



Land Surveying Division Chairman's Message



Sr Koo Tak Ming LSD Council Chairman

Comments on the Consultation Paper on Adverse Possession

The Adverse Possession Sub-committee of the Law Reform Commission released a Consultation Paper (the Paper) on 10 December 2012, which contained preliminary proposals for reforming the law on adverse possession. The preliminary recommendations of the Sub-committee were 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.

A reply jointly prepared by the LSD and GPD, was sent to the Adverse Possession Sub-committee on 15 March 2013 to express our views to the Paper and its recommendations. We opined that adverse possession has long been in practice and is legally sound in terms of Common Law and the Basic Law in Hong Kong. We did not object to retaining the law on adverse possession, as it helps protect against stale claims; prevents land from becoming undeveloped and neglected; and prevents hardship in cases of mistake, especially when a squatter has incurred expenditures to improve the land with mistaken boundaries.

However, we consider that given "the surveying and land boundaries in the New Territories," as highlighted in Chapter 4 of the Paper, such problems do exist in Hong Kong as a whole. But the land grant under the Block Crown Lease and the subsequent land grants in the NT have imposed additional constraints on the re-establishment of those land parcels. The DD sheets prepared in 1903 were well within the standard required for land registration in 1900. Disagreements between parties occurred when they failed to recover the necessary documents, misread them, or failed to understand the true intentions of the grant with reference to the parcel clause/plan and the conditions on the ground. One may refer to Practice Guide 40-S3 on the boundaries issued by Her Majesty's Land Registry of England and Wales, which contain relevant legal principles laid down by the court

to answer questions that arise from these "land boundary problems".

We also urge the government to enact legislation to determine land boundaries, which will enable a positive identification of the extent of each land parcel. We strongly believe that good land governance needs the support of an effective land boundary system. Legislation for implementing such a system is necessary to confirm the location of land parcels. We opine that it is of vital importance for the government to take the lead in implementing a legal framework to establish a good quality Determination of Boundaries through Land Surveying Ordinance.

We trust that what the community would not want to see is land development hindered by the mere lack of a properly legalized survey. Be it a piecemeal or district-systematic survey, it could be used to heal the prevalence of discrepancies between the boundaries shown on a DD sheet or New Grant Plan and the physical boundaries on the ground in the New Territories. It must be frustrating that in some boundary dispute cases, the owners may not even know where the boundaries of their land lie, and thus, would not know if their land is in the possession of a third party.

We support the proposal to implement a ten-year adverse possession rule plus a two-year notice requirement provided that the notice is accompanied by a plan with sufficient information to alert the parties involved of the extent of the land being occupied.

The LSD fully agrees that the government should step up its efforts to address the boundary problem in the New Territories by way of a comprehensive re-survey of all land boundaries. The re-survey should aim to recover the intention of the grants for those "problematic lots" and there should be no new boundaries created.

The Land Surveyor and the Law

Sr Edmond CHEUNG, who has extensive experience in preparing land resumption plans for railway projects over the last 15 years, gave a CPD talk on The Land Surveyor and the Law on 7 March 2013. Sr CHEUNG was kind enough to share his presentation with members on our website: http://www.hkis.org.hk/lsd/en/publication_cpd.php.

Further to the CPD, Sr CHEUNG is also willing to share his research with us on the relevant legal principles laid down by the court to answer questions that may arise from "land boundary problems".



Conveyance Described by Very Small Scale Plans – Relevance to Old Schedule Lots of Block Government Leases

Mummery, LJ in *Cameron v Boggiano* [2012] EWCA Civ 157¹ said:

...A mismatch between a clear plan and the actual physical features on the ground is not in itself a reason that could possibly justify ditching the title documents and determining the position of the disputed boundary by reference to the topographical features alone...However, it is well settled that the approach to construction and to the use of extrinsic evidence of topographical features is different when the title documents and plans are not sufficiently clear about the position of the boundary...

Where the lack of sufficient clarity is in a plan marked 'for identification only' it is, in my view, easier to justify regard to the topography to assist in construing the contract/transfer plan than in a case like this where the plan was not so designated and has been prepared as a defining document. Even so, if that document is insufficiently clear to the reasonable layman with the plan in his hand to determine the position of the boundary...the court is entitled to seek assistance on the construction of the plan and title documents by taking account of the topographical features at the relevant date.

...the correct approach is to take the plan to the land and see what, on the face of it, the plan appears to show is intended to be the relevant boundary feature position. Only if, when you do this, you find that you are indeed in difficulties about what the plan is intended to represent can the plan be regarded as ambiguous.

In this case the plan on its own is, in my view, an insufficiently clear guide to the position of such features as the boundaries. The small scale of the plan, the lack of measurements and area size on it or in the other title documents, the thickness of the black lines drawn on it, the rather poorly, even slapdash, pink and blue colouring on a plan based on an OS map that does not fix precise boundaries and its deficiencies as an accurate plan of the area at the time of the transaction make it difficult, in my view, to say that the position of the boundary on the plan is clear and unambiguous. There is no clear or reliable way by which the reasonable layman can know from the plan alone[:] (a) whether the lines marked on it follow actual physical features, such as the back wall...or the drain, or (b) whether they are merely imaginary lines drawn on paper.

The recourse of the reasonable layman to the topography... for enlightenment does not mean ditching the title documents...It is not a case of substituting the physical

features on the ground for the boundaries shown on the plan. It is a matter of sticking with the plan in the hand and, because it is insufficiently clear on the matter of boundaries, to use the topography at the crucial date to inform and to make sense of where the boundaries of what is being transacted.

In the same judgment, Rimmer added:

The transfer transferred the land 'on the attached plan... coloured pink and blue'. It did not say that the plan was 'for the purposes of identification only', a formula that, for the purpose of identifying on the ground the limits of the land transferred, ordinarily gives predominance to the verbal description of the land. It instead identified the land only by reference to the colouring on Plan A and so gave the plan predominance for the purpose of identifying on the ground the limits of what was being transferred...Plan A was not, however, a carefully drawn one. Mummery LJ has... summarised its manifest deficiencies. Given such deficiencies and the apparent absurdity of a construction that attributes to the parties an intention to mark the relevant boundary... the court can, and in my view must, have regard to all admissible evidence with a view to elucidating the true sense of the transfer. Such evidence will not of course include the parties' prior negotiations or their expressed subjective intentions as to the land to be transferred. It will, however, include a consideration of the topography of the relevant land at the time of the transfer. Recourse can be had to such evidence not for the purpose of contradicting Plan A but for the purpose of elucidating the true sense of its uncertain elements...The court's interpretation is ultimately guided by the answer that the reasonable man, armed with the relevant material, would give to the relevant question..

¹ *In Cameron v Boggiano* [2012], EWCA Civ 157, the property purchased by the claimant, according to the contract, was a unit/building at No 7 Choumert Mews. It was coloured pink and the courtyard area in front of it was coloured blue on a plan. The plan was a magnification of a former Ordnance Survey map and based on and scaled up from the Land Registry File Plan. The plan was not slated 'for identification purposes only' and the coloured areas were represented as two simple squares on it. The Court of Appeal held that where the transfer plan was insufficiently clear to a reasonable layman with the plan in his hand to determine the position of the boundary, the Court was entitled to seek assistance to construct a plan and produce title documents by taking into account the topographical features on the relevant date.

LSD Contact Points

If you have any views on the Council's work, please feel free to send them to the Hon Secretary at lsd@hkis.org.hk or to

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