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學生：蔣昭儀

題目：新界土地「逆權管有」與契約「續期」的關係

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簡介

不少人乍聽到「逆權管有」（即坊間普遍講的「逆權侵佔」）這個名詞時，可能覺得很不可思議；在一個本身自己沒有業權的土地上佔用超過一段時間，就可以成為業權擁有人。亦有人認為逆權管有是不公義的法律，因為其會助長「盜竊土地」[i]。

如果我們純粹將土地視作絕對的私人財產而言，逆權管有或有不公之處。然而，法律是將土地視為一項社會資源，而土地業權並非絕對，只屬「法律施行框架以內的相對概念」，其「擁有人」的概念是「具有已確定的最佳管有權的人」[ii]；換言之，逆權管有是有將土地分配予更佳管有人的含意。是以逆權管有有助鼓勵業權擁有人善用土地，避免任由土地不開發和荒廢的情況，而若「擅自佔地者」在這些「荒廢的土地」行使使用權及開發義務經過一段時間後，其土地使用權利亦能獲得保障。這些都是出於公眾利益考量，使土地資源更有效地開發和使用，特別是在香港這土地資源稀少的地方[iii]。當然，有關觀點亦有相當多的爭議。

另一方面，在訴諸法律的時候，舉證責任是在「擅自佔地者」[iv]，要證明其已在時效期內連續佔用，有關佔用沒有得到業權擁有人同意，而業權擁有人在此期間並沒有使用土地等；實際上要真正透過逆權管有取得土地業權，並非易事。

更何況，除了要證明逆權管有，土地業權若出現變化，也可能使其逆權管有不成立。例如於主權移交初期，基於《新界土地契約（續期）條例》（香港法例第 150 章）對新界所有的土地的原有業權「續期」，而引起對此「續期」是否等於建立新業權的爭議 – 這與在主權移交前已確立的逆權管有是否仍然成立，有直接關係。

本論文不會就「逆權管有是否公義」作出討論，但會從一個主權移交後的逆權管有個案中，了解一下新界土地的制度和《新界土地契約（續期）條例》（香港法例第 150 章），對逆權管有的時效期計算所造成的影響，以及當中所討論到一些與「土地續期」相關的法律觀點。

逆權管有以及香港相關法例

逆權管有，是指任何人可通過持續佔用他人土地一段時間，從而取得該土地的業權。如果業權擁有人在時效期屆滿之時未有收回土地，他對土地的業權即告終絕，他亦不能再收回土地或得到補償； 而擅自佔地者（又稱逆權管有人）就會成為新的業權擁有人[v]。

與逆權管有有關的法例是《時效條例》（香港法例第 347 章）。《時效條例》訂明，政府土地（由政府提出申索）的時效為 60 年，而其他土地（由其他人提出申索）則為 12 年[vi],[vii]；其他土地包括即業權擁有者透過政府批租 (Lease hold)取得土地使用權，但實質擁有者仍然政府(the Crown)的「私人土地」[viii]。

需注意的是，要確立有效的逆權管有有三個要點：(1)逆權管有人需持續管有土地；若土地未有被其他人佔有時，則亦不會計算入時效期內[ix]；(2) 期間業權擁有人「已被剝奪對土地的管有權或已中止使用土地」[x]； 法改會逆權管有小組委員會主席陳景生指出，其中的關鍵，是有關侵佔未有得到原土地業主的准許[xi]。(3)有關佔用不得中斷[xii]。

訂立《新界土地契約（續期）條例》（香港法例第 150 章）的背景

一般的逆權管有的案件，主要是要證明逆權管有人於時效期內連續「敵意佔用」有關土地；然而，於主權移交初期，一些有關新界土地的逆權管有案件，就因為《新界土地契約（續期）條例》（香港法例第 150 章）中對「續期」的理解 - 是基於該續期屬「延續」舊租契抑或算是「重新訂立」全新租契，而引起對時效期計算的爭議。在深入探討這些個案之前，我們先了解一下新界土地契約及《新界土地契約（續期）條例》的簡單背景。

香港和九龍半島（界限街以南）分別於 1841 年及 1860 年割讓予英國，成為英國的殖民地。按大英帝國的慣例，所有土地都是屬於英（女）王，作為殖民地的香港亦不例外。而香港絕大部份的土地都是以租用契約(leasehold tenure)形式批出[xiii]，年期可達 999 年[xiv]。換言之，香港的土地最終的業主是政府（出租人）；而「業權擁有人」是指和政府簽訂租用契約，能夠於限期內行使業權的承租人。

1898 年，英國與清政府簽訂《中英展拓香港界址專條》，向中國租借新界，為期 99 年；英國政並於 1899 年至 1902 年期間進行土地測量，並為能提供土地擁有權證明的新界村民登記土地的業權，並批出集體政府租契。由於當時新界與香港島及九龍半島的情況不同，英國政

府是向中國政府租借而非割讓，因此批租期限不能超越與中國政府簽訂的租借期限：新界土地的租用期為 75 年（由 1898 年 7 月 1 日起計算），並可續期 24 年扣除最後三天[xv]，而非如香港及九龍半島，租用期期限可達 999 年。

1984 年中英簽訂《聯合聲明》，並於附件三第二段列明：「除了短期租約和特殊用途的契約外，已由香港英國政府批出的 1997 年 6 月 30 日以前滿期而沒有續期權利的土地契約，如承租人願意， 均可續期到不超過 2047 年 6 月 30 日，不補地價。」[xvi]

而香港政府就於 1988 年制訂《新界土地契約(續期)條例》，落實有關安排； 條例第 6 條訂明，新界土地的租約（除短期租約和特殊用途的契約外），將續期至 2047 年 6 月 30 日，並無需補繳地價[xvii]。

換言之，一般按集體政府租契批出的新界土地，經歷了兩次續期：第一次是於 1973 年 6 月 30 日，75 年年期屆滿前；第二次是於 1997 年 6 月 27 日，續期 24 年年期（扣除最後三天）屆滿前[xviii]。

在主權移交前亦有一些有關逆權管有的案件，就 1973 年那次續期屬「延續」舊租契抑或算是「重新訂立」全新租契而作出爭論。簡單而言，爭拗點緣於 1969 年訂立《新界(可續期政府租契)條例》（香港法例第 152 章）中有提及「新政府租契」一詞；而英國樞密院[xix]於 1997 年就 Chung 訴 Lam Island 一案[xx]作最終裁定[xxi]，認為該用詞，以至有關條例的訂立只屬行政措施以便利續期，並非訂立全新租契的意思；所謂「新政府租契」是原本租契的雙方（承租人及出租人）權益及義務的延續，因此算是同一份租契，有關續期並不影響逆權管有的時效計算，因此這並不影響陳氏已確立的逆權管有的連續性。

有關《新界土地契約(續期)條例》「續期」的爭議

而第二次續期與第一次續期是按舊租契所載的續期條文不同，是基於《新界土地契約(續期)條例》所執行； 由於此背景的不同，再次觸發就「續期」屬「延續」舊租契抑或算是「重新訂立」全新租契的討論。

這個討論成為逆權管有案件的時效期是否成立的關鍵。因為，如果屬「重新訂立」，一些於條例訂立（或生效，後文會再作討論）日期後方完成的時效期固然會受影響而需重新計算時效期； 而即使一些在此前已超過時效限期並令原業權擁有人業權絕的個案，由於在「續期」時政府與原業權擁有人「重新訂立」契約，因此確立業權擁有人新的業權，使原本已確立的逆權管有失效。

我們將透過其中一個案例：陳天仕訴李天送、李皇財、李皇興、李榮富等案的判詞作分析；此案經歷了原訟及上訴，並由於在上訴時各法官出現不同意見，加上涉及公眾利益，案件最終上訴至終審法院[xxii]

選擇此案作分析的主因是，此案中，逆權管有人的持續佔用土地證據充份，有關逆權管有的爭議主要集中於有關《新界土地契約(續期)條例》中「續期」的討論；而同期的類似案件亦是以此案不同階段的判決作為案例作裁決，因此此案是同期有關《新界土地契約(續期)條例》中「續期」的法律觀點最為完整，故選之為本論文的例子。

陳天仕訴李天送、李皇財、李皇興、李榮富等（「陳訴李案」）案件背景 [xxiii]

此案是關於一幅位於大埔土地（丈量約份第 26 約地段 525RP 號）的業權爭議。涉及地段的土地登記者為李榮富。李榮富於案件入稟時已離世，李天送、李皇財及李皇興為其兒子，根據《新界條例》（香港法例第 97 章）屬該幅土地合法繼承人，因此同列為此案件的被告。

地段 525RP 號原本為 地段 525 號，登記者為李義梅祖 (音譯；原文為 Li Yi Mui Tso)，而毗鄰的 520, 522, 523, 524 號地段則由李三勝堂（音譯；原文為 Li Sam Shing Tong）所持有。1947 年，李三勝堂委任首被告的父親李榮富為管理人；但由於他們視地段 525 號為自己所擁有，於是在政府的登記中，有關此項管理人的登記亦包括地段 525 號。政府在 1954 年 10 月及 1963 年 7 日兩次收回地段 525 號部份土地，並錯誤向李榮富（作為李三聖堂管理人）賠償，而經歷兩次收回部份土地後，地段 525 號餘下未被政府收回土地為 525RP 號。

李三勝堂與李義梅祖有關地段 525(RP)號業權的混亂後來得到順利解決：李義梅祖於 1968 年 3 月將地段 525RP 的業權以港幣 350 元轉讓予李榮富本人（個人名義），李榮富亦隨即於土地註冊處登記成為新的地段 525RP 擁有人。

真正的問題出於李榮富與原訟人陳氏的父親之間的土地買賣。1954 年 1 月，李榮富以李三勝堂管理人的身份，向原訟人陳氏的父親向以港幣 500 元出售地段 520, 522, 523, 524 及 525 號，並訂立中式契約。而陳氏隨即在部份地段 522 至 524 號上建屋居住，及於仳鄰的地段 525 號建一小屋及化糞池作養殖家禽和培植肥料之用，並一直使用直至 1998 年李氏介入為止。

不過，即使已訂立中式契約，李榮富一直拒絕正式於土地註冊處更改有關土地業權，包括其之後從李義梅祖購入並以個人名義持有的地段 525RP。直至 1968 年李三勝堂解散後，陳氏方能正式於土地註冊處登記擁有地段 522, 523 及 524 的部份土地（名為地段 522D, 523D 及 524D，屬其已建屋的部份），其餘土地就歸李榮富特有。而即使陳氏一再要求，李氏一直拒絕更改地段 525RP 號的土地登記；該地段的登記一直是在李榮富名下，並由李氏繳交有關地稅。1993 年，李榮富逝世，而其兒子及陳氏自 1998 年起就地段 525RP 的業權產生紛爭，因此訴諸法庭解決。

確立逆權管有

一如其他逆權管有案件，此案的第一步，是要確立逆權管有人，即陳氏，於時效期之內一直逆權管有該土地，而原業權擁有人於此其間未有使用；有關連續管有的部份，由於證據充足，於原訟時已經清楚確立，之後的上訴亦再無爭議；當時主審法官張舉能指出，即使地段 525RP 於 1968 年 3 月曾有業權轉讓（由李義梅祖轉予李榮富），時效期應由 1954 年抑或 1968 年開始計算可能存在爭議，但不論開始年份為何，直至 90 年代中李氏及陳氏就地段 525RP 出現糾紛時，陳氏已按較早時法例規定，管有該地段超過 20 年；換言之，最遲直至 1988 年 3 月，陳氏已確立對地段 525RP 號的逆權管有[xxiv]。

「續期」後，逆權管有是否仍然成立？

但即使連續管有證據充份，法庭仍需處理一個問題 – 這個逆權管有，於「續期」後是否仍然成立。這取決於如何理解《新界土地契約（續期）條例》對土地「續期」的定義：「續期」後的土地，到底算「延續」舊租契抑或算是「重新訂立」全新租契。

此案於原訟庭中，時任高等法院暫委法官張舉能(Deputy High Court Judge Andrew Cheung）判決陳氏逆權管有有效；上訴庭則以大比數（羅傑志副庭長 (Hon Rogers VP)、郭美超法官 (Hon Le Pichon JA)同意，及袁家寧法官 (Hon Yuen JA)反對）推翻原訟裁決；而終審法院則一致裁定，推翻上訴庭裁決，認為該「續期」為延續舊約[xxv]。整合了在原訟、上訴及終審中提到的主要觀點後，發現比較決定性的討論，是圍繞（一）普通法的限制，及；（二）法例用字及立法原意。

一・普通法的限制

代表李氏的律師提出，在普通法的限制下，並不能通過租契雙方的「共識」延長一份租契期限[xxvi]。終審法院非常任大法官賀輔明勳爵（Lord Hoffmann）於終審判詞中對此概念加以解釋：根據普通法，租契屬一項關於土地權益的財產，最初是經雙方同意而訂立； 一旦落實且公諸於世，就不能單憑雙方的「共識」而修改當中的條件而更改這份「財產」；而租契的期限是租契列明的條件之一，因此在普通法原則下，亦不能透過相互協議去修改[xxvii]。

賀輔明勳爵和張舉能法官都引用案例，指若在一般情況，在普通法的原則下，如果要「延長」租契，只能透過「交還及重批」 (surrender and re-grant)或「復歸租契 」(reversionary lease，即於前一份租契期限屆滿前已訂立在期滿後生效的第二份租契)方式處理[xxviii]。

但今次的「續期」又是否屬「一般情況」呢？代表李氏的律師認為是；他認為新界土地契約(續期)條例》中的第 6 條（即有關續期的條文）[xxix]，只能透過於條例生效時 （即 1988 年 4 月）「交還（舊契）及重批（新契）」 (surrender and re-grant) ，或者於 1997 年 6 月舊契失效時給予新契的形式執行，因此應視作新契，並視之為與李氏訂立新的業權關係。換言之，陳氏於 1988 年所達致逆權管有的時效期只令李氏於舊契中的業權終絕；訂立新契後時效應重新計算，而不論是以 1988 年或是 1997 年起計，至 1998 年入稟時，新契下的時效限期仍未完結，因此陳氏應沒有逆權管有的權利[xxx]。而上訴庭的郭美超法官亦認為，此案不應以 Chung 訴 Lam Island （一如前述，是有關《新界(可續期政府租契)條例》（香港法例第 152 章）的「續期」是否產生新業權）作案例件判決，因為該次續期有列載於原始租約中，不屬新權利；但今次《新界土地契約(續期)條例》中的「續期」並無載於原始租契，承租人（業權擁有者）根據其原始租約所享有的權利在隨著舊租約完結而消失，因此今次「續期」應產生新的業權，逆權管有時效期亦應重新開始計算[xxxi]。

但終審庭的賀輔明勳爵和原訟庭的張舉能法官則認為此講法並不成立。他們均認為，立法機關有權力去透過立法去修改政府地契中的條文（期限）而不受普通法所限[xxxii]。賀輔明勳爵更指出，立法機關（注意香港是三權分立，立法機關並不等同作為行政機關的政府）透過立法修改地契中的條文，有關修改並非「契約雙方共識」；而即使根據《新界土地契約(續期)條例》第 5 條[xxxiii]，業權擁有人可以在指定限期內選擇是否「續期」，但出租人（即政府）並無選擇或否決續租的權利；在其中一方並無選擇之下，不能視為「共識」[xxxiv]；因此，將「續期」視為舊契的延續，並無違反普通法。

a.「交還及重批」(surrender and re-grant)或「復歸租契」(reversionary lease)?

