AC 733.

[In 1898] [f]or the common or customary Chinese tenure under which the inhabitants had previously occupied their land there was substituted by that Ordinance a leasehold interest of 99 years less three days which... took the form of an initial term of 75 years from 1 July 1898 which was automatically renewable for a further term of 24 years less three days. The leasehold interest in particular parcels of land in the New Territories was granted by incorporating the lots, in the schedules of individual Block Crown Lease which identified their location and area and described the use to which they were put in July 1898. This was generally agricultural or garden ground ... Land so described...was subject to an express covenant by the leaseholder not to use the land for building purposes other than for the proper occupation of the land as agricultural or garden ground and no building or structure of any kind could be erected on the land without the approval of the Crown Surveyor.

Put in a nutshell the land developers' claim was that, notwithstanding the 99-year cession under the Peking Convention, they held the retained land, of which they were the successors in title to the Chinese inhabitants of the New Territories at the time of the cession, upon the same common or customary Chinese tenure as those Chinese inhabitants had themselves held it, that is to say a perpetual interest, heritable and assignable and free from any restriction upon building on the land....

The foundation of [the].. claim was a paragraph in the Peking Convention which reads:

it is further understood that there will no expropriation ...and that if land is required for public purposes, it shall be bought at a fair price.⁵⁶

At the time of the action, the customary incidents no longer prevailed in respect of the land. In its Opinion, the Privy Council said that sections 4 and 17 of the *New Territories Land Court Ordinance* conferred power on the government to determine the form of title in the New Territories; that the form adopted was that of the Block Crown

⁵⁶*Ibid.*, at 744-746.

Lease for which tenure under common law, rather than common or customary Chinese law, was pertinent. In addition, the resumption was not *ultra vires* as it had been effected validly under section 12.

In *AG v Melhado Investment Ltd*⁵⁷ the owner of New Territories land had sublet part of the land to be used for storage of steel girders. The Crown maintained that this use was contrary to that provided for in the Schedule to the Block Crown Lease; the owner sought a declaration that such storage would not constitute a breach of the lease. The Court of Appeal noted that in 1905 the Schedule had provided that the land use was 'padi, waste, grave, dry cultivation or broken latrine'. In holding that the user listed in the Schedule was descriptive only, the court said that the schedule was used to identify the land to which the Block Crown Lease related. Had the use been other than descriptive, the court added that there would have been no need to include in the body of the lease restrictions on building without a licence. In his judgment Sir Alan Huggins VP said

the description of the land in the schedule was what it purported to be - merely a description - and was not to be construed as, of itself, limiting the use which could lawfully be made of the land: the limitation on use was imposed by the covenant against building without a licence. The whole purpose of the schedule was to identify the lands and the parties to which the lease related, and then to particularize the terms and the rents which had been reserved by the body of the lease. If anything more were required to show conclusively that the descriptions in the schedule were not intended to constitute a limitation on the use of the lands during the term it is to be found in the fact that the body of the lease does contain a restriction on building without a licence: if the lessee of every plot expressed to be demised as 'padi' was obliged by the schedule to maintain it as padi, the restriction on building would be unnecessary.

The reality of the matter is that in 1905 no one ever imagined that land in the New Territories might be wanted otherwise than for cultivation or building; therefore the Crown did not think it necessary to cover such a possibility by express provision in the lease.⁵⁸

⁵⁷[1983] HKLR 327.

⁵⁸*Ibid.*, at 329-330.

Following this decision, and several others in similar terms, the Government in 1990 amended the *Town Planning Ordinance* to apply to all parts of Hong Kong, including therefore the New Territories. The impetus for amendment came from the state of much agricultural land in the New Territories which was now being used as storage depots for containers.

The effect the *Melhado* decision⁵⁹ had had on planning matters in the New Territories was referred to in *Niceboard Development Ltd v China Light and Power Company Ltd*.⁶⁰ That case considered the operation of the *Town Planning Ordinance* which had been applied by the 1991 ordinance to land in the New Territories. In *Niceboard*, the applicant was seeking compensation for loss in the value of its land caused by the erection of electricity transmission lines on the applicant's land.

