

RIGHTS OF WAY AND LONG USER: A POSTSCRIPT



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In 2008 this journal published an article by the present author in which the question of whether it was possible in Hong Kong to acquire a right of way by long, open and uninterrupted usage was examined.¹ The article concluded that it was possible and that the method of recognition should be the doctrine of lost modern grant. Suggestions that Hong Kong's leasehold system of landholding was an obstacle to that acquisition were examined and found to be flawed. Since the writing of that article the courts have been active in consideration of this question, culminating in a landmark decision by the Court of Final Appeal. During the same period litigation concerning rights of way has continued apace, illustrating the importance of law which enables such rights to be acquired by long enjoyment, particularly in the rural New Territories. The object of this note is to continue the account of rights of way in Hong Kong and to examine the most recent judicial decisions in this area.

1. The Way to the Bottom of the Village

Chan Tin Yau v Tsang Kwok Kay was the most recent Court of First Instance decision recounted in the previous article.² The case concerned a disputed right of way in a New Territories village. The plaintiffs lived at the southern end or bottom of the village, down a way off the route through the village that led to the main Kam Sheung Road. The way, which had been built in the early 1970s, crossed part of the Defendant's land. Chung J, the trial judge, had concluded that the way had been dedicated to public use by the defendant's father in a letter which he had written to the head of the village and also that the plaintiffs had acquired right of way under the doctrine of lost modern grant which was available between leaseholders, agreeing with the influential judgment upon similar facts of Reyes J in *Kong Sau Ching v Kong Pak Yan*.³ The defendants appealed.

In June 2008 a Court of Appeal strong in land law experience (Tang VP, Yuen JA and Andrew Cheung J) rejected the appeal,⁴ confirming

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¹ (2008) 38 HKLJ 51–88.

² HCA 21228/1998; (2008) 38 HKLJ 51, 68. Hereinafter *Chan Tin Yau*.

³ [2004] 1 HKC 119; hereinafter *Kong*.

⁴ [2008] 4 HKC 209. The court deliberated on the decision for almost 6 months.

the interlocutory decision in 1997 of the same court, *Cheung Yeung Hung v Law Man Nga*,⁵ and adopting the reasoning of Reyes J in *Kong*. In *Cheung Yeung Kong*, it will be recalled, the reasoning of the Court of Appeal had been that the Application of English Law Ordinance (AELO),⁶ which had been enacted in 1966 and expressly applied the Prescription Act 1832 to Hong Kong, would have been pointless if prescription had no role in Hong Kong law as would be the case if leaseholders could not acquire easements by long enjoyment since there was only one piece of land, that on which St John's Cathedral is situated, that was not leasehold. Accordingly, and also for the reason that the Court of Appeal was not bound by decisions of the Full Court of the High Court, the earlier decision of the Full Court in the Duddell Street ancient lights case, *Foo Kam Shing v Local Printing Press*⁷ was not followed.

The Court of Appeal in *Chan Tin Yau* adopted this reasoning. The fact that the AELO was no longer law, made no difference because the plaintiff's rights had accrued whilst it was still law and Article 120 of the Basic Law preserved accrued rights. A submission that the grant was in a letter and not a deed was rejected, Yuen JA pointing out that in lost modern grant, a grant was presumed unless it was impossible. The trial judge's finding that there was a public right of way was however not accepted, there being no evidence (unlike in *Kong*) that the Government, as reversioner, had accepted the dedication.

Lost modern grant was treated by the court in *Chan Tin Yau* as a form of common law prescription. This was consistent with the attitude in earlier Hong Kong cases and in English decisions.⁸ That attitude no doubt stemmed from lost modern grant being a creation of judges and from its sharing with common law prescription based on enjoyment as of right since time immemorial the characteristics of long user and presumed grant. But, as we shall see, it was a mistaken attitude.

2. The Wang Fung Terrace Saga

By 2008 the battle by two developers to obtain permission to redevelop sites at Wang Fung Terrace, a predominantly low-rise residential area on a long finger of land off and above Tai Hang Road on Hong Kong Island, had been in progress for seven years, yet still had some way to run. China

⁵ [1997] HKLRD 1022; [1997] 2 HKC 406; hereinafter *Cheung Yeung Hung*.