在有關普通法精神的討論中，亦提出兩個（於此案中）較次要的概念。其中一個是「交還及重批」(surrender and re-grant)或「復歸租契」(reversionary lease)的概念：而在原訟及上訴判詞中，亦有不少關於兩者可行性的討論；這對於終審法院最終決定有關「續期」是立法機構的介入有一定的影響； 而當中，上訴庭法官袁家寧主張「續期」屬舊契延續的解釋最為清楚。

她首先否定《新界土地契約(續期)條例》中的「續期」是交還及重批 (surrender and re-grant)的方法處理[xxxv]。她根據對其他法例的觀察，如果出現需要透過交還及重批方式進行的情況，一般會於法例中明文規定，但在《新界土地契約(續期)條例》中並無明確訂明。

但更重要的，是執行時間；她指出，一般交還及重批 (surrender and re-grant)過程中，是在交還舊契後，新契隨即在當天生效。若果如辯方（李氏）的律師所以指，交還及重批《新界土地契約(續期)條例》第 6 條生效日（1988 年 4 月 25 日）進行的話，《新界土地契約(續期)條例》中就應明確訂明新契的生效日為 4 月 25 日，但條例中並沒有此項；反之，在第 6 條列出：「由契約若非因本條例便會屆滿的日期起…」，她認為這變相承認了此「續期」舊契約是延續。

另外，她亦否定是以復歸租契 (reversionary lease)操作的可能[xxxvi]。因為復歸租契操作條件，是出租者和承租者都有權選擇是否續租出，出租者亦可選擇續租對象； 但一如前述，《新界土地契約(續期)條例》中，只訂明租用者可選擇拒絕續期的權利，但出租者並不能選擇是否續

租，亦不能選擇續租的對象。因此，她亦不認為《新界土地契約(續期)條例》中的「續期」可算作復歸租契。

b.有否確立新的業權？

另一方面，一如前述，基於新界土地的最終業主是政府；因此，「業權」的概念並非單純的「業權擁有人」和「擅自佔用者」之間的關係；有關逆權佔有的確立，屬「業權擁有人」和「擅自佔用者」之間處理； 而有關契約的續期，就是「業權擁有人」作為承租人和政府作為出租人之間的關係。正如上訴庭羅傑志副庭長在判詞中指出，原本的業權擁有人的業權，對於擅自佔地者（逆權管有者）而言宣告終絕，並不代表其作為土地承租者與出租者（即政府）之間的權利與義務終絕；他提出一個很實際易明的例子，就是業權擁有人，即使因逆權管有而使其對於擅自佔用者的業權終絕，但仍然需要繼續向政府繳交地租。

不過他就認為，由於擅自佔用者（即逆權管有人）與最終業主（即政府）之間不存在業權關係，所以當原業權擁有人與出租者之間的契約完結，承租人舊的業權亦告終絕，擅自佔地者原本在該土地所建立的權利（即逆權管有）亦告失效[xxxvii]。

羅傑志副庭長提出有關對應不同對象確立業權的概念亦見於袁家寧法官和賀輔明勳爵所撰寫的判詞中。但關鍵仍然是對於承租人（業權擁有者）及出租人之間的原本契約，在《新界土地契約(續期)條例》的「續期」之下，屬於「延續」舊租契還是視為新訂租契的差異。

二・法例用字及立法原意

終審法院就「回歸基本步」去處理這個關鍵：從法例的用字及立法原意出發去理解法例的用意。終審法院非常任法列顯倫（Mr Justice Litton NPJ）認為，法定解釋必先源於是所用詞語的普通語言含義，並不應過度閱讀，為達致法院所期望效果而為法例添上並不存在的意思，否則難以維持與其他政府機關的關係；他認為此案此前的討論中，猶於在條文中加入「授予新的契約」的字眼，是不能發生的[xxxviii]。變相是否定為了要「符合普通法精神」而將條文理解為授予新契約（不論是「交還及重批」 或「復歸租契 」） 的解釋。

他又認為，此案的討論應該是針對《新界土地契約(續期)條例》第 6 條中的「續期」 的意思及效果； 他認為《新界土地契約(續期)條例》第 6 條中，指是現存契約的年期「由契約若非

因本條例便會屆滿的日期起，予以續期(extend)」已是非常清楚； 法例的英文用詞 Extend，已清晰地展示延續的意思，而解讀應簡單直接：「現存的租契續期（extend）至 2047 年 6 月 30 日，句號。」[xxxix]

而賀輔明勳爵除了如上所述，釐清了一些從先前判決中其他法官所提出的觀點外，他亦提到立法原意：他認為，《新界土地契約(續期)條例》及《中英聯合聲明》而制訂，而他認為，立法的原意是希望維持原狀 (status quo)，不論是對承租者（業權擁有人）或擅自佔地者而言。因此，他重申，《新界土地契約(續期)條例》中的「續期」，應視為舊租約的延續[xl]。

總結

即使在原訟及上訴庭對法律觀點有不同的闡譯，在陳訴李案的終審判詞中，兩位法官已很清晰地「還原基本步」，裁定對法例的理解，應該是從最基本的日常解釋入手； 是以，《新界土地契約(續期)條例》中的「續期」，應視為舊租約的延續。換言之，這亦為我們最初希望討論的命題提供了最直接的答案 ；由於《新界土地契約(續期)條例》的訂立是應「中英聯合聲明」的要求，而聲明的原意是希望維持原狀（status quo） 50 年，因此，有關新界租契的「續期」應視為舊租約的延續；在主權移交前已確立的逆權管有，或已開始的時效期計算，就不受此「續期」影響，不需重新計算。

值得注意的地方是，政府作為土地出租者，其主權由港英殖民地政府轉變為香港特別行政權政府此一觀點，並沒有成為案件的討論要點；反而，就「續期」有否建立新業權的討論，主要是基於有關普通法精神的討論，而非有關政府的「主權」。

若細閱判詞，亦不難留意當中的原因：正如賀輔明勳爵指出，於中英雙方於 1980 年代初就香港前途談判時，由於當時新界所有已批租的土地的契約都會在主權移交之前終結；當時因前途不確定而造成人心惶惶，兩國政府就達成協議，亦於《中英聯合聲明》明確列明，將所有原本在 1997 年 6 月 30 日前終結的土地契約「續期」至 2047 年[xli]；而《新界土地契約(續期)條例》亦為落實此共識而訂立。

另一方面《中英聯合聲明》並無任何條文要求，因為政府的主權不同而重新訂立契約，反而是要求續期[xlii]，英文亦使用 “extend”[xliii] 此一有延續之意的字眼；而在《基本法》第 120 及 121

條亦有相應條文[xliv]。因此，在這些明確的條文之下，就難以純粹從主權的轉變而論證有關契約屬「新契約」，而需從法律觀點入手。

而雖然有關普通法精神討論在終審裁決中被視為對條例的「過份解讀」，而當中的「交還及重批」及「復歸租契 」都被視不符《新界土地契約(續期)條例》的訂立原意。然而，能透過此案例對這些原則有進一步理解，可能對理解其他土地相關案件有幫助；另外，要注意的是到底有關「續期」屬「交還及重批」抑或「復歸租契 」其實一直未有處理，因為法庭認為，不論選項為何，都會達致相同結果而未有作決定；但無論如何，因為兩者都不成立而有關「續期」視為延續舊契，相信亦不會再就此作討論。

最後，此論文因為篇幅及時間所限，只從《新界土地契約(續期)條例》出發了解其對逆權管有時效期計算的影響；然而，主權移交之後，除了有《新界土地契約(續期)條例》及與土地直接相關的規定外，亦有原業權擁有人（紙上擁有人）認為《時效條例》與《基本法》第 6 條及第 105 條關於保障私有財產條文有所抵觸而訴諸法庭，最後均被律政司及終審法院駁回其司法覆核的申請。雖然駁回的主因是基於其有濫用法律程序之嫌及有原業權在《基本法》生效前已終絕，但法官在判詞中亦有確立逆權管有制度的必要性 – 主要亦是基於法例的用字以及私有財產與公眾利益（珍貴的土地資源）之間的平衡作考量[xlv]；這相信可以作為日後探討逆權管有的存在意義時的一個重要參考。

[i] 法律改革委員會「逆權管有小組委員會」諮詢文件。2012 年 12 月，段 2.1。取自：https://www.hkreform.gov.hk/tc/publications/adversepossession.htm

[ii] Ibid. 段 2.2

[iii]Ibid. 段 2.6-2.8 及 2.42

[iv] 在閱讀陳訴李案的判詞時，法官曾多次提出陳氏作為逆權管有人有舉證責任。High Court of the Hong Kong SAR, Court of First Instance. Chan Tin Shi VS Li Tin Sung, Li Wong Choi, Li Wong Hing and Li Tin Sun (appointed to represent the estate of the Deceased Li Wing Fu) (HCMP 4191/1998) 14 January 2003.

[v] 法律改革委員會「逆權管有小組委員會」諮詢文件。2012 年 12 月。取自：https://www.hkreform.gov.hk/tc/publications/adversepossession.htm

[vi] 《時效條例》(香港法例第 347 章) 第 7 條，原文為「(1) 自有關訴訟權在官方方面產生的日期起計滿 60 年後，官方不得提出收回土地的訴訟；如該訴訟權最初在某人方面產生，而官方是透過該某人而申索的，則官方亦不得在該訴訟權在該人方面產生的日期起計滿 60 年後提出收回土地的訴訟。 (2) 自有關訴訟權在任何其他人方面產生的日期起計滿 12 年後，他不得提出收回土地的訴訟；如該訴訟權最初在某人方面產生，而他是透過該某人而申索的，則他亦不得在該訴訟權在該某人方面產生的日期起計滿 12 年後提出收回土地的訴訟。」取自：https://www.elegislation.gov.hk/hk/cap347!en-zh-Hant-HK?INDEX_CS=N； 而法律改革委員會「逆權管有小組委員會」諮詢文件亦有對此項作解釋 。

[vii] 於《1991 年時效(修訂)條例》第 31 號第 5 條對第 347 章作出修訂。在此之前，收回土地的時效期為 20 年。

[viii] 參見 Cheung, S.W. (2017), "Landlords, Squatters, and Tenants: Fundamental Concepts of Land Administration in Early Colonial Hong Kong," in Sui-Wai Cheung (ed.), Colonial Administration and Land Reform in East Asia, Oxon: Routledge, 2017, pp. 21-36.
[ix] 參見《時效條例》(香港法例第 347 章) 第 13 條(1)，原文：「除非土地是由時效期的計算對其有利的人所管有(在本條中提述為逆權管有)，否則收回土地的訴訟權須當作沒有產生；而凡根據本條例前述條文上述訴訟權被當作在某日期產生，但無人於該日期在逆權管有，則訴訟權不當作產生，除非與直至該土地處於逆權管有下。」
[x] 參見《時效條例》(香港法例第 347 章) 第 8 條(1)，原文：「凡提出收回土地的訴訟的人或任何其他人(而提出訴訟的人是透過該人申索的)，一直管有該土地，而於有權管有的期間，被剝奪或中止其管有，則有關訴訟權須當作在剝奪或中止管有的日期產生」
[xi] 香港電台《視點 31》：難收回的霸地。2018 年 6 月 12 日。取自：https://www.youtube.com/watch?v=eoL8c7CwXas
[xii] 法律改革委員會「逆權管有小組委員會」諮詢文件中對此亦有解釋。
[xiii] 除了聖約翰座堂（條件是該土地必需用作教堂）及香港大學（後來轉為 999 年租約）是以 freehold tenure 形式批出外，其餘土地都是以 leasehold tenure 形式批出。見 Cheung, S.W., "Landlords, Squatters, and Tenants: Fundamental Concepts of Land Administration in Early Colonial Hong Kong," in Cheung. S.W. (ed.), Colonial Administration and Land Reform in East Asia, Oxon: Routledge, 2017, p26
[xiv] Cheung, S.W., "Landlords, Squatters, and Tenants: Fundamental Concepts of Land Administration in Early Colonial Hong Kong," in Cheung. S.W. (ed.), Colonial Administration and Land Reform in East Asia, Oxon: Routledge, 2017, pp21-36
[xv] 《土地註冊解碼:土地註冊通識教育科教材套》，香港：土地註冊處，2013 年。頁 15 。
[xvi] 《中英聯合聲明》附件三。取自政制及內地事務局網頁： https://www.cmab.gov.hk/tc/issues/jd5.htm
[xvii] 《新界土地契約(續期)條例》(香港法例第 150 章)第 2 及第 6 條。取自：https://www.elegislation.gov.hk/hk/cap150!en-zh-Hant-HK?INDEX_CS=N
[xviii] High Court of the Hong Kong SAR, Court of First Instance. Chan Tin Shi VS Li Tin Sung, Li Wong Choi, Li Wong Hing and Li Tin Sun (appointed to represent the estate of the Deceased Li Wing Fu) (HCMP 4191/1998) 14 January 2003. 段 75.
[xix] 1997 年主權移交前，為香港進行案件終審的機構。
[xx] 全稱為 *Chung Ping Kwan v. Lam Island Development Co. Ltd* [1997]
[xxi] *Chung Ping Kwan v. Lam Island Development Co. Ltd* [1997] 見 High Court of the Hong Kong SAR, Court of First Instance. Chan Tin Shi VS Li Tin Sung, Li Wong Choi, Li Wong Hing and Li Tin Sun (appointed to represent the estate of the Deceased Li Wing Fu) (HCMP 4191/1998) 14 January 2003. 段 76-79.
[xxii] High Court of the Hong Kong SAR, Court of Appeal. Judgement of Chan Tin Shi VS Li Tin Sung, Li Wong Choi, Li Wong Hing and Li Tin Sun (appointed to represent the estate of the Deceased Li Wing Fu) (CACV 71/2003) 27 January 2005.
[xxiii] High Court of the Hong Kong SAR, Court of First Instance. Judgement of Chan Tin Shi VS Li Tin Sung, Li Wong Choi, Li Wong Hing and Li Tin Sun (appointed to represent the estate of the Deceased Li Wing Fu) (HCMP 4191/1998) 14 January 2003.
[xxiv] High Court of the Hong Kong SAR, Court of First Instance. Judgement of Chan Tin Shi VS Li Tin Sung, Li Wong Choi, Li Wong Hing and Li Tin Sun (appointed to represent the estate of the Deceased Li Wing Fu) (HCMP 4191/1998) 14 January 2003.
[xxv] 終審判詞主要由非常任大法官賀輔明勳爵（Lord Hoffmann）執筆；除了烈顯倫大法官在同意之上再加一些意見，其餘法官均表示完全同意。Court of Final Appeal of the Hong Kong SAR. Judgement of Chan Tin Shi VS Li Tin Sung, Li Wong Choi, Li Wong Hing and Li Tin Sun (appointed to represent the estate of the Deceased Li Wing Fu) (FACV 7/2005)5 January 2006 (Heard together with FACV 12/2005 and FACV 13/2005 and 21/2005 (Consolidated))
[xxvi] 見 High Court of the Hong Kong SAR, Court of Appeal. Judgement of Chan Tin Shi VS Li Tin Sung, Li Wong Choi, Li Wong Hing and Li Tin Sun (appointed to represent the estate of the Deceased Li Wing Fu) (CACV 71/2003) 19 November 2004
[xxvii] Court of Final Appeal of the Hong Kong SAR. Judgement of Chan Tin Shi VS Li Tin Sung, Li Wong Choi, Li Wong Hing and Li Tin Sun (appointed to represent the estate of the Deceased Li Wing Fu) (FACV 7/2005)5 January 2006 (Heard together with FACV 12/2005 and FACV 13/2005 and 21/2005 (Consolidated))段 25.
[xxviii] 見 Court of Final Appeal of the Hong Kong SAR. Judgement of Chan Tin Shi VS Li Tin Sung, Li Wong Choi, Li Wong Hing and Li Tin Sun (appointed to represent the estate of the Deceased Li Wing Fu) (FACV 7/2005)5 January 2006 (Heard together with FACV 12/2005 and FACV 13/2005 and 21/2005 (Consolidated))段 25 及 High Court of the Hong Kong SAR, Court of First Instance. Judgement of Chan Tin Shi VS Li Tin Sung, Li Wong Choi, Li Wong Hing and Li Tin Sun (appointed to represent the estate of the Deceased Li Wing Fu) (HCMP 4191/1998) 14 January 2003. 段 86

