

LRC releases consultation paper on adverse possession

The Adverse Possession Sub-committee of the Law Reform Commission today (December 10) released a consultation paper at a press conference, making preliminary proposals for the reform of the law on adverse possession.

The preliminary recommendations of the Sub-committee are made against a background of a deeds registration system (which is a register of documents) as opposed to a title registration system (which is proof of ownership) of conveyancing in Hong Kong.

The consultation paper discusses that despite the enactment of the Land Titles Ordinance (Cap 585) in 2004, the Ordinance is not yet implemented. The existing deeds registration system gives no guarantee of title. Even if a person is registered as the owner of a property, there may still be uncertainties or defects in his title to the property. Hence, title to land is relative and depends ultimately upon possession.

The Chairman of the Adverse Possession Sub-committee, Mr Edward Chan, SC, said the main provisions on adverse possession can be found in the Limitation Ordinance (Cap 347). Except in the case of government land for which the limitation period is 60 years, no action to recover landed property is allowed after 12 years from the date upon which the right of action accrued. Time starts to run when the owner has been dispossessed of his land and the adverse possessor has taken possession of the land.

The Sub-committee has considered the case law and has made recommendations on various aspects of the case law. Further, in view of the broader and ongoing reviews of the Land Titles Ordinance, the Sub-committee has made recommendations applicable to Hong Kong when a registered title regime is in place.

The main recommendations in the paper are:

* After careful consideration of the situation in Hong Kong, including the existing possession-based unregistered land regime, the land boundary problem in the New Territories, and that the existing provisions in the Limitation Ordinance on adverse possession have been held to be consistent with the Basic Law, the Sub-committee is of the view that the existing provisions on adverse possession should be retained

since they offer a practical solution to some of the land title problems.

* The law of adverse possession should be recast under the prospective registered land system. Registration should of itself provide a means of protection against adverse possession, though it should not be an absolute protection.

* When a registered title regime is in place in Hong Kong, adverse possession alone should not extinguish the title to a registered estate. The rights of the registered owner should be protected. If, for example, the registered proprietor is unable to make the required decisions because of mental disability, or is unable to communicate such decisions because of mental disability or physical impairment, then a squatter's application will not be allowed. However, such protection would not be absolute. Under the proposed scheme:

- The squatter of registered title land will only have a right to apply for registration after 10 years' uninterrupted adverse possession.

- The registered owner will be notified of the squatter's application and will be able to object to the application.

- If the registered owner fails to file an objection within the stipulated time, then the adverse possessor will be registered.

- If the registered owner objects, the adverse possessor's application will fail unless he can prove either: (a) it would be unconscionable because of an equity by estoppel for the registered owner to seek to dispossess the squatter and the circumstances are such that the squatter ought to be registered as the proprietor; (b) the applicant is for some other reason entitled to be registered as the proprietor of the estate; or (c) the squatter has been in adverse possession of land adjacent to their own under the mistaken but reasonable belief that they are the owner of it.

- If the squatter is not evicted and remains in adverse possession for two more years, then the squatter would be entitled to make a second application, and the matter can be referred to the adjudicator for resolution.

* The Government should step up its efforts to address the boundary problem in the New Territories. However, the Sub-committee is of the view that a comprehensive resurvey of the boundaries alone could not solve the problem, because persons who

suffer any loss or disadvantage under the resurveyed boundaries may not accept the new boundaries. It would appear that the land boundary problem in the New Territories is best dealt with together and in the context with the implementation of the Land Titles Ordinance.

* In relation to a mortgagee's right to take possession of a mortgaged property vis-à-vis the mortgagor, the Sub-committee recommends that legislation should be passed to spell out clearly that the limitation period starts to run from the date of default of the mortgagor's obligations.

* The Sub-committee is aware that practically speaking adverse possession cannot be established on "Tso" land, but it does not see the need to change the law on this issue.

Mr Edward Chan, SC, said that the recommendations in the consultation paper are intended to facilitate discussion and do not necessarily represent the Sub-committee's final conclusions. He added that the Sub-committee would welcome views, comments and suggestions on any issues discussed in the consultation paper.

Also attending today's press conference were member of the Sub-committee Mr Michael Yin; the Secretary of the Law Reform Commission, Mr Stephen Wong; and the secretary of the Sub-committee, Ms Cathy Wan.

Copies of the consultation paper are available on request from the Secretariat of the Law Reform Commission at 20/F Harcourt House, 39 Gloucester Road, Wan Chai, Hong Kong. The consultation paper can also be accessed on the commission's website at www.hkreform.gov.hk.

All the views should be addressed to the Secretary, Adverse Possession Sub-committee, Law Reform Commission, by mail (20/F, Harcourt House, 39 Gloucester Road, Wan Chai), by fax (2865 2902) or by email (hklrc@hkreform.gov.hk) on or before March 15, 2013.

Ends/Monday, December 10, 2012