⁶ Ordinance No 2 of 1966, formerly Cap 88.

⁷ (1953) 37 HKLR 201.

⁸ Eg *Simmons v Dobson* [1991] 1 WLR 720 (CA, Eng).

Field Limited wanted to build two 39-storey towers at Nos 11–12 Wan Fung Terrace. Sun Honest Development Limited wanted to construct a 40-storey building at Nos 4 and 4A-D Wang Fung Terrace. Plans were submitted to the Building Authority for approval in 2001. Both sets of plans were rejected by the Authority. In the case of Sun Honest's plans one of the grounds for rejection was that the planned building exceeded the permitted plot ratio for the site. The problem was that, in applying the plot ratio to the site, Sun Honest's architects had included in the site an area of Sun Honest's land next to the existing buildings which was used as part of a lane through which occupiers of neighbouring buildings were accustomed to gain access to their flats and had done so since 1958: the Building Authority regarded those occupiers as having a right of way over the lane. Since regulations required that no street or lane be included in calculating the plot ratio if it was subject to a right of way, the Authority deducted the part of the site covered by the lane. Sun Honest disputed this, arguing that no right of way could be acquired in Hong Kong by user alone.

Initially, the Building Appeal Tribunal agreed with Sun Honest's argument about the right of way, but nevertheless dismissed the developer's appeal on other grounds. Sun Honest challenged that decision by judicial review. Chung J dismissed the application, upholding the other grounds, but said that he was inclined to think that there could be a right of way.⁹ The application was continued to the Court of Appeal which granted the application but on the basis that there was an appearance of bias in consequence that the Chairman of the tribunal, a barrister, had represented the Building Authority before the tribunal in other cases. The matter was remitted to the tribunal for consideration by another panel.

That panel heard Sun Honest's appeal together with that of China Field against the rejection of their plans since the appeals involved common questions.¹⁰ The panel also rejected Sun Honest's plans, on grounds which included a finding that there was a right of way over the lane. This led to a second judicial review, this time before Saunders J, in the summer of 2007. On the right of way, Saunders J concluded that a limited owner might acquire an easement by prescription. That is the point which the proceedings had reached at the time of the writing of the previous article.

⁹ [2004] 3 HKC 652.

¹⁰ China Field's initial appeal had been aborted after an application had been made that the Chairman should recuse himself for apparent bias: *see* [2008] 5 HKC at 171A.

The case proceeded to the Court of Appeal which on 25 August 2008¹¹ followed the decision less than three months earlier of the differently constituted Court of Appeal in *Chan Tin Yau*. Counsel for the appellants submitted that under English law the common law doctrine of lost modern grant was not available as between leaseholders of a common freeholder, that for a period of 100 years prior to *Cheung Yeung Hung* the case law in Hong Kong was to the same effect and that the recent decisions to the contrary were based on an erroneous view as to the meaning and effect of the AELO and the Supreme Court Ordinances which had preceded it. Le Pichon and Cheung JJA, the judges who delivered reasons for the decision, were not persuaded of this. The AELO had applied the common law to Hong Kong so far as it was applicable to the circumstances of Hong Kong and subject to such modifications as those circumstances may require. The Court of Appeal in *Cheung Yeung Hung* (which, it will be remembered, was an interlocutory decision) had in Le Pichon JA's view every reason to consider it arguable that in Hong Kong the doctrine of lost modern grant is available to lessees holding under a common landlord and it was virtually inconceivable that the court would not have so held had the substantive question arisen for decision. Cheung JA thought so, too, and in addition was of the opinion that after reunification the courts anyway possessed jurisdiction to extend the doctrine of lost modern grant to leaseholds by virtue of Article 8 of the Basic Law which provided that the law previously in force, including the common law, should be maintained, and that included the power to modify the common law to local circumstances.¹² In consequence the judges were far from persuaded that *Chan Tin Yau* was plainly wrong and considered themselves bound to follow it.