The Tribunal made the following points;

1. the majority of New Territories land under Block Crown Leases was contractually limited to agricultural use;
2. until 1981, any other use required a waiver from the government; the waiver enabled the government to exercise control over storage;
3. much land was used for storage of containers under such waiver procedure; however most waivers were subject to conditions;
4. *Melhado* in 1981 had held that 'storage' was within the lawful 'agricultural' user of land;
5. between 1981 and 1991 no control had been exercised, and this resulted in a 'tragic misuse in both economic and environmental terms of the limited land resources of the New Territories' [at 32];
6. the *Town Planning (Amendment) Ordinance* was enacted in 1991 to make 'any' area in Hong Kong subject to its terms; and to enable any area to be designated a 'development permission area'

⁵⁹See *Garden City Development Bhd v Collector of Land Revenue, Federal Territory* [1982] 2 MLJ 98 where the Privy Council reached a similar decision in respect of a similar covenant.

⁶⁰(1993) Misc Ref 14/91 (Lands Tribunal).

[DPA] thereby requiring the obtaining of consent from the Government to any development within that area:

7. the 1991 amendments apply both to existing and new uses of NT land; and
8. the draft DPA are to be replaced by Outline Zoning Plans [OZP].

The Tribunal, in an extensive judgment, also looked at all other relevant legislation which might in some way regulate planning in the New Territories.

Since 1991 the most relevant provision of the ordinance in respect of New Territories land is that of section 23 under which an 'unauthorised development' [as defined in section 1A] is required to be discontinued. In some cases the defendant will claim that even though the use to which the land is being put would constitute an unauthorised development, yet that use is an 'existing use' [section 1A] to which the land has long been put. Section 23 (9) permits such a defence.

In *R v Way Luck Industrial Ltd*⁶¹, an appeal to the High Court from the Magistrates Court, Litton JA [as he then was] observed that the question for determination was whether there had been a 'material change in the use of the land'⁶² since the publication of the draft DPA plan? The existing use had that of occasional parking and storage; but there had been a 'conversion of the land into an enclosed commercial storage depot, stripped of vegetation, with a hard surface laid over the whole area'.⁶³ It was thus impossible to rely on section 23 (9). Consequently the defendant had been 'rightly convicted'.⁶⁴

In *AG v Lam Mei Chai*⁶⁵, a similar appeal to the High Court from the Magistrates Court involved a purely New Territories situation. Notice had been served on the manager of a *t'so*, a Chinese customary trust, requiring discontinuance of an unauthorised development. The manager did not comply with the notice and in the Magistrates' Court he

⁶¹[1995] 2 HKC 290.

⁶²*Ibid.*, at 296.

⁶³*Ibid.*

⁶⁴*Ibid.*, at 297 See also *R v Tang Ying Yip* [1995] 2 HKC 277.

⁶⁵[1997] 1 HKC 22.

successfully claimed that he should not be treated as the 'owner' for the purposes of section 23 (1). However the Attorney General appealed. In delivering judgment of the Court of Appeal on a case stated, Mayo JA observed that section 15 of the *New Territories Ordinance*.

contemplates that a manager is vested with the duties and responsibilities incidental to the ownership of land and the section is consistent with the manager assuming the responsibilities referred to [sic] s 23 (1) aforesaid.

If this were not enough it is also clear from s 2 of Cap 123 [Buildings Ordinance] that the definition of 'owner' includes the person entitled to receive the rents and profits of the land. This if itself would be conclusive in determining the result of this appeal.⁶⁶

Consequently the Court of Appeal held that the Magistrate was not correct in holding that the manager was not the 'owner' for the purposes of section 23 (1).