[xxix] 原文：「本條例所適用契約的年期現予續期，由契約若非因本條例便會屆滿的日期起，續期至 2047 年 6 月 30 日完結時止，無須補繳地價。」《新界土地契約(續期)條例》(香港法例第 150 章)第 6 條。取自：https://www.elegislation.gov.hk/hk/cap150!en-zh-Hant-HK?INDEX_CS=N

[xxx] High Court of the Hong Kong SAR, Court of Appeal. Judgement of Chan Tin Shi VS Li Tin Sung, Li Wong Choi, Li Wong Hing and Li Tin Sun (appointed to represent the estate of the Deceased Li Wing Fu) (CACV 71/2003) 19 November 2004 段 11-17

[xxxi] Ibid.段 29-30

[xxxii] 見 Court of Final Appeal of the Hong Kong SAR. Judgement of Chan Tin Shi VS Li Tin Sung, Li Wong Choi, Li Wong Hing and Li Tin Sun (appointed to represent the estate of the Deceased Li Wing Fu) (FACV 7/2005)5 January 2006 (Heard together with FACV 12/2005 and FACV 13/2005 and 21/2005 (Consolidated))段 26-27 及 High Court of the Hong Kong SAR, Court of First Instance. Judgement of Chan Tin Shi VS Li Tin Sung, Li Wong Choi, Li Wong Hing and Li Tin Sun (appointed to represent the estate of the Deceased Li Wing Fu) (HCMP 4191/1998) 14 January 2003. 段 96

[xxxiii] 原文：「承租人可藉於指定日期前在田土註冊處註冊紀錄冊上將一份以田土註冊處處長所指明的格式而作出的備忘錄註冊，將他根據任何契約而享有的權益(與該契約有關的土地的不分割份數除外)摒除於本條例適用範圍之外。」《新界土地契約(續期)條例》(香港法例第 150 章)第 5 條(1)。取自：https://www.elegislation.gov.hk/hk/cap150!en-zh-Hant-HK?INDEX_CS=N

[xxxiv] 見 Court of Final Appeal of the Hong Kong SAR. Judgement of Chan Tin Shi VS Li Tin Sung, Li Wong Choi, Li Wong Hing and Li Tin Sun (appointed to represent the estate of the Deceased Li Wing Fu) (FACV 7/2005)5 January 2006 (Heard together with FACV 12/2005 and FACV 13/2005 and 21/2005 (Consolidated))段 26-27

[xxxv] High Court of the Hong Kong SAR, Court of Appeal. Judgement of Chan Tin Shi VS Li Tin Sung, Li Wong Choi, Li Wong Hing and Li Tin Sun (appointed to represent the estate of the Deceased Li Wing Fu) (CACV 71/2003) 19 November 2004. 段 36-45.

[xxxvi] ibid. 段 46-50

[xxxvii]Ibid. 段 15-16

[xxxviii] Court of Final Appeal of the Hong Kong SAR. Judgement of Chan Tin Shi VS Li Tin Sung, Li Wong Choi, Li Wong Hing and Li Tin Sun (appointed to represent the estate of the Deceased Li Wing Fu) (FACV 7/2005)5 January 2006 (Heard together with FACV 12/2005 and FACV 13/2005 and 21/2005 (Consolidated))段 4-10

[xxxix] Ibid.

[xl] Ibid.段 38

[xli] Ibid.段 14

[xlii] 《中英聯合聲明》附件三。取自政制及內地事務局網頁： https://www.cmab.gov.hk/tc/issues/jd5.htm

[xliii] 《中英聯合聲明》附件三（英文版）。取自政制及內地事務局網頁：https://www.cmab.gov.hk/en/issues/jd5.htm

[xliv] 《基本法》第 120 條：「香港特別行政區成立以前已批出、決定、或續期的超越一九九七年六月三十日年期的所有土地契約和與土地契約有關的一切權利，均按香港特別行政區的法律繼續予以承認和保護。」第 121 條：「從一九八五年五月二十七日至一九九七年六月三十日期間批出的，或原沒有續期權利而獲得續期的，超出一九九七年六月三十日年期而不超過二o四七年六月三十日的一切土地契約，承租人從一九九七年七月一日起不補地價，但需每年繳納相當於當日該土地應課差餉租值百分之三的租金。此後，隨應課差餉租值的改變而調整租金。」取自《基本法》網頁：https://www.basiclaw.gov.hk/tc/basiclawtext/chapter_5.html#section_2

[xlv] 有關裕傑發展有限公司訴律政司司長及其他人(Harvest Good Development Ltd v Secretary for Justice and others)，載於法律改革委員會「逆權管有小組委員會」諮詢文件。2012 年 12 月，段 2.37-2.43

附錄列表

香港法律改革委員會

逆權管有小組委員會

諮詢文件

逆權管有

本諮詢文件已上載互聯網，網址爲：<**http://www.hkreform.gov.hk**>。

2012 年 **12** 月

本諮詢文件是由法律改革委員會（法改會）屬下的逆權管有小組委員會擬備，以供各界人士討論及發表意見。本諮詢文件的內容並不代表法改會或小組委員會的最終意見。

小組委員會歡迎各界人士就本諮詢文件發表意見，並請於 **2013** 年 **3** 月 **15** 日或之前將有關的書面意見送達：

香港灣仔

告士打道 **39** 號夏慤大廈 **20** 樓

法律改革委員會

逆權管有小組委員會秘書

電話：**(852) 2528 0472**

傳真：**(852) 2865 2902**

電郵：**hklrc@hkreform.gov.hk**

法改會和小組委員會日後與其他人士討論或發表報告書時，可能會提述和引用各界人士就本諮詢文件所提交的意見。任何人士如要求將他提出的所有或部分意見保密，法改會當樂於接納，惟請清楚表明，否則法改會將假設有關意見無須保密。

法改會在日後發表的報告書中，通常會載錄就本諮詢文件提交意見的人士的姓名。任何人士如不願意接納這項安排，請於書面意見中表明。

香港法律改革委員會

逆權管有小組委員會

諮詢文件

逆權管有

目錄

頁

導言

研究範圍

1. 2006 年 8 月，律政司司長及終審法院首席法官把下列範圍的課題交予法律改革委員會研究：

> "檢討香港現有的逆權管有規則，並提出該委員會認爲適當的改革建議。"

小組委員會

2. 逆權管有檢討小組委員會於 2006 年 9 月委出，負責研究上述的課題，並向法律改革委員會提出改革建議。小組委員會的成員如下：

陳景生先生，SC ***（主席）***	資深大律師
周君倩女士 ***〔任期至 2010 年 1 月止〕***	司力達律師樓合夥人
韋健生教授	香港大學法律專業學系
夏思義博士	歷史學者
殷志明先生	大律師
梁守肫教授	梁守肫土地測量顧問有限公司董事總經理
黃小雲女士 ***〔任期至 2011 年 6 月止〕***	地政總署副署長（法律事務）
黃佩翰先生	黃許律師行合夥人
蕭善頌女士 ***〔任期由 2011 年 10 月起〕***	地政總署助理署長（法律事務） 港口機場鐵路發展及新界東（法律諮詢及田土轉易處）（至 2012 年 4 月止）
龍漢標先生	香港地產建設商會秘書長
雲嘉琪女士 **（由 2010 年 6 月起擔任秘書）**	法律改革委員會 高級政府律師

會議

3. 小組委員會由 2006 年 10 起開始研究這個課題，一共舉行了 15 次會議，成員又以書信形式交換意見。小組委員會先前的負責人員分別爲高級政府律師梁東華先生和李天恩先生以及法律改革委員會副秘書顏倩華女士。

香港逆權管有問題的概況

4. 逆權管有指任何人可通過與土地擁有人的權利相抵觸的方式持續佔用他人土地，從而取得該土地的業權。如逆權管有人（亦稱爲“擅自佔地者”）持續佔用有關土地，而擁有人在訂明限期屆滿時或之前，沒有行使他收回該土地的權利，擁有人得到補救的機會和對該土地的業權即告終絕，擅自佔地者亦成爲新的擁有人。擅自佔地者新取得的管有業權，在範圍或期限上通常都不能超出原擁有人的業權。

5. 英格蘭法律委員會（English Law Commission）指出，[1] *“擅自佔地者能夠藉逆權管有而取得業權是敏感的議題，這個情況不時受到公眾的強烈批評。”*[2] 公眾對逆權管有的一般印象是，懷有侵佔意圖的擅自佔地者進行的不當管有，因爲時間的過去而最終變成有效。然而，逆權管有亦適用於其他情況。事實上更典型的例子（至少在英國是這樣）是土地擁有人據用了鄰居的土地。[3] 逆權管有亦可用於解決因沒有簽立正式的轉易契而產生的業權欠妥問題。[4]

6. 英格蘭法律委員會曾表示，在英格蘭 *“逆權管有也非常普遍。”*[5] 在英國國會通過《2002 年土地註冊法令草案》（Land Registration Bill 2002）時，有關的報告指：

> “土地註冊處（Land Registry）每年接到超過 20,000 宗完全或部分以逆權管有爲依據的註冊申請。在這些個案中，約有四分之三（15,000 宗）的申請人能夠取代先前的擁有人。很多個案都出現爭議，須進行法庭程序

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1 英格蘭法律委員會，《廿一世紀土地註冊諮詢文件》（*Land Registration for the Twenty-First Century: A Consultative Paper*）（1998 年 9 月，法律委員會第 254 號，Cm 4027）。

2 出處同上，第 2.44 段。

3 英格蘭法律委員會，《土地註冊法令草案和評論》（*Land Registration Bill and Commentary*）（2001 年，法律委員會第 271 號），第 2.70 段。

4 *Bridges v Mees* [1957] Ch 475.

5 英格蘭法律委員會，《土地註冊法令草案和評論》（2001 年，法律委員會第 271 號），第 2.70 段。

或在土地註冊處律師（Solicitor to the Land Registry）或他的一名副手席前進行聆訊。土地註冊處約四分之三的聆訊涉及擅自佔地，而在約 60%的個案中，擅自佔地者獲裁定全部或部分勝訴。”[6]

7. 香港的一篇文章曾說，逆權管有的法律困難而多變數，可能會涉及龐大利益，又是時下備受關注的議題。[7] 牽涉逆權管有的案件已多次上訴至終審法院，本諮詢文件稍後會詳細討論一些這類案件。我們亦會討論香港與英格蘭關於逆權管有的案例如何不同，以及從其他司法管轄區的案例典據中可得到甚麼裨益。我們也會探討這個範疇的現行案例有何問題。[8]

8. 以下列表所載的統計數字，大致顯示出香港涉及逆權管有的爭議數目。[9]

	市區土地			**新界土地**		
	擅自佔地者勝訴	*業權擁有人勝訴*	*不適用*	*擅自佔地者勝訴*	*業權擁有人勝訴*	*不適用*
2011 年 (15 宗)	4	2		4	5	
2010 年 (16 宗)	2	3	1	5	4	1

6 S Jourdan 在 *Adverse Possession*（Butterworths）一書的序言中引述 Baroness Scotland of Asthal 的話。這是指在非註冊業權制度轉變爲註冊業權制度之前的情況。

7 陳慶輝：“逆權管有：最近的變化”《香港律師》，2006 年 10 月。

8 見本諮詢文件第 5 和 6 章。

9 我們在 www.lexisnexis.com 的“所有香港案件”資料庫中，對有關時期進行搜索。如案件由多於一級的法庭審理（例如先由原訟法庭審理，再由上訴法庭審理），會視作兩項裁決。在內庭作出的裁決（例如簡易判決申請、剔除抗辯申請和登錄部分判決申請）亦計算在內。“不適用”的欄目包括業權擁有人不能證明妥善的業權而須依據逆權管有以取得管有業權的案件，因此有關的擁有人既是擅自佔地者，又是業權擁有人。該欄亦包括法庭沒有就逆權管有作出最終裁決的案件，例如法庭下令重審的案件。在 2010 年的一宗案件中，判決並無明確顯示所涉及的土地是市區土地還是新界土地。我們假設有關土地爲市區土地。在香港，提交法庭審理的逆權管有爭議的數目不多，這部分是因爲香港以多層建築物居多，而建築物內單位的業主通常較難針對同座建築物的另一名業主確立逆權管有。見之後第 6 章。

	市區土地			新界土地		
	擅自佔地者勝訴	*業權擁有人勝訴*	*不適用*	*擅自佔地者勝訴*	*業權擁有人勝訴*	*不適用*
2009 年 (18 宗)	1	3		2	10	2
2008 年 (15 宗)	2	2		3	8	
2007 年 (10 宗)		3		3	4	
2006 年 (11 宗)	1	2		5	3	
2005 年 (9 宗)					9	
2004 年 (11 宗)		1		4	6	
2003 年 (8 宗)	2	1		2	3	
2002 年 (13 宗)	2	1		4	6	

9. 逆權管有的法律亦觸及人權議題。在 *JA Pye (Oxford) Ltd v Graham* 這宗英格蘭的案件中，[10] 法官在初審時裁定擅自佔地者確立了對 *Pye* 所擁用的土地的管有業權，但這項裁決被上訴法庭推翻。當時的英國上議院司法委員會在考慮逆權管有的法律後，判擅自佔地者上訴得直。擁有永久業權的土地擁有人 *JA Pye (Oxford) Ltd* 於是以關於時效期的成文法違反《歐洲人權公約》（European Convention on Human Rights）爲理由，向歐洲人權法院提出針對英國政府的訴訟。歐洲人權法院前第四部門的審判庭裁定英格蘭的逆權管有法律違反

[10] 見第 2 章的討論。

《歐洲人權公約》，但上述裁決被歐洲人權法院大審判庭以 10 比 7 的多數推翻。[11]

本諮詢文件的編排

10. 本諮詢文件的第 1 章扼要論述香港關於逆權管有的現行法律，以及關於證明逆權管有所需的要求。第 2 章研究支持逆權管有的理據，包括探討相關的人權原則。第 3 章檢視其他司法管轄區關於逆權管有的法律。第 4 章列述香港新界地區的測量和土地界線問題。第 5 章說明非註冊土地和註冊土地的業權制度，並解釋《土地業權條例》（第 585 章）。第 6 章討論一些涉及逆權管有的法律議題，而第 7 章則列出小組委員會的初步建議。第 8 章是建議摘要。