2. One Freehold or Two?

In the course of their judgments Le Pichon and Cheung JJA asserted that there are in fact two pieces of freehold land in Hong Kong: the grounds of St John's Cathedral and the estate of the University of Hong Kong.¹³ This is inconsistent with what had been said in the court below, by the Court of Appeal in *Cheung Yeung Hung* and *Chan Tin Yau*, and by writers and lecturers on Hong Kong land law, all of whom were under the impression that the cathedral's was the only freehold. Had those judges, writers and lecturers, and generations of law students, been misled?

¹¹ *China Field Ltd v Appeal Tribunal (Buildings)* [2008] 5 HKC 163.

¹² [2008] 5 HKC 163 at 197–199, 201–202 and 208–209.

¹³ [2008] HKC at 198I and 205C.

Fortunately not, for the freehold of the University was surrendered in the 1920s, in exchange for the grant of further land and re-grant of the original estate both for 999 years from the Government.¹⁴ It was, rather, Le Pichon and Cheung JJA who had been misled by section 20 of the University's founding statute,¹⁵ a reference to which they had picked up from Williams J's judgment in *Foo Kam Shing v Local Printing Press Ltd.*¹⁶ The founding statute has been repealed and replaced. The current statute of the University includes no such grant.¹⁷

3. The Decision of the Court of Final Appeal

The developers appealed to the Court of Final Appeal.¹⁸ The issue on final appeal concerning the right of way was whether the rule of English law that the doctrine of lost modern grant does not apply as between leaseholders holding under a common landlord represented or should continue to represent the law of Hong Kong. Consideration of this, however, inevitably led to the consideration of the more general and prior rule that an easement can be acquired by prescription only by the owner of the freehold against the owner of the freehold.

The answer of the Court of Final Appeal was that the more general rule was not founded on principle but on *obiter dicta* in a line of authority that was deeply flawed, being based on the false premise that lost modern grant is a form of common law prescription.¹⁹ The *dicta* "cannot stand against a powerful tide of logical and academic criticism" and the rule should not be adopted in Hong Kong, said Lord Millett NPJ delivering the main judgment. The fee simple rule (as Lord Millett called the more general rule) was counter-intuitive, his lordship said, because it was difficult to see why it should be impossible to presume a lost grant of an easement by or to a lessee for the term of his lease when such a grant might be made expressly. The grant could not prejudice the reversion to the servient land, he explained, for the right granted would expire with the term of the grantor's lease and use during the currency of the lease would not bind the reversion unless the reversioner knew of and acquiesced in it. Moreover, the rule was contrary to the policy of the law that long-established *de facto* enjoyment should not be disturbed.²⁰

¹⁴ Information from Dr Peter Cunich, associate professor and historian of the University of Hong Kong.

¹⁵ Ordinance No 10 of 1911; Cap 319 (1950 ed), s 5.

¹⁶ [1952] HKLR 192 at 199. The case is dealt with in the earlier article, (2008) 38 HKLJ 51 at 59.

¹⁷ Cap 1053.

¹⁸ FACV 2 and 3/2009; [2009] 5 HKLRD 662.

¹⁹ The authorities are dealt with in the earlier article at (2008) 38 HKLJ 56–59 and 81–83.

²⁰ *China Field Ltd v Appeal Tribunal (Buildings)*, para 54.

In Lord Millett's view, statements of the fee simple rule in the leading cases were based on the false premise that lost modern grant was merely a form of common law prescription. While in both common law prescription and lost modern grant long enjoyment gives rise to a presumption of lawful origin and the origin consists of a presumed grant by the owner of the servient tenement, the grant is not the same in the two instances, he explained: in common law prescription the grant is presumed to have been made before 1189 and thus almost invariably before the commencement of any lease of the tenements, while in lost modern grant it is presumed to have been made recently, quite possibly during the currency of the term of a subsisting lease.²¹