The Building regulations and the New Territories

Similarly, until 1987 land regulated by Part II of the *New Territories Ordinance* was not subject to the terms of the *Buildings Ordinance*⁶⁷. But the ordinance was amended in that year, by the *Building Ordinance (Application to the New Territories) Ordinance*,⁶⁸ and as a result Part III of the *Building Ordinance* applied to the New Territories. But, in appropriate cases, a Certificate of Exemption from the terms of Part III can be given, especially in respect to 'village-style' housing; if exemption is not given then any construction on the land requires an Occupation Permit.⁶⁹ The Occupation Permit will then be treated as one of the documents of title necessarily produced when the owner is selling on.

⁶⁶*Ibid.*, at 24.

⁶⁷[Cap 123].

⁶⁸[Cap 123].

⁶⁹*Lui Kwok Wai v Chan Yiu Hing* [1995] 1 HKC 197.

Adverse Possession

Possessory title to any land in Hong Kong, whether Government land or land held by a Government lease, can be gained by adverse possession. However, most such claims are in respect of land in the New Territories held under a Block Crown Lease.⁷⁰

The operation of the limitations period inherently has little to do with custom. However, in many cases, proof of the passing of the limitation period has concerned evidence of customary incidents, such as the relationships of the persons who had been in occupation, succession to the rights of an adverse possessor and so on. But it is not an incident of custom per se. The further complication in the New Territories has been that most adverse possession occurs over rural land, for which Part II applies custom. Most adverse possessors would have been indigenous farmers rather than non-indigenous squatters. Custom would then continue to apply to the land. But if the squatter was non-indigenous the presumption that custom would not apply was incorrect as was discovered in relation to other New Territory land, in respect of intestate succession, which had to be dealt with by the *New Territories Land (Exemption) Ordinance*.

The acquisition of possessory title involves evidence of two steps; and on this Hong Kong has followed the common law as regulated by statute. The two essentials for obtaining a possessory title are:

1. the operation of the *Limitations Ordinance* [Cap 347] which extinguishes the right of the true owner to take action for the recovery of possession against an adverse possessor. As against the Government, adverse possession for 60 years is necessary, and as against a Government lessee adverse possession for 20 years [or for possession commenced in 1991, 12 years] is necessary. The operation of the limitations period does not give the adverse possession title to the land: instead it merely bars the true owner from seeking recovery, and

⁷⁰*Man Kam-tong v Man Li-tai* [1984] HKLR 181; *Lai Ching Yue v Chau Shing* [1987] 3 HKC 406.

- b. possession by the adverse possessor for a sufficient period of continuous possession adverse to that of the true owner.

The squatter must show that his possession has been with *animus possidendi*, by his physical control of the land which is inconsistent with the rights of the true owner and the use for which the true owner intends to put the land.⁷¹ There must be factual evidence of this possession.⁷²

Adverse possession has a purely *negative* effect in that it disentitles the dispossessed from asserting his title and recovering possession from the dispossessor or squatter.⁷³ Ultimately the squatter will gain title by merely exercising such right or by seeking a declaration from the court of his rights as owner to the land based on the adverse possession.

The acts of the squatter must not only be of a sufficient length of time, but they must also be of a particular quality, such as continuous possession adverse to that of the true owner by a squatter.⁷⁴

The dispossession of a lessee, may not give title to the land to the squatter but may merely bar the right of the lessee to recover the term: *Fairweather v St Marylebone Property Co Ltd*⁷⁵ where the House of Lords held that the operation of the limitation period did not vest title in the squatter but merely terminated the remedy of the lessee to recover possession. The passing of title did not automatically effect a statutory conveyance of the term in favour of the squatter, and the surrender of the lease by the lessee effectively vested the remainder of the term in the lessor who then had the right to seek possession as against the squatter. It is presumed that *Fairweather's* case applies in Hong Kong⁷⁶

⁷¹*Leigh v Jack* (1879) 5 Ex D 264; *Williams Bros Direct Supply v Raferty* [1958] 1 QB 159.