11. 我們強調本文件是一份諮詢文件，當中提出的建議旨在推動大家對有關問題的討論。我們歡迎各界對本諮詢文件所討論的任何問題，提出不同的看法、意見及建議。本小組委員會和法律改革委員會在擬定最後建議時，定會仔細考慮所有回應。

[11] 見第 2 章的討論。

第 1 章　關於逆權管有的現行法律

1.1　　本章會詳細討論逆權管有的不同方面，包括管有的重要性、如何證明逆權管有，以及《時效條例》（第 347 章）的相關條文。

相關法律

1.2　　關於通過逆權管有而取得土地的基本規則，見於《時效條例》（第 347 章）和相關的案例。

《時效條例》（第 347 章）

1.3　　《時效條例》的相關條文分述如下：

"收回土地的訴訟時效

第 7 條　(1) 自有關訴訟權在官方方面產生的日期起計滿 60 年後，官方不得提出收回土地的訴訟；如該訴訟權最初在某人方面產生，而官方是透過該某人而申索的，則官方亦不得在該訴訟權在該人方面產生的日期起計滿 60 年後提出收回土地的訴訟。

(2) 自有關訴訟權在任何其他人方面產生的日期起計滿 12 年後，他不得提出收回土地的訴訟；如該訴訟權最初在某人方面產生，而他是透過該某人而申索的，則他亦不得在該訴訟權在該某人方面產生的日期起計滿 12 年後提出收回土地的訴訟：

但如訴訟權最初在官方方面產生，而提出訴訟的人是透過官方而申索的，則該訴訟可在官方本可提出訴訟的期間屆滿前的任何時間提出，或可在該訴訟權在並非官方的其他人方面產生的日期起計 12 年內提出，以首先屆滿的期間爲準。

土地現有權益訴訟權的產生

第 8 條　(1) 凡提出收回土地的訴訟的人或任何其他人（而提出訴訟的人是透過該人申索的），一直管有該土地，而於有權管有的期間，被剝奪或中止其管有，則有關訴訟權須當作在剝奪或中止管有的日期產生。

處於逆權管有下訴訟權始產生或繼續

第 13 條　(1) 除非土地是由時效期的計算對其有利的人所管有（在本條中提述爲逆權管有），否則收回土地的訴訟權須當作沒有產生；而凡根據本條例前述條文上述訴訟權被當作在某日期產生，但無人於該日期在逆權管有，則訴訟權不當作產生，除非與直至該土地處於逆權管有下。

(2) 凡收回土地的訴訟權已產生，而其後在該權利受禁制之前，有關土地已停止在逆權管有下，則該訴訟權不再當作已產生，而新的訴訟權亦不當作產生，除非與直至該土地再度處於逆權管有下。”

1.4　換言之，在訴訟權產生的日期起計滿 12 年後，就不得提出收回土地的訴訟，但時效期爲 60 年的政府土地則爲例外。時效期不會只因土地未被佔用而計算。只有當土地擁有人已被剝奪對土地的管有權或已中止使用土地，而逆權管有人又已取得對該土地的管有，時效期才開始計算。有關條文容許時效期由不同管有人的一連串逆權管有期累積而成，但在有關的 12 年期內逆權管有不能有任何中斷。[1] 如就逆權管有提出的申索成功，效果是使紙上擁有人（即“文書上”所顯示的物業擁有人）的業權完全終絕。

1.5　在某些情況下，《時效條例》（第 347 章）的條文會對土地擁有人造成困難。英國的法院曾提出以下意見：

[1] *Wong Kar Shue & Others v Sun Hung Kai Properties Ltd & Anor* [2006] 2 HKC 600.

"一般而言，支持訂立時效期的常見理由，是人們不應獲准無限期不行使他們的權利，……然而，如像本案那樣，土地擁有人因無需即時使用土地，不介意讓其他人暫時侵佔該土地，本席看不出有何公義原則，可以讓侵入者有權不付分文而取得該土地。……本席認爲這個結果是有欠公允的，因爲……該結果對擁有人來說似乎過於嚴厲，但卻令擅自佔地者無端得益……。"[2]

1.6 另一方面，*Sze To Chun Keung v Kung Kwok Wai David*[3] 一案的判詞表示："……《時效條例》不是關乎被告人是否已取得業權，而是關乎原告人的訴訟權是否已受禁制。"[4]

1.7 *Adnam v Earl of Sandwich*[5] 一案曾解釋訂立時效法規的目的：

"所有時效法規的正當目的，無疑是確認長時間的持續管有，但該等法規都是基於一個概括易明的原則：人們如先前依法有權享有土地或其他財產或金錢，但因自己的過失和疏忽而沒有維護他們的權利，在一段長時間內都對這些權利坐視不理，以致如果容許他們有權中斷他人長時間享用土地或享有豁免的情況，便是不公平的。在一定意義上，他們的默許也是促成以上情況的原因……。"[6]

管有

1.8 逆權管有土地的依據是：*"任何人如管有土地，儘管在開始時是不當的，但其後取得該土地的管有業權。在滿 12 年後，該業權相對於所有其他人而言都屬於妥善的業權。"*在早期的法律，並無清楚區分擁有和管有的概念。管有是通過"佔有土地"（seisin）這個概念來解釋，而"佔有土地"本身是事實問題而不是權利問題。[7] 從十五世紀起，"佔有土地" *"變成只局限於以永久業權形式持有產業權的人，而且'佔有土地'會產生具有土地擁有權的推定。"*[8]

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2 廖柏嘉法官（Neuberger J）的判詞，見 *JA Pye (Oxford) Holdings Ltd v Graham* [2000] Ch 676. 本案後來由英國上議院和歐洲人權法院審理。第 5 章會更深入討論本案。

3 [1997] 1 WLR 1232.

4 賀輔明勳爵（Lord Hoffman）在第 1236 頁的判詞。

5 (1877) 2 QBD 485.

6 費爾茲法官（Field J）在第 489 頁的判詞。

7 S Panesar，"管有在普通法傳統中的重要性"（"The importance of possession in the common law tradition"）*Coventry Law Journal*, Cov LJ 2003, 8(1)，第 1 至 13 頁。

8 出處同上。

1.9　由於管有會產生具有擁有權的推定，而普通法的傳統又把擁有權視爲相對概念而非絕對概念，因此相對於真正擁有人以外的人而言，管有業權屬於妥善的業權。[9]

證明逆權管有

1.10　在明霸有限公司訴新蒲崗大廈業主立案法團及其他人（*Shine Empire Ltd v Incorporated Owners of San Po Kong Mansion & Others*）一案中，上訴法庭法官袁家寧說：

> "英國上議院在 *Pye* 案中曾說，由於擅自佔地者無須對紙上業權擁有人懷有敵意，因此'逆權管有'這個詞應盡量避免使用（第 36 和 69 段），但當事人（'擅自佔地者'）如聲稱已剝奪紙上業權擁有人的管有權，仍須證明兩項不同的要素：(1)充分程度的事實管有（即實質控制土地），以及(2)管有意圖。爲了確立事實管有，擅自佔地者須證明他在未得到紙上業權擁有人的同意下，進行單一和獨有的管有，而且他曾作出某些行爲，這些行爲能證明在有關情況下（特別是有關土地的性質和通常的用途），他曾經像佔用土地的擁有人通常預期會做的那樣處置該土地，並且沒有其他人曾這樣做（第 41 段）。爲了確立管有意圖，擅自佔地者須證明他有意圖把該土地當作自己的土地一樣佔用和使用（第 71 段），並在合理可能的情況下把所有其他人排除在外，當中包括紙上業權擁有人。"[10]

事實管有

1.11　爲了證明逆權管有，擅自佔地者須確立他實質管有有關土地，並具有管有該土地的所需意圖（*animus possidendi*）。[11] 由於法律推定土地是由擁有人管有，[12] 因此擅自佔地者須確立他已對有關土地實施充分程度的獨有及實質控制。[13] 在 *Powell v McFarlane* 一案中，斯萊德法官（Slade J）說：

9　出處同上。

10　明霸有限公司訴新蒲崗大廈業主立案法團及其他人（*Shine Empire Ltd v Incorporated Owners of San Po Kong Mansion & Others*）[2006] 4 HKLRD 1，第 28 段。

11　*Buckinghamshire County Council v Moran* [1990] Ch 623，第 636 頁。

12　*Powell v McFarlane* (1977) 38 P & CR 452，第 452 和 470 頁。

13　*Powell v McFarlane* (1977) 38 P & CR 452，第 471 頁。

> "事實管有代表適當程度的實質控制。這必須是單一和明確的管有，但單一的管有可由多人共同作出或代多人共同作出。因此，土地的擁有人和未經他同意而侵入該土地的人不可能一起同時管有該土地。"[14]

這是一個事實問題，答案取決於所有情況，尤其是有關土地的性質和通常享用該土地的方式。[15]

1.12 核心的概念是管有必須是不當的，而逆權管有也曾被形容爲*"當然不當的管有"*。[16] 但是，管有無須帶有敵意。[17] 在 *Pye* 案中，霍普勳爵（Lord Hope of Craighead）對*"逆權"*這個詞解釋如下：

> "明白《1980 年時效法令》（Limitation Act 1980）第 15 條使用'逆權'這個詞想表達甚麼意思，對現在和將來都顯然有一定重要性。乍看之下，人們可以認爲'逆權'這個詞是描述擅自佔地者須證明的有關管有的性質。這個詞顯示管有必須涉及一些侵犯行爲、敵對意圖或詭計手段。然而，在研究相關的背景後，便可清楚了解這個詞的意思並非如此。這個詞不過是用作爲方便的標籤，目的只爲了確認擅自佔地者對土地的管有是與紙上擁有人或（如屬註冊土地）註冊擁有人的權益相逆這個事實。相關的背景是一直管有土地但被剝奪管有權或中止管有的人，提出收回土地的訴訟：《1980 年法令》附表 1 第 8 段。一旦該人的土地是由時效期的計算對其有利的其他人所管有，該人的訴訟權即當作產生。就此意義和目的而言，上述其他人的管有是與該人的管有相逆的。但是，上述其他人事實上是否管有該土地卻是另一個問題，並無法從'逆權'這個詞得知。"[18]

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14 *Powell v McFarlane* (1977) 38 P & CR 452，第 470 頁。

15 *Powell v McFarlane* (1977) 38 P & CR 452，第 452 和 471 頁。

16 *Buckinghamshire County Council v Moran* [1990] Ch 623，受勳上訴法官納斯（Nourse LJ）在第 644 頁 D 行的判詞。

17 曾有判例表示逆權管有*"必須是和平和公開的"*（*Browne v Perry* [1991] 1 WLR 1297，坦普曼勳爵(Lord Templeman)在第 1302 頁的判詞）。亦見 *Mulcahy v Curramore PEY Ltd* [1974] 2 NSW LR 464，第 475 頁："公開而不秘密的、和平而不涉及武力的，以及逆權而不獲真正擁有人同意的"。
以上說法被視爲原則上錯誤。"雖然根據時效歸益權就無體可繼承產而提出的申索必須符合該等要求，但上述申索是基於申索人有當然權利享有該無體可繼承產的推定。相反，逆權管有屬'當然不當的管有'，因此看來並無理由把逆權管有局限於管有並非以武力取得而且是顯而易見的情況。"C Harpum（主編），*Megarry & Wade: The Law of Real Property*（Sweet & Maxwell，2000 年第 6 版），第 21-018 段。

18 *JA Pye (Oxford) Holdings Ltd v Graham* [2000] Ch 676，第 69 段。

在該案中，布朗韋基遜勳爵（Lord Browne-Wilkinson）也對有關概念澄清如下：

> "案例有時說擁有人必須被擅自佔地者驅逐，才屬於被剝奪管有權：例子可見 *Rains v Buxton*（1880）14 Ch D 537，費賴法官（Fry J）在第 539 頁的判詞。'驅逐'（ouster）這個詞源自逆權管有的舊有法律，帶有以對抗方式在知情下把真正擁有人逐出使他失去管有的含意。這樣的處理方式是完全不正確的。在任何情況下，如紙上擁有人並無中止對土地的管有，只要擅自佔地者按照管有這個詞的普通涵義管有該土地，紙上擁有人即會'被剝奪管有權'。"[19]

1.13 顯示管有權的行爲類別，因應有關土地的種類而有所不同。[20] 把土地圈圍起來是 *"逆權管有在可能的範圍內最強而有力的證據"*，[21] 但未必是決定性的。[22] 由於獨有控制是確立逆權管有的必要因素，而且紙上擁有人被推定爲仍在繼續管有土地，因此微不足道的行爲是不足夠的。[23] 此外，擅自佔地者自己無須實質管有土地；擅自佔地者只要批出租約或特許，由他的租客或特許持有人代爲管有土地，就已足夠。[24] 如擅自佔地者已證明他事實上管有土地，真正擁有人如只是要求擅自佔地者離開，並不會終止擅自佔地者的管有權。[25] 時效期會繼續以對擁有人不利的方式計算，直至擅自佔地者騰出土地或承認擁有人的業權或管有令狀發出爲止。[26]

1.14 *Pye* 案引用 *Powell v McFarlane* 一案的判詞，說明有關行爲必須是明確的：

> "76. ……如聲稱藉逆權管有而取得業權的人，就有關土地所作的行爲是不明確和可以有多於一種詮釋的，該等行爲就不足以確立管有意圖。……

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19 出處同上，第 38 段。

20 *Wuta-Ofei v Danquah* [1961] 1 WLR 1238，格斯特勳爵（Lord Guest）在第 1243 頁的判詞。

21 *Seddon v Smith* (1877) 35 LT 168，第 169 頁。

22 *George Wimpey & Co Ltd v Sohn* [1967] Ch 487.

23 *Boosey v Davis* (1987) 55 P & CR 83.

24 *Wong Kar Sue & Ors v Sun Hung Kai Properties Ltd & Anor* [2006] 2 HKC 600.

25 C Harpum（主編），*Megarry & Wade: The Law of Real Property*（Sweet & Maxwell，2000 年第 6 版），第 21-018 段。

26 *Mount Carmel Investments Ltd v Peter Thurlow Ltd* [1988] 1 WLR 1078.

77. 在 *Powell v McFarlane* 一案中，斯萊德法官（Slade J）在第 472 頁認爲從佔用人的上述行爲可得出以下結論：

> ‘如該人的行爲是可以有多於一種詮釋的，而該人也沒有以行動或說話向所有的人直接了當表明，他一直意圖盡力把擁有人排除在外，那麼法庭不會認爲他具有所需的管有意圖，因此也不會認爲他已剝奪擁有人的管有權’。”[27]

管有意圖

1.15 擅自佔地者除了須證明他事實上管有土地外，還須證明他具有所需的意圖，即是 *“在當其時排除包括擁有人在內的所有其他人而管有土地的意圖”*，[28] 但他無須具有擁有該土地或取得該土地的擁有權的意圖。[29] 即使擁有人和擅自佔地者錯誤相信土地屬於後者，或擅自佔地者不知道他正侵佔另一人的土地，擅自佔地者仍可確立所需的意圖。[30] 所需的意圖是否存在，必須以客觀的方式裁定：*“意圖必須從行爲本身推斷出來”*。擅自佔地者以往或現在就自己的意圖作出的聲明，都會被視作爲自圓其說的證據。[31]

1.16 擅自佔地者須明確地表現出所需的意圖，以便清楚顯示擅自佔地者不只是持續的侵入者。[32] 明確的行爲是指那些展示出排除擁有人的意圖的行爲：

> “這些行爲相當可能是獨有的實質管有行爲，而非一些雖然與擁有權有關連，但性質較爲輕微，並可能與從該土地獲取收益或以某方式享有該土地的意圖相符的行爲。”[33]

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27 *JA Pye (Oxford Holdings Ltd v Graham* [2000] Ch 676，第 76 至 77 段。

28 *Buckinghamshire County Council v Moran* [1990] Ch 623，第 643 頁。

29 *Buckinghamshire County Council v Moran* [1990] Ch 623，第 643 頁。

30 *Hughes v Cork* [1994] EGCS 25; *Prudential Assurance Co Ltd v Waterloo Real Estate Inc* [1997] 17 EG 131.

