Land Surveyor and Law

Hong Kong Institute of Surveyors
Land Surveying Division
Professional Development Presentation
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Article 8 of Basic Law

- The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.
Article 18 of Basic Law

- The laws in force in the Hong Kong Special Administrative Region shall be this Law, the laws previously in force in Hong Kong as provided for in Article 8 of this Law, and the laws enacted by the legislature of the Region.
Article 84 of Basic Law

- The courts of the Hong Kong Special Administrative Region shall adjudicate cases in accordance with the laws applicable in the Region as prescribed in Article 18 of this Law and may refer to precedents of other common law jurisdictions.
The Common Law is essentially judge-made law and is to be found primarily in the judgments of the courts of the HKSAR and other common law jurisdictions.
Doctrine of Precedent

- Decisions by Courts are explicitly acknowledged to be legal sources.
- Decisions by higher courts bind lower Courts.
- On the principle that it is unfair to treat similar facts differently on different occasions.
Strength of Common Law

- Reasonably precise guidance.
- Parties may predict whether a proposed course of action is likely to be lawful or unlawful.
Construction of Conveyance

- Construction of a deed is always a matter of the Court.

Re-establishment of Boundaries

- Recover the title documents.
- Interpret the legal meaning of the words and plans in the title documents.
- Apply the words and plans to the conditions on the ground.
- Give opinions as to where the actual on-the-ground locations of boundaries.
- Opinions defendable in the Court.
Possible Failures

- Failure to recover the necessary documents.
- Failure to correctly read the documents.
- Failure to correlate the words and plans in the documents to conditions on the ground.
Stages

- Ascertain the facts.
- Locate relevant statues and cases.
- Extract principles, analogies and statements of “What the Law says”.
- Determine how the next Court is likely to rule on the facts of the present case.
- Apply the Law to the facts.
Descriptions of properties in rural communities are somewhat indefinite, and even inaccurate.

“Older measurements were made by survey parties hauling their chains up hill and down dale. The net result is that recent surveys frequently disagree with older surveys of the same property.”

(Spainhour v B Aubrey Huffman & Assoc. [1989] 377 SE 2d 615 (Va 1989))
"….. different conveyances use different descriptions of the parcel of land to be granted and adopt different formulae with regard to the use to be made of the plan annexed to the conveyance. If there is a dispute with regard to what is actually conveyed, that is a matter of construction of the whole conveyance, including the parcel clause and the plan, in the light of other relevant surrounding circumstances. The object is to ascertain what the parties intended to be passed under the document and what is passed. …..”

(Secretary for Justice v Wing Lung Wai Community [1999] CACV 173/1996)
“In those circumstances it seems to me impossible to extract the parties’ intention with any sort of clarity from the four corners of these documents. I have got to go outside it. I have got to look at all the surrounding circumstances. But this is a process of construction, not rectification. ….”

More Particularly Delineated on Plan

- “I have not forgotten that the assignments expressly provide that the Property assigned was as “more particularly delineated and described” in the annexed plan. I accept that, generally, where such or similar words are used, if there exists any conflict or uncertainty between words of description and the plan referred to, the latter would prevail: Neilson v. Poole (1969) 20 P & CR 909, 915-6. However, this is not to say that where the court is of the view that the wording in an assignment, when seen as a whole, clearly expresses what the parties intended to be assigned (as in the present case), the court is then bound somehow to follow the plan regardless if the words “as more particularly delineated and described” in a plan are used. ….”

“….. an entirely general statement of the law applicable to the construction of instruments of title to land. Thus, if, as here, there is a conveyance or transfer which describes the land conveyed or transferred by reference to a plan of very small scale, the effect of the plan must be judged in the light of the surrounding circumstances or, as Mr Justice Megarry called them, ‘the physical circumstances of the land’ …..”

(Gillon v Baxter [2003] EWCA Civ 1591)
Old Schedule Lots

- The Lease Plans were actually to depict the actual occupation features for owners to claim their land holdings between 1898 and 1903.
- Re-establishment of land boundaries of OSL is, to survey the surviving boundary features which formed as boundary lines delineated on the Lease Plan at the time when it was drawn up.
- There must be some evidence to prove that the surviving boundary features are in existence, or they are replacements of, or otherwise related to the boundary features which were in existence in 1899 to 1903.
“Now a boundary agreement may constitute a contract to convey land. The parties may agree that in return for a concession by A in one place, straightening the line of division, B will make a concession in another place; and the agreement may thus be one for the conveyance of land.”
“But there is another type of boundary agreement. This does no more than identify on the ground what the documents describe in words or delineate on plans. Nothing is transferred, at any rate consciously; the agreement is to identify and not to convey. In such a case, I do not see how the agreement can be said to constitute a contract to convey land.”
“In general, I think that a boundary agreement will be presumed to fall into this latter category. ... There the Lord Chancellor said: To say that such a settlement of boundaries amounts to an alienation, is not the true idea of it; for if fairly made, without collusion (which cannot be presumed), the boundaries so settled are to be presumed to be the true and ancient limits.”
Boundary Agreements