⁷²*Buckinghamshire CC v Moran* [1989] 2 All ER 225.

⁷³*Marquis Cholmondeley v Lord Clinton* (1820) 2 Jac & W 1, 37 ER 527.

⁷⁴*Hayward v Challoner* [1967] 3 All ER 122; *Ocean Estates Ltd v Pinder* [1969] 2 AC 19; see the judgment of Hunter J in *Man Kam-tong v Man Lin Tai* [1984] HKLR 181; *Ho Hang Wan v Ma Ting Cheung* (1989) MP No 1032/87.

⁷⁵[1963] AC 510.

⁷⁶*Chung Ping Kwan v Lam Island Development Co Ltd* [1996] 2 HKC 467; *Lai Moon Hung v Lam Island Development Co Ltd* [1994] 1 HKC 11.

But the most usual problem in the New Territories in relation to adverse possession was caused by the length of the Block Crown lease. Under the *Fairweather* decision, as only the title of the lessee is barred and the lessor's title remains unaffected, the lessor and the lessee can combine to defeat the adverse possessor. Thus if the lessee surrenders the lease to the lessor, before the passing of the limitations period, the lease is extinguished and the adverse possessor is left with nothing. In any case, the application of *Fairweather* in the New Territories was complicated by the terms of the New Territories (*Renewable Crown Leases*) Ordinance⁷⁷

The *New Territories (Renewable Crown Leases) Ordinance*⁷⁸ was enacted in 1969 to facilitate the renewal of Government leases in the New Territories on the lapsing of the original term of 75 years in 1973. Government lessees who had an option to renew their existing Government lease a term of 24 years less 3 days from 1st July 1973 were not obliged to exercise that option for renewal; instead Cap 152 made 'renewal' automatic. Those Government lessees who did not wish to 'renew' the Government lease expressly had to surrender the lease to the Government.

The ordinance provided in section 4 (4) that

- (4) Every new Crown lease and the land thereby deemed to be demised shall be deemed to be subject to such of the following encumbrances and interests as the land and the existing Crown lease relating thereto were subject to immediately before the 1st day of July 1973-
- (a) any mortgage, whether legal or equitable, and whether registered in a District Land Registry or not;
 - (b) any public rights; and

⁷⁷[Cap 152].

⁷⁸[Cap 152].

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

The spirit and intention behind the legislation was to provide for the renewal or extension of the original lease rather than the grant of a new lease.⁷⁹ Further to this intention, section 4 (4) (c) provided for the preservation of certain rights obtained under the original lease which were thought to continue under the 1973 lease. But the wording of the ordinance was contrary to that expressed intention so that the lease granted in 1973 was new lease.

The consequences of this was that there were decisions which have held that section 4 (4) (c) does *not* apply to accruing rights but only to those rights which have accrued prior to 1973; this means that it is not possible to add periods of adverse possession earned prior to 1973 to periods after 1973; however there have also been decisions to the contrary. In favour of survival of the rights: see *Yeung Kong v Fu Mei Ling, Mary*⁸⁰ and against survival cases such as *Hong Kong Ferry (Holdings) Co Ltd v Chan Kwan Fat et al.*⁸¹ The Privy Council in *Chung Ping Kwan v Lam Island Development Co Ltd*⁸² decided that the rights were preserved.

Conclusion

Most traditional elements of Chinese custom still applies to land subject to Part II of the *New Territories Ordinance* but amendment to that ordinance, and the application of building and planning regulations to Part II land, has resulted in alteration of some of the traditional features of that custom. Whilst intestate succession rights of males has

⁷⁹Explanatory Note to the Bill: (1969) GG C55.

⁸⁰[1994] 2 HKC 1 [CA].

⁸¹[1995] 1 HKC 542 [CA].

⁸²[1996] 2 HKC 447.

been statutorily abolished, the one area of custom which has not been interfered with is that of the customary trust. Thus the patrilineal form of custom remains extant, to the extent referred to herein.

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