31 *Powell v McFarlane* (1977) 38 P & CR 452，第 476 至 477 頁。

32 *Powell v McFarlane* (1977) 38 P & CR 452，第 480 頁。

33 S Nield, *Hong Kong Land Law*（朗文出版社，1998 年第 2 版），第 169 頁。

1.17 如擅自佔地者的行爲是不明確的，他不會被視爲具有所需的管有意圖（*Animus possidendi*）。[34] 某項行爲是否明確，取決於有關個案的情況，但有些行爲較有可能被視爲明確的行爲：

> "與放牧、收割土地的天然產物或搭建臨時構築物相比，設置圍欄、興建永久構築物、以犁田和收割的方式在土地全面進行種植或耕作等一類行爲較有可能被視爲明確的行爲。" [35]

逆權管有的效果

1.18 如擅自佔地者能證明逆權管有土地最少已有 12 年，擁有人收回該土地的訴訟權和他的業權均告終絕。[36] 根據《時效條例》（第 347 章）第 17 條:

> "除第10條的條文另有規定外，在本條例就任何人提出收回土地的訴訟（包括贖回訴訟）所訂明的期限屆滿時，該人對該土地的所有權即告終絕。"

擅自佔地者藉逆權管有而取得的業權的性質

1.19 由於業權的相對性原則，擅自佔地者會根據逆權管有和不存在更佳業權的情況而持有新的產業權，但該產業權須受到隨土地轉移並且仍未終絕的第三者權利所規限，例如地役權和限制性契諾。[37] 擅自佔地者在使紙上擁有人的業權終絕前，已取得不完整或初始的業權；該業權相對於所有其他人而言都屬於妥善的業權，但

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34 C Harpum（主編），*Megarry & Wade: The Law of Real Property*（Sweet & Maxwell，2000 年第 6 版），第 21-019 段。*Tecbild Ltd v Chamberlain* (1969) 20 P & CR 633，第 642 頁（在土地放牧矮馬，以及容許小孩玩耍，並不足夠）；*Powell v McFarlane* (1977) 38 P & CR 452，第 472 頁（14 歲男童放牛、打獵和放牧的行爲，被視爲從土地獲取收益的證據，而非意圖剝奪管有權的證據）；*Buckinghamshire County Council v Moran* [1990] Ch 623，第 642 頁。

35 S Nield, *Hong Kong Land Law*（朗文出版社，1998 年第 2 版），第 169 頁。

36 《時效條例》（第 347 章）第 7 及 17 條。《1991 年時效（修訂）條例》第 5 條對第 347 章作出修訂。在此之前，收回土地的時效期爲 20 年。12 年的時效期適用於在 1991 年 7 月 1 日後產生的訴訟權：S Nield, *Hong Kong Land Law*（朗文出版社，1998 年第 2 版），第 169 頁。《時效條例》第 7(1)條規定，自有關訴訟權在政府方面產生的日期起計滿 60 年後，政府不得提出收回土地的訴訟。

37 C Harpum（主編），*Megarry & Wade: The Law of Real Property*（Sweet & Maxwell，2000 年第 6 版），第 21-057 和 21-67 段。*Re Nisbet & Potts' Contract* [1906] 1 Ch 386。如紙上擁有人爲承租人，則擅自佔地者在使該擁有人的業權終絕後，並不會取代該擁有人成爲新的承租人。然而，擅自佔地者如利用有關租契，則可能"被禁止"（estop）否認他根據該租契持有有關土地，並會受到有關契諾約束：S Jourdan, *Adverse Possession*（Butterworths, LexisNexis，2003 年），第 24-46 和 24-57 段。

對於可證明有更佳業權的人而言則屬例外。[38] 擅自佔地者更可因土地被侵佔而對侵入者提出訴訟，亦可因被滋擾而對陌生人提出訴訟。[39]

終審法院審理的逆權管有案件

1.20 終審法院曾在逆權管有的案件中，進一步解釋何謂*"管有意圖"*。在 *Wong Tak Yue v Kung Kwok Wai & Another* 一案中，[40] 終審法院裁定在租契終止後，擅自佔地者如有意圖向擁有人支付租金，便不再具有所需的管有意圖。[41] 首席法官李國能駁回擅自佔地者的申索，並裁定：

> "任何人如聲稱逆權管有土地，必須證明他已管有該土地，並具有所需的管有意圖。……〔擅自佔地者〕和他的女兒所作的非宗教式誓詞證明，自爲期七年的租約在 1964 年 4 月屆滿後，擅自佔地者的意圖一直是：如擁有人要求他支付租金，他是願意向擁有人支付租金，而且他亦準備並有能力這樣做。上述的誓詞是針對權益的陳述，本院會極爲重視。在本席的判決中，擅自佔地者這樣的意圖明顯與管有意圖完全不符……。因此，他在時效期的問題上並無可爭辯的論據。"

1.21 然而，如擅自佔地者通過租賃收取租金，情況便有所不同。在 *Cheung Yat Fuk v Tang Tak Hong & Others* 一案中，[42] 終審法院裁定擅自佔地者如通過租賃收取租金，可藉此而確立逆權管有。常任法官包致金裁定：

> "如擅自佔地者批出租約並收取租金，他的行爲就與紙上擁有人的業權相抵觸，使擅自佔地者可通過租客而逆權管有該土地。如此，擅自佔地者可通過租客對該土地的佔用而取得該土地的管有業權。"[43]

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38 Gray and Gray, *Elements of Land Law*（Butterworths，2000 年第三版），第 278 頁。*Hunter v Canary Wharf Ltd* [1997] AC 655，第 703 頁 E 行。

39 Gray and Gray, *Elements of Land Law*（Butterworths，2000 年第三版），第 278 頁。*Hunter v Canary Wharf Ltd* [1997] AC 655，第 688 頁 E 行至 689 頁 D 行。

40 [1998] 1 HKLRD 241.

41 但請注意英格蘭在此問題上的觀點不同。參閱下文對 *JA Pye (Oxford) Ltd v Graham* [2002] 3 WLR 221 的討論。

42 (2004) 7 HKCFAR 70.

43 出處同上，第 78 頁。

英國上議院在 JA Pye (Oxford) Ltd v Graham 一案中考慮逆權管有問題[44]

1.22 英國上議院（最高上訴法庭）在此案的判決中強調，在逆權管有的申索中，管有是申索成功的重要基礎。歐洲人權法院曾進一步考慮上議院的判決。我們會在下一章一併討論歐洲人權法院的判決和其他人權問題。在本章中，我們會說明本案的案情，以及上議院對申索逆權管有的要求所作的澄清。

JA Pye (Oxford) Ltd v Graham ——案情

1.23 一戶姓格林姆（Graham，下稱“格氏”）的農民家庭，對 *JA Pye（Oxford）*有限公司所擁有的 25 公頃農地的管有業權提出申索，該農地爲該公司土地儲備的一部分。格氏根據《1980 年時效法令》第 15 條提出申索，該條文所規定的時效期爲 12 年，從訴訟權在擁有人方面產生的日期起計。*Pye* 曾向格氏批給一份放牧協議，費用爲 2,000 英鎊，該協議在 1983 年 12 月 31 日屆滿。雖然 *Pye* 多次要求格氏離開，但格氏仍然留在該土地，而且沒有再支付費用。格氏曾口頭表示願意取得新的特許並支付費用，但雙方並無訂立進一步協議。在 1986 年後，*Pye* 對該土地所做的事情很少，直至 1998 年 *Pye* 才提出收回該土地的法律程序。

1.24 格氏辯稱，他們自 1984 年起便管有該土地。*Pye* 則指稱格氏從沒有剝奪 *Pye* 的管有權，理由是：第一，在 1983 年 12 月 31 日之前，格氏一直是根據放牧協議而使用該土地；第二，在該協議屆滿後，格氏願意爲使用該土地而付費，因此格氏並無以該土地擁有人的身分行事。

法庭的裁決

1.25 *Pye* 提出收回管有的法律程序。在初審時，法官裁定在有關的特許協議屆滿後，時效期自 1984 年起便以對 *Pye* 不利的方式計算，因此格氏已剝奪 *Pye* 的管有權達 12 年。上訴法庭推翻上述的裁決，並裁定由於格氏是抱着可得到新特許協議的希望而使用該土地，因此不可能裁定他們在 1984 至 1986 年間剝奪了 *Pye* 的管有權。上訴法庭因而裁定時效期仍未屆滿，*Pye* 仍可提出收回該土地的申索。

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44 [2000] Ch 676 (Ch D); [2002] UKHL 30; [2003] 1 AC 419 (HL).

1.26　上議院推翻上訴法庭的裁決，並裁定根據有關事實，格氏已證明他們在所需的期間內事實上管有該土地，並具有管有意圖。布朗韋基遜勳爵（Lord Browne-Wilkinson）解釋，管有所需的行爲須具備兩項要素：第一，有充分程度的保管和控制（"事實管有"）；第二，具有爲自己的利益而作出此等保管和控制的意圖（"管有意圖"）。所需的意圖不是擁有或甚至是取得擁有權的意圖，而是管有的意圖。上議院又裁定，只要格氏一直對該土地進行所需的管有，他們願意爲佔用該土地而支付費用的事實無關重要。

據用

1.27　與逆權管有法律有密切關係的是租客據用土地的法律。大體上來說，據用土地的租客須被推定爲是爲了業主的利益而這樣做，除非上述的推定被推翻，否則在時效期屆滿時，被他據用的土地在法律上會當作爲根據原租約而租予他的土地的一部分。因此，據用土地的租客須在租約屆滿時，把原來租予他的土地和被他據用的土地一起交給業主。香港據用案件的數目很少，我們不建議對關於據用的法律進行檢討或提出建議。

香港法律和英格蘭法律的分歧之處

Wong Tak Yue 案

1.28　香港的法律目前與英格蘭的法律出現分歧。在香港，如管有土地的擅自佔地者具有意圖在擁有人要求付款時支付租金，擅自佔地者就沒有意圖把紙上擁有人排除。[45] 在 *Wong Tak Yue* 案中，終審法院裁定支付租金的意願和管有意圖完全不符。正如上文指出，布朗韋基遜勳爵在 *Pye* 案的判決並非如此。

1.29　一些作者曾提出疑問：究竟終審法院以後會依循自己在 *Wong Tak Yue* 案的判決，還是會應用 *Pye* 案的原則。[46] 似乎在 *Pye* 案與 *Wong Tak Yue* 案相抵觸的範圍內，香港終審法院以下的法庭不得依循前者。然而，*Pye* 案在其他各方面的判決已獲接納爲對法律的正確陳述，香港的法庭此後亦已多次引用該案。

45　這項原則應用於 *Hong Kong Kam Lan Koon Ltd v Realray Investment Ltd* (No 5) [2007] 5 HKC 122。

46　在 *Yu Kit Chiu v Chan Shek Woo* [2011] HKEC 244，上訴法庭表示他們受 *Wong Tak Yue* 案約束。

1.30　雖然 *Pye* 案的判決是逆權管有案件的權威代表，[47] 但《2002 年土地註冊法令》（Land Registration Act 2002）已大大削弱了逆權管有在英格蘭的應用基礎，因爲擅自佔地者藉逆權管有而取得註冊土地已變得困難很多。[48]

Common Luck 案

1.31　在 *Common Luck Investment Ltd v Cheung Kam Chuen* 案中，[49] 有關的問題是：根據《時效條例》第 7(2)條，承按人收回物業管有權的權利在何時喪失時效（按揭人仍然管有按揭物業，但沒有償還任何本金或利息）？

1.32　該案的事實大概爲：按揭人在 1964 年擁有元朗的一幅土地，並簽立一份按揭〔《新界條例》（第 97 章）附表的表格 B〕。按揭人把有關物業轉讓予銀行，用作保證在一年之內償還貸款，以作爲該筆貸款的代價。按揭人在到期日沒有還款，而銀行亦進行清盤，並無採取步驟接管該物業。1977 年，破產管理署署長以銀行清盤人的身分把該物業售予 *Common Luck*，而按揭人則繼續在該物業居住。政府在 1991 年收回有關土地，並支付 517,492.80 元作爲補償。原訟法庭裁定，在上述貸款的還款到期日屆滿後，按揭人便一直逆權管有該土地。在此情況下，按揭人在滿 20 年後（當時適用的時效期），亦即在 1985 年取得該物業妥善的管有業權，因此有權獲得補償。上訴法庭確認這項裁決。該案遂上訴至終審法院。

1.33　正如夏普（Harpum）指出，[50] 由於按揭只不過是償還欠款的保證，一旦承按人不得再從按揭人個人得到補救，承按人對該土地的強制執行權也應告終絕。夏普的分析是：

- 時效期會從訴訟因由產生的日期開始計算。由於有關訴訟是就管有而提出的，因此訴訟因由已必然在承按人最初具有管有權的日期產生。

- 承按人通常從按揭的日期起便具有管有權，[51] 但承按人可同意他不會在指明期間內取得管有權。[52]

47　M Dray，“土地誰屬？—— 藉逆權管有而取得業權”（*"Whose land is it any way? - Title by adverse possession"*）L & T Review 2003 年，7(3)，第 40 至 42 頁。

48　英格蘭的《2002 年土地註冊法令》（Land Registration Act 2002）會在第 3 章中討論。

49　[1999] 2 HKC 719.