This condemnation of the greater rule also deprived the lesser rule (called by Lord Millett the "common landlord" rule) of logical foundation. Lord Millett observed that this rule was based on the principle that the possession of a tenant is considered to be that of his landlord, but it was only the fee simple rule, requiring that any easement be granted by freeholder to freeholder, which prevented the presumed grant from being by the lessee of the servient tenement to the lessee of the dominant tenement, thereby avoiding infringement of the fundamental principle that a man cannot have a servitude over his own land. Whilst it was true that a tenant was able to exercise rights over the servient tenement only because he was in possession of the dominant tenement and his possession was with the consent of the landlord, the tenant did not derive rights over the servient tenement from his landlord under his lease as part of the demised premises, nor did he acquire them with the landlord's consent, his lordship said. The tenant derived his rights instead from a separate, fictitious grant presumed from long user of land not comprised in his lease and did so without his landlord's consent.²²

The court was of the opinion that the latter rule was not, and may never have been, part of Hong Kong law; not only was it inapplicable to local circumstances but the reasoning in the English cases that led to the rule was flawed. There was no reason in principle that a right of way or other easement should not be acquired by long enjoyment on the part of a lessee of the dominant tenement against servient land held under lease from the same landlord, provided that no prejudice is caused to the reversion of the common landlord. Furthermore, Lord Millett added, "I doubt whether either of the two rules of law under discussion would be upheld in England were they to be examined by the House of Lords."²³

²¹ *Ibid.*, paras 64 and 65.

²² *Ibid.*, para 68.

²³ *China Field Ltd v Appeal Tribunal (Buildings)* FACV 2 and 3 of 2009, para 86.

Once those fallacies had been exposed, Lord Millett concluded, there was no reason in principle that a right of way or other easement should not be acquired by long enjoyment on the part of a lessee of a dominant tenement against servient land held under a lease from the same landlord, provided that no prejudice was caused to the reversion in the landlord. If the supposed grant were presumed to have been made by a lessee of the servient land, the right granted could not endure for a term longer than that of his lease and so could not bind the reversion. Once the fee simple rule was abandoned, the common landlord rule had no logical foundation.²⁴

This is a resounding and most welcome decision. It is vindication not just for Godfrey JA, the judge who first questioned the restrictions which had been placed upon lost modern grant by earlier decisions both in Hong Kong and in England,²⁵ but also of the writers who had criticised those restrictions over several decades, not least the Irish author Dr V.T.H. Delany. In a seminal article published in 1958,²⁶ Delany had subjected to analysis the old English cases, which previously had been uncritically accepted by land law textbooks, and had contrasted those cases with the almost equally venerable Irish cases where the restrictions had been rejected. Delany showed that the reasoning in the English cases was dubious and the Irish approach was more principled. Lord Millett had evidently read and approved of Delany's analysis.²⁷

4. The Common Law of Hong Kong

What of the contention propounded by counsel for *Sun Harvest* that the AELO and its predecessors and a hundred years of authority did not allow the Court of Appeal in *Cheung Yeung Hung* to depart from the English law regarding leaseholds and prescriptive easements? The Court of Final Appeal was unanimous that both before and since 1997 the courts of Hong Kong had and have the power to depart from English common law. Prior to²⁸ 1 July 1997 the law that applied was a modified form of English law, suited to local circumstances. The way that Bokhary PJ put this was that as a result of the ordinances the courts had to develop a common law for Hong Kong even though it was for the most

²⁴ *Ibid.*, paras 71 and 72.

²⁵ In *Pang Kwan Lung v Ma Choi Hop* [1989] 2 HKC 449 and *Cheung Yeung Heung*, above.

²⁶ Delany, "Lessees and The Doctrine of Lost Grant" (1958) 74 LQR 82.

²⁷ Delany's article is mentioned at para 55 of the CFA judgment.

