

LCQ4: Repealing the provision on adverse possession

Following is a question by the Hon Lau Kwok-fan and a reply by the Secretary for Development, Mr Michael Wong, in the Legislative Council today (September 1):

Question:

Under the Limitation Ordinance and relevant case law, where a person who encroached on a piece of private land without permission (i.e. an adverse possessor) has continuously occupied the land for 12 years or more, the landowner may not take legal action to recover the land and the adverse possessor may apply to the court to become the new landowner. There are comments that while such provision on adverse possession has an original intent to facilitate the optimal use of precious land resources, it has all along been rather controversial as it covertly encourages land thefts. In this connection, will the Government inform this Council:

(1) given that the Basic Law provides for the protection of private property rights, and anyone robbing or illegally taking possession of another person's movable properties is criminally liable, but a person who has encroached on another person's land is not criminally liable and a landowner resorting to means such as severing padlocks or fences for entering his own land may incur criminal liabilities, of the reasons why a person encroaching on another person's land is conversely protected by the law and may even lawfully plunder the landowner's property under the provision on adverse possession;

(2) given that even though the court may decide that an adverse possessor is the new owner of a land, the adverse possessor normally cannot obtain the deed for the land concerned, rendering the acquisition of the land by a property developer being unable to be effected by normal land assignment procedures, whether the Government will conduct an overall assessment on the hindrance brought about by the provision on adverse possession to land development and urban renewal; and

(3) given that the recommendations put forward by the Law Reform Commission in its report on adverse possession released in 2014 have not been implemented so far, and that some overseas jurisdictions have repealed their enactments on adverse possession in recent years, whether the Government will consider repealing the provision on adverse possession as the circumstances have changed with the passing of time?

Reply:

President,

The basic rules relating to acquisition of land through adverse possession are found in the Limitation Ordinance (Cap. 347) and relevant case

law. Simply put, when a piece of privately owned land is occupied by another person, the landowner has to take legal action to recover the land within 12 years from the date on which the right of action accrued to him or her. On the other hand, when an occupier has occupied the land for 12 years or more, he or she may apply to the court for an order declaring that he or she has acquired adverse possession of the land.

A person who submits an application to the court for adverse possession or invokes adverse possession as a defence in a proceeding (e.g. in the face of an application by a landowner for an eviction order from the court) has the burden of proof. This person has to establish his or her physical possession of the land and the intention to possess it, which means that he or she intended to exclude the landowner and the world at large from the land. To establish an adverse possession of land and meet the evidential requirements, the above two elements must be satisfied and the possession of the privately owned land must last for 12 years in a continuous and uninterrupted manner.

My reply to the various parts of the question raised by the Hon Lau is as follows:

(1) Adverse possession is part of the laws of limitations. Such laws establish time limits for different categories of civil litigation, with the objective of encouraging persons whose rights have been infringed to commence proceedings at the earliest possible time, in order to resolve the disputes in an expeditious manner and provide certainty for social and economic activities.

The relationship between the statutory mechanism of adverse possession and the provisions on protection of private properties under the Basic Law (namely Articles 6 and 105) has been considered by the local courts (see Note). The court considered that under the deeds registration system currently in operation in Hong Kong, title to land is possession-based, and not registration-based. A registered deed only serves as a record but not a guarantee of title. The court also pointed out that the mechanism of adverse possession has been instrumental in tackling land title issues over the years while encouraging landowners to safeguard their land rights and to make good use of their land. Therefore, the mechanism is considered to meet the public interest, and does not contravene the right of private ownership of property as protected by the Basic Law.

Whether occupation of someone else's land is criminally liable depends on the circumstances of individual cases and cannot be generalised. If there is evidence showing that one occupies the land of someone else through illegal acts (such as criminal damage or fraud), the acts of such persons may likely be criminally liable. Both land occupiers and owners should abide by the law.

(2) An adverse possessor only obtains a possessory title but not the title to the land. He may make use of the land or sell to others such right to use of the land. This kind of transactions have formalities similar to that of other land transactions in general, and are occasionally seen in the market.

When the Government needs to resume a piece of land for development or for redevelopment via the Urban Renewal Authority, it can invoke the Lands Resumption Ordinance (Cap. 124) or other relevant legislation to resume the land and revert it to the Government. Whether the land has been adversely possessed or not does not affect the statutory powers that the Government can exercise for land resumption. Persons whose land interests have been so extinguished, including the landowners and the adverse possessors, may claim compensation from the Government in accordance with the statutory mechanism. As far as private developments are concerned, when acquiring land which has been adversely possessed as declared by the court, developers have to acquire the possessory title to the land from the adverse possessor in addition to the land title as stated on the land instrument from the landowner. While such kind of land acquisition may be relatively more complicated, it has been proven that this is not impossible.

(3) In 2006, the Law Reform Commission (LRC) appointed a Sub-committee to review the rule of adverse possession in Hong Kong. In 2012, the Sub-committee conducted a public consultation on its tentative recommendations and subsequently published a report in 2014 to submit its final recommendations to the Government.

As to whether the existing laws of adverse possession should be retained, most of those submitting their views in the public consultation agreed that the existing laws should be retained. Although some individual views considered the existing laws unfair to landowners, after careful consideration of the situation in Hong Kong, including the deeds registration system still in operation, the possible disputes in land boundaries in the New Territories due to surveying methods in the past, and that adverse possession has been held by the court to be consistent with the Basic Law, the Sub-committee recommended that the existing provisions be retained since they offer a solution to some of the land title problems. In addition, the Sub-committee was of the view that the laws of adverse possession should be reviewed upon implementation of the title registration system introduced by the Land Titles Ordinance (Cap. 585) in the future. For example, a mechanism may be introduced to require the occupiers to apply for registration in advance for the registered owners of the land to be notified and given a chance to object, and the occupiers can only register as the new owners through adverse possession if no objection is heard from the registered owners. This complements the objective of strengthening the protection of land titles under the title registration system.

Laws of adverse possession are common found in other common law jurisdictions (e.g. England, Australia), generally applicable to land not registered under a title registration system. For land registered under a title registration system, some countries repealed their laws of adverse possession while others retained such laws with appropriate amendments (including England and Australia as mentioned above).

Hong Kong has not yet implemented a title registration system. Retaining the laws of adverse possession is in line with the practice of other common law jurisdictions. The Development Bureau, in its response to the LRC in May this year, agreed that the laws of adverse possession should be retained

under the existing deeds registration system, and that due consideration should be given to providing more certainty to the titles of privately owned land upon implementation of the title registration system in the future. The Government is actively liaising with stakeholders regarding the proposal of implementing the title registration system on newly granted land first. If consensus can be reached on the main issues of the proposal with stakeholders within this year, we expect to put forward more concrete proposed amendments to the Land Titles Ordinance and work out a more concrete implementation timetable next year.

Note: *Harvest Good Development Ltd v Secretary for Justice and others* [2006] HKEC 2318.