50　“時效與不履行責任的管有按揭人”（*"Limitation and the Defaulting Mortgagor in Possession"*）（2001 年）HKLJ 5。

51　“按揭一經簽立，承按人即可行使管有權，但如有關合約有明示或隱含的條款，規定承按人已放棄此項權利，則屬例外”：*Four-Maids Ltd v Dudley Marshall (Properties) Ltd* [1957] Ch 317，哈曼法官（Harman J）在第 320 頁的判詞。實際上，如按揭人沒有不履行責任，承按

- 根據《時效條例》第 23(1)條，[53] 在一般情況下，如按揭人定期支付利息及／或本金，則就該條例而言，時效期會從每次付款的日期起重新計算。

- 在 *Common Luck* 案中，由於按揭人從沒有支付利息或本金，因此根據《時效條例》第 7(2)及 17 條，承按人的權利已在 1984 年（即在按揭簽立後的 20 年）受禁制並告終絕。

- 因此，在政府於 1991 年收回該土地的管有權時，按揭人有權獲得政府須予支付的補償。

1.34 *National Westminster Bank PLC v Ashe* 一案闡述了英格蘭的情況。[54] 該案的主要爭論點是：就《1980 年時效法令》而言，如按揭人獨有管有他們已按揭的房屋，他們是否“逆權管有”該房屋。受勳上訴法官馬邁理（Mummery LJ）裁定，*Pye* 案[55] 給予“逆權管有”一詞的涵義普遍適用於收回土地的訴訟。管有一詞應按其普通涵義理解。銀行的訴訟權以及銀行容忍按揭人管有該房屋的事實，都不阻止按揭人正常管有有關物業。一旦銀行的訴訟權已經產生或已經因爲部分繳款而重新產生，上述管有的性質並不妨礙時效期針對銀行計算。受勳上訴法官馬邁理亦引用法律委員會在其報告書內所提出的觀點，該報告書促成了《2002 年土地註冊法令》的制定。[56] 法律委員會指出，就《1980 年時效法令》而言，有關按揭人士正在逆權管有，“因爲受押記所限的有關土地，正由時效期的計算對其有利的人所管有……就這方面而言，有關按揭人在任何意義上無須是‘侵入者’”。[57]

1.35 終審法院推翻了上訴法庭的判決。終審法院認爲，在法庭命令將按揭止贖或承按人爲了將抵押變現而將物業出售之前，不履行責任的按揭人享有衡平法贖回權。按揭人不會僅因爲不履行責任的行爲而變成侵入者。按揭人的管有權源自按揭本身，他在不履行

人不會接管有關土地，因爲承按人一旦這樣做，不但要就他們所收取的租金和收益向按揭人作出交代，也要就他們應當收取的租金和收益向按揭人作出交代。

52 這具有在有關期間內把土地重新批租予按揭人的效果，而在有關期限屆滿之前，時效期不會以不利於承按人的方式計算：*Wilkinson v Hall* (1837) 3 Bing NC 508。

53 “凡有收回土地的訴訟權(包括止贖訴訟權)產生……而……如屬承按人提出止贖或其他訴訟的情況，如上所述般管有的人或負有法律責任繳付按揭債項的人就該債項繳付任何款項，不論屬本金或利息，則該權利須當作在承認或繳款的日期而非在該日期之前產生。”

54 [2008] 1 WLR 710.

55 *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419.

56 2001 年第 271 號報告書。

57 2001 年第 271 號報告書第 15 章註釋 51。

責任後仍有留在該物業的隱含特許，不能被視作爲 *"擅自佔用自己家園的人"*。

1.36 對於終審法院的判決，夏普評論說：

> "很遺憾，〔終審〕法院假定按揭人必須是侵入者，按揭人的管有才能構成對承按人的逆權管有。該法院認爲按揭人的管有權是合法的，直至承按人根據《新界條例》第 25(1)(c)條行使管有權爲止。據此，按揭人的管有從來不是逆權的，而承按人收回管有的權利也一直不受影響。儘管我對該法院極爲尊重，但仍得指出這不可能是正確的。……就《時效條例》而言，存在逆權管有的唯一要求，是針對管有有關土地的人的訴訟因由應已產生。這就是 *Common Luck* 案的情況。正如先前解釋，由於按揭人的訴訟權最初在按揭的日期產生，因此按揭人的管有從該日期起已經是逆權的。因爲按揭人從沒有支付利息或本金，所以時效期也從未有重新計算。[58] 這與陌生人開始逆權管有他人土地的情況完全不同。在這種情況下，除非陌生人是侵入者，否則擁有人並無針對該人的訴訟因由。由於以上原因，侵佔在這種情況下等同於逆權管有，但這並不是逆權管有的一般要求。……因此，按揭已不再只是對貸款的保證。即使承按人追討獲得保證的款項的合約權利已經終絕，承按人收回管有的所有權權利仍然存在。"[59]

1.37 小組委員會注意到香港的情況與英國不同。在香港，除按揭契據有相反規定外，承按人在按揭人拖欠付款之前，並無權行使按揭土地的管有權。[60] 因此，夏普忽略了以下事實：在香港，根據以法定押記方式作出的按揭，承按人通常只有在按揭人不履行責任後才享有管有權。在《物業轉易及財產條例》生效後，法定產業的按揭只能以法定押記方式作出。對於現有以轉讓法定產業方式作出的按揭（在該條例生效前通行的法定產業按揭方式），按揭財產須當作再予轉讓，而該按揭須當作已解除及由一項法定押記代替。除《物業轉易及財產條例》另有規定外，該法定押記的條款、效力及優先權，須與被其代替的按揭的條款、效力及優先權一樣。[61]

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58 見上文對《時效條例》第 23 條的解釋。
59 第 9 至 10 頁。
60 《物業轉易及財產條例》（第 219 章）第 44(2)條。
61 《物業轉易及財產條例》（第 219 章）第 44(3)條。

1.38　　然而，夏普所忽略的事實並不影響他所提出的主要論點。根據《時效條例》而存在逆權管有的唯一要求，是針對管有有關土地的人的訴訟因由應已產生。逆權管有並無侵佔方面的一般要求。

第 2 章　支持逆權管有的理據：逆權管有與人權原則

2.1　逆權管有的概念曾被一些人批評爲不公義，理由是逆權管有助長“盜竊土地”。本章會探討支持這個概念的理據，以及這個概念是否違反相關的人權原則和《基本法》。

土地業權的性質

2.2　土地業權不是絕對的，而只是法律施行框架以內的相對概念。[1]“*擁有人*”的概念不過是指“*具有已確定的最佳管有權的人*”而已。[2] 英格蘭法律委員曾表示非註冊土地的業權是相對的，並且以管有爲基礎。[3] 尼爾特（Nield）對此點說明如下：

> “一直以來，土地業權都是以管有爲基礎。如出現關於土地擁有權的爭議，法庭會判能夠證明有更佳（即在先）管有權的人勝訴。因此，土地業權是相對而非絕對的。如土地擁有人（甲）的管有權被乙剝奪，而乙對該土地的佔用又被丙干擾，乙無須證明自己是該土地的擁有人，以便對丙提出訴訟。他只需證明自己比丙具有更佳的管有權。丙對乙的訴訟進行抗辯時，也不能辯稱甲才是該土地的真正擁有人。……因此，雖然擅自佔地者沒有土地的書面業權，但相對於所有沒有更佳管有權的人而言，他也有權保護自己對土地的管有。”[4]

尼爾特繼續解釋強調管有的緣由：

> “業權的相對概念源於以下事實：過往爲收回土地而制定並以管有爲依據的訴訟，效率遠勝以擁有權爲依據的訴訟，因此也獲得更多人採用。即使土地擁有人在提出收回土地的申索時，也選擇以他更佳的管有權作

1　J G Riddall, *Land Law* (LexisNexis 英國，2003 年第七版)，第 581 頁。

2　J G Riddall, *Land Law* (LexisNexis 英國，2003 年第七版)，第 581 頁；C Harpum（主編），*Megarry & Wade: The Law of Real Property*（Stevens and Sons Ltd，1975 年第 4 版），第 1009 頁。

3　英格蘭法律委員會，《廿一世紀土地註冊諮詢文件》（*Land Registration for the Twenty-First Century: A Consultative Paper*）（1998 年，法律委員會第 254 號），第 10.21 段。

4　S Nield,　*Hong Kong Land Law*（朗文出版社，1998 年第 2 版），第 7.2.1 段。

爲依據，而不以他的擁有權作爲依據。因此，以擁有權爲依據的訴訟漸被棄用，土地業權與管有也建立起密不可分的連結關係。”

2.3 相對於具有更佳業權的人以外的所有其他人而言，管有土地的事實使管有人有權繼續保有土地。因此，儘管土地上的擅自佔地者沒有該土地的書面業權，但相對於沒有更佳管有權的人而言，他仍能夠保護自己對該土地的管有。麥納頓勳爵（Lord Macnaghten）在 *Perry v Clissold* 一案說：

> “任何人如以擁有人的身分管有土地，並安寧地行使擁有權的一般權利，相對於合法擁有人以外的所有其他人而言，該人具有完全妥善的業權。如合法擁有人沒有在適用於該案的《時效法規》（Statute of Limitations）條文所規定的限期內站出來以法律程序維護自己的業權，他的權利便告永遠終絕，管有土地的擁有人也取得絕對業權。”[5]

支持這個概念的理據

2.4 正如多克里（Dockray）解釋，逆權管有的規則引出多個問題：

> “乍看之下，逆權管有的法律似是缺乏原則和被忽略，就像滯流的河水；一個需予以改革，但又未必是非常重要的法律範疇。人們或許會問，擁有財產者只因爲他人長期持續的管有而被剝奪產權，理據何在？爲何法律好像對侵入者的過錯置諸不理？爲何法律要保障犯錯的人（該人的行爲可能等同盜竊），甚至協助他抗衡不知情的擁有人（即擁有人既不知道也無法發現時效期已開始計算）？爲何蒙受損害的情況因長期延續而令致補救無門？……我們爲何需要有逆權管有？”[6]

2.5 多克里列出支持逆權管有規則的多項公認理據。他指出有關規則有三項在傳統上歸因於《時效法規》的總體目標，以及第四項政策目標，這四項目標會在下文討論。英格蘭法律委員會在 1998

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5 [1907] AC 73，第 79 頁。

6 多克里（M Dockray），“我們爲何需要有逆權管有？”（*“Why do we need adverse possession?”*）[1985] *Conv* 272，第 272 頁。

年發表的諮詢文件中，贊同多克里所論述的支持有關規則的理據。[7] 該委員會指出，由於有關規則的影響極爲廣泛，因此必須有充分理據支持。

第一項理據：防止陳舊的申索

2.6 逆權管有是時效法律的一個範疇。實施時效法規的政策，是爲了防止被告人受到陳舊的申索影響，並促使原告人不要對自己的權利坐視不理。這是因爲隨着時間的過去，要調查管有是在甚麼情況下開始和繼續進行，會變得越來越困難。因此，有關政策是規定一個固定期限，以求達到清楚明確的目標。但正如英格蘭法律委員會指出，[8] 逆權管有不僅禁制擁有人提出申索，而且擅自佔地者也可藉管有土地而取得土地業權，這只能由解釋時效法律以外的因素支持。

第二項理據：避免任由土地不開發和荒廢

2.7 如土地擁有權和實際管有情況脫節，有關土地會變成無法出售。這種情況會因以下原因而發生：

(a) 真正的擁有人不知所蹤，而擅自佔地者已長時間行使擁有的權利；或

(b) 曾有涉及有關土地的交易是在"*註冊紀錄以外*"，使註冊記錄再不能反映土地"*真正的*"擁有權。

對於本可能長期未被充分利用的土地，鼓勵對其進行妥善的維護、改善和開發，是符合公眾利益的。

第三項理據：避免在有錯誤時造成困苦

2.8 英格蘭法律委員會指出，逆權管有的法律可避免在有錯誤時造成困苦。該委員會舉出的例子是擅自佔地者因擁有權或界線問題的錯誤而花費開支於改善土地的事上。假如真正擁有人知道並默許擅自佔地者犯錯，擅自佔地者可根據"*擁有人不容反悔*"原則（*proprietary estoppel*）提出申索。話雖如此，但實際情況卻往往不是這樣。

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7 英格蘭法律委員會，《廿一世紀土地註冊諮詢文件》（1998 年，法律委員會第 254 號），第 10.5 至 10.10 段。

8 英格蘭法律委員會，出處同上，第 10.6 段。

反駁的論點

2.9　下文列出一些論點，反駁上述三項支持逆權管有規則的理據。

2.10　第一項理據假設擁有人知道對其有利的訴訟因由已經產生。事實上，逆權管有可能是暗中進行或未必是顯而易見，擁有人可能不知道其他人正據用他的土地。[9] 因此，擁有人不是真的對自己的權利坐視不理。實際知道或憑法律推定而知道訴訟因由已經產生，並不是時效期生效的先決條件。[10] 況且，即使擅自佔地者承認自己在整段時效期內所進行的管有是不當的，逆權管有的規則也照樣施行。[11]

2.11　對於第二項理據（鼓勵對土地進行開發和維修），多克里認爲這項目標只切合有限的情況，不能成爲支持逆權管有規則普遍適用的理據。有關規則並不限於安寧地長期管有荒廢物業的情況，[12] 而是不加區分地一概適用，既適用於年代久遠和不知情的據用情況，也適用於強行驅逐的個案。

2.12　至於第三項理據（避免對被告人造成困苦），儘管在訂定時效期的長短時，已考慮到如何平衡原告人因不知道時效期正針對他計算而可能遭受的困苦和被告人所受到的困苦，但逆權管有的規則並無嘗試作這樣的平衡。[13] 原告人提出訴訟的時限是自動生效而非酌情決定的。多克里曾提出以下問題：

> "如規定法庭有酌情權按每宗案件的事實裁定誰人所受的困苦較大，那麼有關規則是否更完備呢？"[14]

他又問："〔時效〕期是否需要短至 12 年？"[15]

第四項理據：便利非註冊土地的轉易

2.13　多克里認爲，上文所討論的三項最常提出以支持逆權管有規則的理據，都不能完全解釋關乎收回土地的訴訟時效的現代法

9　英格蘭法律委員會，《廿一世紀土地註冊報告書》（*Report on Land Registration for the Twenty-First Century*）（2001 年，法律委員會第 271 號），第 2.71 段。
10　多克里，"我們爲何需要有逆權管有？"[1985] *Conv* 272，第 274 頁。
11　多克里，"我們爲何需要有逆權管有？"[1985] *Conv* 272，第 273 頁。
12　多克里，"我們爲何需要有逆權管有？"[1985] *Conv* 272，第 277 頁。
13　多克里，"我們爲何需要有逆權管有？"[1985] *Conv* 272，第 275 頁。
14　多克里，"我們爲何需要有逆權管有？"[1985] *Conv* 272，第 275 頁。
15　多克里，"我們爲何需要有逆權管有？"[1985] *Conv* 272，第 276 頁。

律，並表示有另一個*"難以捉摸的額外因素"*似乎在發揮作用。他繼而提出時效法律的更基本目標是便利調查非註冊土地的業權。[16]

2.14 有關的背景是非註冊土地的賣方必須證明從妥善的業權根源起至少 15 年的業權。[17] 多克里引用下文作爲例證和理據：

> "《1969 年財產法律法令》（Law of Property Act 1969）把根據開放式合約證明業權的法定年期由 30 年減至 15 年。這是依循法律委員會於 1967 年發表的《土地轉移：關於永久業權土地業權根源的中期報告書》的建議。……
>
> 該報告書首先簡略回顧上述兩個年期之間的關係。該報告書繼而討論買方根據當時存在的 30 年規則所享有的保障水平，並考慮假如把證明業權的最短年期縮減至不少於 12 年，會如何影響對買方的保障，'因爲委員會認爲，人們會普遍同意該年期不應較正常的時效期爲短。' ……
>
> ……委員會進而建議縮減 30 年的年期。委員會作出這項建議，是因爲一般執業的物業轉易律師大都認爲（儘管專門處理物業轉易案件的大律師或許不是這樣認爲），在大多數交易中，報告書所論述的風險是很小和可以接受的，而且縮減該年期會有效簡化有關程序。委員會確定把該年期縮減至 15 年是基於多項原因，其中一項原因是'這樣會與正常的 12 年時效期保持合理差距……'。"[18]（表示強調的底線後加）

2.15 多克里的結論是，《時效法規》的目的是爲了確保第三者對擁有權可能有的任何未決申索都會喪失時效，以便利非註冊的物業轉易。英格蘭法律委員會後來亦得出相同的結論。[19] 梅加里和韋特（Megarry and Wade）也贊同這個結論：

> "在不受爭議的情況下長期管有土地的人，能夠以擁有人身分處置有關土地是合乎公眾利益的。已確立並安

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16 多克里，"我們爲何需要有逆權管有？"[1985] *Conv* 272，第 277 頁。