²⁸ *China Field*, CFA para 76.

part identical to the English common law and that the enactment of the AELO had not in any practical sense affected this.²⁹ The AELO ceased to apply in 1997 but the continuity of existing laws was of fundamental importance and a vital element in the Joint Declaration and the Basic Law. The disappearance of the reference to local circumstances and the modification of English law contained in the AELO should not inhibit the courts from developing the common law in the context of Hong Kong, just as Australian and New Zealand judges apply and develop their own versions of the common law.³⁰

Article 8 of the Basic Law maintained the common law, although it was now, as a result of the change in the definition in the Interpretation and General Clauses Ordinance “the common law in force in Hong Kong” rather than English common law, and the courts continued to develop Hong Kong’s common law. The Hong Kong courts would continue to have respect for and regard to decisions of English courts but will decline to adopt them when the reasoning is considered unsound or contrary to principle or unsuitable for the circumstances of Hong Kong.³¹

5. An Unsurprising Conclusion

The Court of Final Appeal’s conclusion that it is possible in Hong Kong for leaseholders to acquire an easement by prolonged enjoyment was not surprising since it represented the consensus of the most recent authorities. Nor is the conclusion that the medium for this is the doctrine of lost modern grant unexpected: it was predicted in the earlier article.³² Where the views of the court were less predictable was that they established that lost modern grant was not a form of common law prescription (a matter upon which previous judges had expressed differing views) and that Lord Millett went so far as to suggest that the law would be changed in England if it were now to be considered there at the highest level.

Sun Honest is an unusual case in that it involved the acquisition of a right of way by long enjoyment in an urban area. Such rights are essentially rural easements; most of the previous cases have arisen in the New Territories, as explained in the previous article. Rights of way

²⁹ *Ibid.*, paras 8 and 10.

³⁰ *Ibid.*, paras 77 and 78.

³¹ *Ibid.*, paras 11, 77 and 81.

³² (2008) 38 HKLJ 51 at 88.

continue to cause problems in the rural New Territories, as evidenced by two recent decisions.

One concerned the use of a concrete and graveled vehicular access road from the plaintiff's lorry park across the defendant's land to reach a main road at Mo Fan Heung near Yuen Long.³³ Since the use had begun fewer than 20 years previously, no question of prescription or lost modern grant arose but both the defendant's and the plaintiff's land had previously been in the possession of one owner who had assigned them separately to different parties so the courts were able to deploy the rule in *Wheeldon v Burrows*³⁴ to the effect that where a grant is made of part of his land by an owner, all continuous and apparent quasi-easements which had been enjoyed by that owner over the retained portion of land are conveyed with the grant. The courts also relied upon the presumption in section 16 of the Conveyancing and Property Ordinance, Cap 219, that assignments operate to convey with the land all easements appertaining to the land enjoyed at the time of assignment.

The other case concerned neighbouring pieces of land at San Tong in the Lam Tsuen Valley near Taipo.³⁵ The only access to the Lam Kam Road, the local artery, from the plaintiff's new 3-storey house on one of the pieces of land lay over the defendant's land. On the evidence, the trial judge found that long use of a way over a bund between fields on the defendant's land had been established. But the judge went on to hold that this use was for agricultural purposes and the change in use from agricultural to residential led to a substantial increase in the burden upon the servient land. The way had been concreted to accommodate the increased traffic over it. Somewhat contentiously, the judge found that the easement had been lost or suspended through the change in the degree of use. A less extreme interpretation of the facts would have been that the right of way was restricted to pedestrian and light agricultural use so that the only vehicles permitted by the fictional grant would be carts and trolleys of the sort commonly used in agriculture in the New Territories.

Nevertheless, the case shows the social importance of the law providing a means by which long enjoyment of a way can be promoted into a legal right. During the past two decades, the Hong Kong courts have developed that means. The development has now reached its culmination with the imprimatur of the Court of Final Appeal.

³³ *Loyal Luck Trading Ltd v Tam Chun Wah* [2007] 4 HKC 468 (Barma J); [2008] 4 HKC 257, CA. (1879) 12 Ch D 31; see (2008) 38 HKLJ 51 at 55 and 83.

³⁵ *Wan Yuk Wing v Wing Kwok Hing Patrick* HCA 1713/2007; Anthony Chan SC; 21 August 2009.