Neilson v Poole [1969] 20 P&CR 909

“In short, in my judgment, a boundary agreement is presumed not to convey land; the presumption may be rebutted. ….”
“I must, too, bear in mind that a boundary agreement is, in its nature, an act of peace, quieting strife and averting litigation, and so is to be favoured in the law. I also bear in mind that many boundary agreements are of the most informal nature.....”
“….. Yet what the agreement did was merely to establish on the ground, by agreement, what it was that the conveyance showed. A boundary agreement that merely demarcates is, I think, an agreement that is ancillary to the conveyance; it does not supersede it.”
Pre-requisites

- The boundaries are not defined, or have become lost, or confused, or in the context of the conveyance of land where the information contained in the conveyance is unclear or ambiguous.
Application

“….. There is **ample** authority that a boundary may be fixed by agreement between the parties …..”

*(Wu Muk Fung v Vocalion Estates Ltd [1987] HCA 902/1986)*
Suggested Solution

- Individual land owners arrange for land boundary surveys conducted by PPLS.
- The new accurate plan surveyed by modern survey instrument is to be presumed to describe the true and original locations of boundaries.
- The new survey plan is to ancillary to the Government Lease; it does not supersede the DD Sheet.
- The new survey plan may then be lodged with the Survey and Mapping Office of the Lands Department.
- Upon the new survey plan is accepted by the Survey and Mapping Office, it may be regarded as legal evidence as to the locations of the boundaries of the lot.
New Grant Lots

- Where a land parcel was sold under the Conditions of Sale, the purchaser received the Conditions of Sales together with a Memorandum of Agreement which he signed.

- These documents together constituted a binding contract.

*(Attorney General v Tong Lu [1968] HCA 31/1968).*
Plan Subject to Survey

- The boundaries delineated on a provisional plan or marked “subject to survey” should not be treated as the sole evidence for determination of land boundaries.
Determination of Boundaries in General Conditions

- The exact area, boundaries and measurements of each lot shall be determined before the issue of the Crown Lease and the Premium and Crown Rent shall be when adjusted in accordance with the area and the amounts of Premium and Crown Rent at which the lot was sold.
“….. General Condition 14 does not say that the area, boundaries and measurements will be determined by agreement between the parties after negotiation. It says that the area, boundaries and measurements shall be determined; and that means determined by the Crown. ….”

“….. The point is: there has been a clear determination by the Crown of the area, boundaries and measurements of the lot. If the question of issuing a Crown lease in respect of lot 535 were ever to arise, on the evidence before this Court, and in the absence of any further contracts between the parties, the plan attached to such a lease would, in all probability, be … [Government's as-built plan]. …..”

When?

- The issue of Certificate of Compliance does not prevent the Government from determination of boundaries under the Conditions of Sale at a later date.
Building in Special Conditions

“No building or site development shall be commenced on the lot until plans in duplicate of such work and a block plan in duplicate showing the position of such work on the lot shall have been submitted to the District Officer. Plans submitted for a new building must be prepared by an authorised architect.”
Certification of Compliance

All the positive obligations imposed under the Conditions of Sale had been compiled with to the satisfaction of the Government, including its location unless there were disclaimers to the otherwise.
Land Boundary Survey

- To survey the as-built locations of the lot as at the date of issuing the Certificate of Compliance.
New Boundaries?

In general, the physical boundaries on the ground in NT are fixed and do not move - except in very rare cases due to soil erosion, weather factors, encroachment by neighbours or by mistakes.
The Law has been developing over the years.

Land Surveyors may not be fully aware of the development in this specialized area.

A relevant legislation will certainly provide a more structured and easier framework for the determination of boundaries of old Government Leases in Hong Kong.
Legislation

- Not to rectify the Lease Plan.
- To be ancillary to the Government Lease.
- In most cases, there are in fact no changes in the actual locations of boundaries on the ground.