17 《1969 年財產法律法令》（Law of Property Act 1969）（英國）第 23 條（適用於多克里教授撰寫該文章的時候和現在）。

18 多克里，"我們爲何需要有逆權管有？"[1985] *Conv* 272，第 283 至 284 頁。

19 多克里，"我們爲何需要有逆權管有？"[1985] *Conv* 272，第 284 頁。英格蘭法律委員會，《廿一世紀土地註冊諮詢文件》（1998 年，法律委員會第 254 號），第 10.9 段。

寧地進行的管有應得到保障，這樣比法律應協助提出舊有申索更爲重要。達成這個目的的法規是一項‘安寧法令。長時間不提出的申索經常是帶來不公多於維護公義’……。

時效也發揮另一項重要功能，這就是便利對非註冊土地的業權進行調查。土地的買方必須對業權進行調查的年期（目前爲 15 年）與時效期有直接關係，長久以來都是如此。因此，各項時效法規提供了‘一種有限度的保證，確保第三者對擁有權可能有的任何未決申索已喪失時效’。”[20]

2.16 英格蘭法律委員會已清楚表明第四項理據“*無疑是支持逆權管有的最有力理據*”。[21] 史密夫（Smith）對此表示同意，並指這項理據“*爲支持逆權管有提供充分理據*”，因爲若非如此，“*購置土地難免會變得遠爲複雜、不安全和昂貴*”。[22] 然而，第四項理據不適用於註冊土地。

2.17 由於《土地業權條例》（第 585 章）（稍後會在本諮詢文件中討論）還要過一段時間後才生效，因此香港尚未設有業權註冊制度。在香港，賣方必須證明從妥善的業權根源起至少 15 年的業權。[23] 雖然目前根據《土地註冊條例》（第 128 章）而設的文書註冊制度可以便利追溯業權，但該制度與業權註冊制度不同，並不賦予或保證業權。非書面的衡平法權益是不可註冊的，可能影響某人從註冊文書所得到的業權。現在，我們的土地法律制度仍是以管有爲基礎，因此逆權管有的規則繼續適用於香港。

2.18 由於香港的土地買賣實際上是指政府租契的買賣，因此假如賣方已同意給予妥善的業權，但對於同意出售的該部分土地只能持有擅自佔地者的業權，買方是否必須接納有關業權，仍屬疑問。這是因爲受擅自佔地者的業權規限的該部分土地，可能有被業主（通常是政府）沒收批租權的風險。不過，如受擅自佔地者的業權規限的土地只佔將出售土地的一小部分，而業主重收該部分土地的風險極微，在多數情況下都可以說賣方已證明持有妥善的有價業權。

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20 C Harpum（主編），*Megarry & Wade: The Law of Real Property*（Sweet & Maxwell，2000 年第 6 版），第 21-001 段。

21 英格蘭法律委員會，《廿一世紀土地註冊諮詢文件》（1998 年，法律委員會第 254 號），第 10.10 段。

22 R J Smith, *Property Law*（朗文出版社，2002 年第 4 版），第 66 頁。

23 《物業轉易及財產條例》（第 219 章）第 13 條。

2.19　由於我們在香港所買賣的一概是批租土地，逆權管有原則在香港協助物業轉易的作用大概比在英格蘭爲小。但正如下文第 4 章所論述，丈量約份地圖或新批租約圖則所顯示的界線與新界土地上的實際界線不符的情況十分普遍，所以逆權管有往往是解決土地業權問題唯一可行的辦法。

法庭就支持逆權管有的理據而提出的意見

2.20　逆權管有的法律公認是艱深的法律，而法庭也就這項原則的施行提出了支持和批評的意見。下文會列出若干這些意見：

支持的意見

2.21
- “時效法規是很多法律制度的共同特徵。時效法規是名副其實的‘休止法規’和‘安寧法令’……爲了社會利益，訴訟應要有終結的一天……。”[24]

- “〔申請人公司〕因爲訴訟時效法例可預見的施行（立法機關的議員最近綜合整理了有關法例）而失去土地，而他們本來只要採取少許措施看顧自己的權益，就可以使時效期停止對他們計算……。管有權（擁有權）不單賦予權利，亦同時和時常施加一些責任。相關法例的目的是要土地擁有人保持警惕，以保護他們的管有權，不要‘對自己的權利坐視不理’……。本案所涉及的責任只不過是在 12 年內展開收回管有權的訴訟，這不能視爲過度或不合理的。”[25]

批評的意見

2.22
- “本案所展現的舊制度[26]的不公平之處，不在於沒有補償（儘管這也是重要因素），而在於註冊擁有人有疏忽或無心之失時，沒有措施保障他們。”[27]

24　*Wong Tak Yue v Kung Kwok Wai & Another* [1998] 1 HKLRD 241，首席法官李國能的判詞。

25　*JA Pye (Oxford) Ltd v United Kingdom* (2005) 19 BHRC 705，歐洲人權法院佔少數的法官在第 725 頁的異議判決。

26　即英格蘭在實施《2002 年土地註冊法令》（Land Registration Act 2002）之前的制度。

27　*JA Pye (Oxford) v Graham* (2003) 1 CA 419，霍普勳爵（Lord Hope）在第 446 頁的判詞。

- “但如本案、*Pye* 案及其他案例顯示，有關的侵佔行爲可能並不明顯，或可能是微不足道和全無損害。況且，擁有人可能不了解有關法律，也可能不知道假如他不採取措施終止一種對他並無損害的情況，可對他的處境有不利影響。擁有人可能只有輕微過錯或根本沒有過錯。另一方面，侵入者通常都知道自己正侵佔他人的土地財產，並已從侵佔行爲中受益，而他也沒有做任何事情，便可在長期非法使用該項財產後無端得到該項財產。這基本上是以無償方式把財產從應得者轉移至不應得者，並沒有充分理據支持這樣的事情……。”[28]

人權與逆權管有

2.23 在上一章，我們討論了 *JA Pye (Oxford) Ltd and JA Pye (Oxford) Land Ltd v Graham*[29] 和 *JA Pye (Oxford) Ltd and JA Pye (Oxford) Land Ltd v the United Kingdom*[30] 這一系列受到廣泛報道的判決中的逆權管有原則。*Pye* 案亦詳細解釋了相關的人權問題。該案的案情已在上一章敍述。格林姆一家是擅自佔地者，佔用原告人所擁有的土地。原告人在 1999 年發出法律程序文件，尋求收回有關土地的管有。廖柏嘉法官（Mr Jusitice Neuberger）在英格蘭高等法院裁定，由於格氏自 1984 年起已進行逆權管有，因此根據《1980 年時效法令》（Limitation Act 1980）的規定，原告人的業權已告終絕。

2.24 原告人於是提出上訴。上訴法庭判決他們上訴得直，理由是格氏不具有管有有關土地的必需意圖，因此並沒有逆權管有有關土地。受勳上訴法官馬邁理和基利（Lord Justice Mummery and Lord Justice Keene）進而回應原告人指他們根據《1998 年人權法令》（Human Rights Act 1998）和《歐洲人權公約》第一號議定書（First Protocol of the European Convention on Human Rights）第一條安寧地享用財產的權利受到侵犯的論點。上訴法院裁定，法定的訴訟時效期與公約並無抵觸，也不是不合乎比例、帶有歧視成分、無法或難以遵從。《歐洲人權公約》（正式名稱爲《歐洲保障人權和基本自由公約》）第一號議定書第一條規定：

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28 *Beaulane Properties Ltd v Palmer* [2005] 4 All ER 461，高等法院暫委法官施特勞斯御用大律師（Strauss QC）在第 512 頁的判詞。

29 [2000] Ch 676（高等法院），[2001] Ch 804（上訴法庭）和 [2002] 3 All ER 865（上議院）。

30 申請編號第 44302/02 號，2005 年 11 月 15 日和 2007 年 8 月 30 日（歐洲人權法院）。

"每個自然人或法人均有權安寧地享用其財產。除非是爲了公眾利益並符合法律與國際法一般原則所規定的條件，否則任何人不得被剝奪財產。

然而，上述規定不得在任何情況下損害國家執行其認爲必需的法例的權利，以便按照整體利益管制財產的使用，或是確保稅款、其他供款或罰款得到支付。"

2.25 格氏向英國上議院（最高上訴法庭）提出上訴。上議院判決他們上訴得直，並回復高等法院的命令，理由是格氏已逆權管有有關土地。

歐洲人權法院

2.26 原告人向歐洲人權法院提出針對英國政府的申請，[31] 指稱他們的土地因爲英格蘭的逆權管有法律而被格氏奪取，這些法律違反了《歐洲保障人權和基本自由公約》第一號議定書第一條。

2.27 該案由歐洲人權法院前第四部門審判庭的七名法官審理。法院以 4 比 3 的多數裁定英格蘭的逆權管有法律（《1980 年時效法令》和《1925 年土地註冊法令》（Land Registration Act 1925））剝奪了原告人的土地業權，對原告人施加過重的責任，並破壞公眾利益與原告人安寧地享用其財產的權利之間的恰當平衡。因此，有關法律違反了公約第一號議定書第一條。

2.28 英國政府要求歐洲人權法院（下稱"法院"）由 17 名法官組成的大審判庭重新審理該案。法院在 2007 年 8 月 30 日宣布的判決中，[32] 以 10 比 7 的多數裁定有關的法例條文並無違反公約第一號議定書第一條。法院認爲有關的法例條文不屬公約第一號議定書第一條中"*剝奪財產*"的涵義之內。法院裁定：

"66. 因此，使申請人公司失去實益擁有權的法例條文，目的不是爲了剝奪紙上擁有人的擁有權，而是爲了管制有關制度的業權問題。過去，在這個制度下，12 年的逆權管有就足以使原擁有人重收土地或收回管有的權利終絕，而新的業權是以不受反對的長期管有可給予業權這項原則作爲依據。該 1925 年法令和該 1980 年法令適用於申請人公司的條文是整體土地法律

31 *J A Pye (Oxford) Ltd v United Kingdom* (2005) 19 BHRC 705.

32 申請編號第 44302/02 號，2007 年 8 月 30 日。

的一部分，涉及管制多項事宜，包括個人之間在土地使用和擁有權方面的時效期。因此，申請人公司不是受第一條第一段第二句所指的‘剝奪財產’影響，而是受該條第二段所指的‘管制〔土地〕的使用’影響。”[33]

2.29 歐洲人權法院同意英國政府的觀點，認爲時效期本身和業權在時效期屆滿時終絕的規定都涉及整體公眾利益。法院表示：

“72. 各方所提交的比較資料清楚顯示，很多成員國都設有某種機制，根據與普通法制度中逆權管有相類似的原則轉移業權，而這些轉移都是在原擁有人不獲補償的情況下進行。

73. 本法院亦與審判庭一樣，注意到《2002 年土地註冊法令》（Land Registration Act 2002）對逆權管有制度的修訂並沒有廢除該 1925 年法令和該 1980 年法令的相關條文。因此，英國國會確認了國內認爲傳統的整體利益仍屬有效的觀點。

74. 財產有一個特點，就是不同國家都以各種方式管制財產的使用和轉移。相關的規則反映出因應當地如何理解財產的重要性和作用而形成的社會政策。即使土地財產的業權已經註冊，立法機關仍可以重視不受反對的長期管有土地情況，多於重視正式註冊的事實。本法院同意，如原擁有人因爲法律的施行而不能收回對土地的管有，以致業權終絕，這也不能說是明顯沒有合理依據的。因此，時效期本身和業權在時效期屆滿時終絕的規定都存在整體利益。”[34]（表示強調的底線後加）

2.30 該案所涉及的土地是註冊土地，有關的業權已記錄在土地登記冊上。在誰是擁有人的問題上，土地登記冊的紀錄是決定性的。法院沒有把《2002 年土地註冊法令》生效前註冊土地的逆權管有規則，與非註冊土地的逆權管有規則或該 2002 年法令生效後註冊土地的逆權管有規則區分開來。法院亦裁定，公約第一號議定書第 1 條規定必須在整體利益的需要與個別擅自佔地者的利益之間維持“*恰當平衡*”，這個平衡在本案中並無受到破壞。法院表示：

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[33] 出處同上，第 17 頁。

[34] 出處同註釋 32，第 19 頁。

"81. 自《2002 年土地註冊法令》生效後，如時效期已針對註冊土地的紙上擁有人計算，該擁有人在有關時間的處境確實比申請人公司爲佳。……但是，該 2002 年法令的條文並不適用於本案，本法院必須按照當時的情況考慮本案的事實。無論如何，在如土地法律這樣複雜的範疇內，修改法例需要很長時間，而法庭對法例的批評，本身並不能影響之前的條文是否符合公約的問題。"[35]（表示強調的底線後加）

聯合的異議意見

2.31 歐洲人權法院大審判庭的裁決是終局的，但值得留意的是，屬於少數的七名法官的異議意見十分強調非註冊土地和註冊土地的分別。當中的五名法官在聯合的異議意見中指出：

"7. ……本案關乎適用於註冊土地的逆權管有法律。在註冊土地，……歷來支持在時效期屆滿時把實益業權轉移給逆權管有人的理據，遠遠沒有在涉及非註冊土地的情況下那樣有說服力。賓咸勳爵（Lord Bingham）在本案中認爲，如土地已經註冊，很難看出有任何理據支持實施一項法律規則，造成剝奪擁有人的實益業權而使逆權管有人受惠這樣明顯不公的結果。我們認爲賓咸勳爵這個觀點非常有力，盧卡迪斯法官（Judge Loucaides）在他的異議意見中也贊同這個觀點。……

11. 但是，在註冊土地上，業權的依據不是對土地的管有，而是註冊爲擁有人的事實。土地的準買家可翻查註冊紀錄以確定誰是土地的擁有人，準賣家也不需藉證明管有土地而確立業權。正如法律委員會指出，對於導致業權在時效期屆滿時終絕的逆權管有法律，歷來爲支持這項法律而提出的理據現已失去大部分說服力。在本案的情況下，〔上議院的〕賓咸勳爵和〔英格蘭高等法院的〕廖柏嘉法官都贊同這個觀點。他們裁定土地擁有權偶爾出現的不確定情況，極不可能在可藉查閱所有權註冊紀錄而輕易識別誰是土地擁有人的土地擁有權制度下出現。"[36]（表示強調的底線後加）

35 出處同註釋 32，第 22 頁。
36 出處同註釋 32，第 27 和 28 頁。

逆權管有與註冊業權

2.32 歐洲人權法院所提及的英格蘭法律委員會的觀點，可見於該委員會關於土地註冊的諮詢文件和報告書。[37] 該委員會在諮詢文件中提及多克里教授所確認的理據後表示：

> "10.2 ……我們的結論是，儘管現行法律對於非註冊土地而言是有理可據的，但對於註冊業權而言卻非如此。……
>
> 10.3 ……支持就非註冊土地實行現有的逆權管有制度的政策考慮因素，對於註冊業權而言遠遠沒有那麼重要。"[38]

2.33 英格蘭法律委員會又在報告書中表示：

> "2.70 ……難以提出理據支持繼續就註冊土地實行現有的〔逆權管有〕原則。……
>
> 2.73 對於非註冊業權的土地而言，這項原則有充分的法律理據。事實上，逆權管有原則是基於業權並非註冊的預先假設，該等原則對於非註冊的業權而言也是合理的。這是因爲非註冊土地的業權最終是以管有爲基礎。……由於逆權管有能夠使在先的管有權終絕，因此可便利對非註冊土地的業權進行調查，費用亦可因而減少。但是，如業權已經註冊，業權的基礎就主要是註冊的事實而非管有。"[39]（表示強調的底線後加）

2.34 事實上，對於非註冊土地而言，英格蘭高等法院的廖柏嘉法官和上議院的賓咸勳爵都同意多克里教授所確認的支持逆權管有規則的理據，尤其是第四項理據。廖柏嘉法官說：

> "人們經常以土地擁有權偶爾出現不確定情況爲由，解釋藉逆權管有取得土地業權的權利，但本席認爲除了一兩個例外情形外，上述的不確定情況極不可能在涉及強制註冊的土地擁有權制度下出現。只要查閱土地

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37 英格蘭法律委員會，《廿一世紀土地註冊諮詢文件》（1998 年，法律委員會第 254 號）和《廿一世紀土地註冊：物業轉易的革命》（2001 年，法律委員會第 271 號）。

38 英格蘭法律委員會（1998 年），出處同上，第 10.2 至 10.3 段。

39 英格蘭法律委員會（2001 年），出處同上，第 2.70 和 2.73 段。

註冊處內相關業權的所有權註冊紀錄，便可輕易識別有關土地的擁有人。在土地仍無註冊的時代，如擁有人試圖倚賴老舊的轉易契，人們可完全理解到不確定的情況可能出現。正在管有土地的人可聲稱失去了確立其業權的文件。立法機關可能決定應避免就很久以前究竟發生了甚麼事出現爭論，並決定應通過以下方式達到這個目的：如擅自佔地者能夠證明他無中斷地管有土地超過 12 年，具有看來妥善但年代稍爲久遠的紙上業權的擁有人就會被剝奪擁有權。”[40]（表示強調的底線後加）

2.35 賓咸勳爵認爲，如涉及非註冊土地或是在註冊尚未成爲慣例的年代，逆權管有的規則可避免長期出現無法確定土地業權屬誰的情況，因此無疑是有充分理據支持的。但他指出如土地已經註冊，就很難看出有任何理據支持一項造成如此明顯不公結果的法律規則。[41]

2.36 歐洲人權法院大審判庭佔少數的法官也十分重視《2002 年土地註冊法令》所作的修訂，其中五人在他們聯合的異議意見中表達以下意見：

“19. 〔有關修訂〕影響註冊土地，因此不僅是代表逆權管有法律順其自然的發展。這些修訂標誌着現有制度的重大改變，而法律委員會和法庭都曾承認現有制度會導致不公平的情況，並對註冊擁有人的權利造成不合乎比例的影響。……

21. 總的來說，我們不能同意本法院多數法官的意見，他們認爲該 1925 年法令和該 1980 年法令的條文在適用於土地的註冊擁有人時，可在擁有人的權利和任何整體利益之間取得恰當平衡。英國的法官曾以‘嚴苛’、‘不公義’、‘不合邏輯’、‘不合乎比例’等不同詞語來形容這些條文適用於本案的情況。我們認爲，申請人公司被剝奪了他們是註冊擁有人的土地的實益擁有權，以致須承擔過重的個人責任，因

40 [2000] Ch 676，第 709 頁。
41 [2002] 3 All ER 865，第 867 頁。

此他們根據第一號議定書第一條所享有的權利受到侵犯。”[42]（表示強調的底線後加）

涉及《基本法》方面的問題

2.37 在裕傑發展有限公司訴律政司司長及其他人（*Harvest Good Development Ltd v Secretary for Justice and others*）一案中，[43] 法庭曾考慮關於逆權管有的條文是否合憲。在裕傑案中，在 *Chan Tin Shi* 案[44] 中敗訴的紙上擁有人要求律政司司長採取措施廢除《時效條例》（第 347 章）第 7(2)及 17 條或以其他方式使上述條文符合《基本法》第六條和第一百零五條，並且恢復他們的財產權或對他們因爲第 347 章上述條文的施行而被剝奪的財產給予足夠的補償。

2.38 《基本法》第六條和第一百零五條規定：

“第六條 香港特別行政區依法保護私有財產權。

第一百零五條 香港特別行政區依法保護私人和法人財產的取得、使用、處置和繼承的權利，以及依法徵用私人和法人財產時被徵用財產的所有人得到補償的權利。徵用財產的補償應相當於該財產當時的實際價值，可自由兌換，不得無故遲延支付。”

2.39 律政司司長不允許上述要求。裕傑發展有限公司於是針對律政司司長的決定提出司法覆核申請，指他們因爲《時效條例》（第 347 章）關於逆權管有的條文而在未獲補償的情況下被剝奪財產，違反《基本法》第六條和第一百零五條。

2.40 夏正民法官裁定，由於在申請人之前的業權持有人的業權已在 1982 年終絕，因此所有關於取得和失去管有業權的事件都在《基本法》生效前發生。《基本法》因爲沒有追溯效力而不適用於這宗案件，所以有關的司法覆核申請必須予以駁回。[45] 夏正民法官進而考慮並裁定其他爭論點，以防他在《基本法》追溯效力的問題上出錯。他裁定由於申請人本可並本應在已完結的收回土地法律程序中提出關於《基本法》的論點，因此申請人爲了提出此論點而進行另一宗訴訟，屬於濫用程序。雖然收回土地法律程序的各方和司

42 申請編號第 44302/02 號，2007 年 8 月 30 日，第 31 頁。

43 [2006] HKEC 2318.

44 終審法院的決定，(2006) 9 HKCFAR 29。

45 裕傑發展有限公司訴律政司司長（HCAL 32/2006），第 63、66、87、91 和 92 段。

法覆核的各方並不相同，但仍可構成濫用程序。[46] 夏正民法官亦表示，被剝奪管有產業權的是在申請人之前的業權持有人，而申請人卻由於從未取得管有產業權，因此並沒有被剝奪該項業權。申請人只是取得紙上業權，別無其他。[47]

2.41 夏正民法官繼而考慮第 347 章第 7(2)及 17 條是否涉及《基本法》。他同意代表答辯人的大律師的觀點，認爲《基本法》第一百零五條英文本的"*deprivation*"和中文本的"*徵用*"在涵義上有明顯差異，"*徵用*"有更具體和有限的解釋。由於全國人民代表大會常務委員會在 1990 年 6 月 28 日所作的決定，上述條文必須以中文本爲準。[48] 夏正民法官認爲，他必須把第一百零五條的英文本解釋爲：香港特別行政區會依法保護私人被政府或政府機構徵用財產時得到補償的權利。他表示，根據對第一百零五條的"*真實解釋*"（"有關解釋獲第六條支持"），亦可得出相同結果。[49] 他的結論是，依據第 7(2)及 17 條而失去管有業權，並不構成事實上或其他形式的徵用。[50]

2.42 夏正民法官接着考慮第 7(2)及 17 條是否抵觸《基本法》的問題。由於逆權管有的政策是基於經濟和社會方面的需要，因此他必須給予廣闊的酌情判斷餘地。他信納即使涉及《基本法》第六條和第一百零五條，逆權管有的法定計劃也符合上述條文。[51] 他的理由如下：

> "183. 據本席了解，余先生〔代表答辯人的大律師〕在陳詞中，改爲辯稱自十九世紀中葉以來，逆權管有的機制已是香港土地法律不可或缺的部分。雖然香港的土地法律制度已變得越來越精密，使有關法律更能操作，但逆權管有的機制仍然是不可或缺的。這個機制鼓勵批租契持有人維護自己的管有權，使香港的土地得獲充分利用；而由於所有土地的業權最終仍是以管有爲基礎，因此這個機制也確保在有問題發生時，會有解決的制度。
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> 184. 考慮到香港並無設有業權註冊制度，本席認爲必須承認《時效條例》第 7(2)及 17 條所載的逆權管有

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46 裕傑發展有限公司訴律政司司長（HCAL 32/2006），第 110、114、115、116、120 和 121 段。

47 裕傑發展有限公司訴律政司司長（HCAL 32/2006），第 128 段。

48 裕傑發展有限公司訴律政司司長（HCAL 32/2006），第 137 段。

49 裕傑發展有限公司訴律政司司長（HCAL 32/2006），第 138 和 152 段。

50 裕傑發展有限公司訴律政司司長（HCAL 32/2006），第 152 段。

51 裕傑發展有限公司訴律政司司長（HCAL 32/2006），第 191 段。

制度明顯是爲了貫徹一個正當的目標。就此，本席注意到暫委法官辛達誠在香港佛教聯合會訴佔用人一案的判決中也持有相同觀點。

185. 依本席看，真正的爭論點是：在有關法定計劃的目標與管有業權被終絕的人所遭受的困苦這兩者之間，是否已取得恰當平衡。

186. 本席認爲，逆權管有的機制是難用的，可能會在一些情況下造成不公平的結果。英格蘭國會已設計了一個更公平的制度，或許香港在適當時間後也會這樣做。但有關問題並非是可否設立一個更完善的制度，而是現有的法定計劃是否抵觸《基本法》關於保護財產權的條文。

187. 余先生在陳詞時指出，在以管有爲基礎的法律制度中，法律應袒護持續管有土地的人還是擁有紙上業權但卻長年對自己的權利坐視不理的人，這是由立法機關而非法庭決定的政策問題。本席認爲，余先生這個論點擲地有聲。

188. 土地在香港是稀有資源，應受到充分利用，這點是無容置疑的。《基本法》第七條就土地的'使用、開發'作出規定。就土地獲批予批租權利的人，既負有責任，又享有權利。正如本席先前所說，如業權最終是以管有爲基礎，擁有人似乎有責任管有土地，不能夠讓土地實際上被長年棄置。依本席看，立法機關和行政當局無疑有權斷定有充分的社會和經濟理由支持土地應至少有人佔用，而不是讓其被棄置，並且提醒所有批租土地的擁有人注意此事。

189. 香港的立法機關和政府都認爲，讓土地實際上被長年棄置，是違背公眾利益的。逆權管有所需的年期不但沒有延長，更反而縮短。雖然《基本法》可對財產權提供保障，但這些權利經常因公眾利益而受到規例的很多限制。至於如何最妥善地管制土地這種基本資源，則顯然是民主決定的問題：例子可參閱 *Grape Bay Ltd v. Attorney General of Bermuda*，第 585 頁。

190. 正如余先生強調，自 1843 年以來，關於時效和逆權管有的法律已是香港土地法律制度的一部分。過去，有關法律已多次施行，以滿足以下的社會需要：防止個人受到陳舊的申索影響，避免在界線或紙上業權不確定的案件中造成困苦，防止土地被棄用，以及便利物業轉易。現在，藉著各項成文法則和規例，可能已減少使用逆權管有機制的需要。然而，本席認爲這個機制仍然是香港土地法律制度不可或缺的部分，因此這個機制能夠並確實發揮建設性的作用，而非只是有破壞性的作用，這是無可否認的。”（表示強調的底線後加）

2.43 申請人向上訴法庭提出上訴。上訴法庭駁回申請人的上訴，並維持原訟法庭的判決。[52] 申請人於是申請向終審法院上訴的許可，但有關申請亦被駁回。

本章摘要

2.44 我們在本章探討了支持逆權管有這個概念的理據和反駁這些理據的論點。在法庭的意見中，有些是支持逆權管有的，有些則對逆權管有的施行提出批評。我們在討論 *JA Pye (Oxford) Land Ltd v Graham* 一案時，也探討了逆權管有是否符合人權原則。這宗案件先後經過英格蘭高等法院、上訴法庭和上議院審理，最後才上訴至歐洲人權法院。

2.45 香港的法庭亦曾有機會考慮逆權管有是否符合《基本法》的規定。在裕傑發展有限公司訴律政司司長及其他人一案中，[53] 法庭裁定逆權管有的法定機制符合《基本法》第六條和第一百零五條。我們會在下一章研究其他司法管轄區關於逆權管有的法律。

52 民事上訴 2007 年第 10 號。

53 [2006] HKEC 2318.

第 3 章　其他司法管轄區的相關法律

3.1　　在本章中，我們會列述多個司法管轄區的相關法律。很多採納業權註冊制度的英聯邦國家已修訂逆權管有的法律，有些已廢除逆權管有，有些則對逆權管有作出修訂。

澳大利亞

非註冊土地

3.2　　在澳大利亞，就非註冊土地而言，被剝奪管有權的擁有人收回土地的權利受到法規限制（但澳洲首都地區和北領地除外，在上述的兩個司法管轄區，擁有人不會因逆權管有而失去土地業權）。[1] 時效期一般爲 12 年，由訴訟權最初在原告人方面產生的日期起計（但南澳大利亞和維多利亞除外，在上述的兩個司法管轄區，時效期爲 15 年）。[2] 時效期的效力是容許擅自佔地者取得有關土地的業權，而原擁有人的業權則告終絕。[3] 擅自佔地者必須符合普通法關於逆權管有的要求：實際管有和所需的意圖。[4] 所需的意圖是排除所有其他人（包括土地的真正擁有人）而管有該土地的意圖。[5]

1　例如，《1985 年時效法令》（Limitation Act 1985）（澳洲首都地區），第 5(a)條。見 A Bradbrook, S MacCallum and A Moore, *Australian Real Property Law*（Lawbook Co, 第 3 版，2002 年），第 16.01 段，以及 *Halsbury's Laws of Australia*（LexisNexis Butterworths），卷 16，第 255-235 段。但是，界線爭議會以不同方式處理。除了西澳大利亞和維多利亞外，澳大利亞的所有司法管轄區都明文或實際禁止逆權管有界線邊緣的狹長土地（或逆權管有"一幅地的一部分"）。相反，界線爭議一般會通過關於錯誤改善別人土地（mistaken improver）或者據用建築物（building encroachment）的法例解決。見 U Woods，《逆權管有界線邊緣的土地》（"Adverse Possession of Boundary Land"），皇家特許測量師學會會議文件（Conference Paper of the Royal Institution of Chartered Surveyors），2010 年 9 月。

2　《1969 年時效法令》（Limitation Act 1969）（新南威爾斯），第 27(2)條；《1974 年訴訟時效法令》（Limitation of Actions Act 1974）（昆士蘭），第 13 條；《1974 年時效法令》Limitation Act 1974）（塔斯曼尼亞），第 10(2)條；《1935 年時效法令》（Limitation Act 1935）（西澳大利亞），第 4 條；《1936 年訴訟時效法令》（Limitation of Actions Act 1936）（南澳大利亞），第 4 條；《1958 年訴訟時效法令》（Limitation of Actions Act 1958）（維多利亞），第 8 條。

3　*Re Jolly, Gathercole v Norfolk* [1900] 2 Ch 616.

4　*Mulcahy v Curramore Pty Ltd* [1974] 2 NSWLR 464，第 475 頁，首席法官寶雲（Bowen CJ）的判詞。

5　*Powell v McFarlane* (1977) 38 P & CR 452，第 471 至 472 頁。

註冊土地

3.3 在澳大利亞的某些司法管轄區，亦可能通過逆權管有在根據托倫斯（Torrens）制度下[6] 註冊的土地取得業權（但澳洲首都地區和北領地除外）。[7] 有關做法大致可分爲兩種。南澳大利亞、昆士蘭、新南威爾斯、維多利亞和西澳大利亞採取第一種做法：在時效期屆滿時，擅自佔地者會取代被剝奪管有權的註冊擁有人，成爲新的註冊擁有人。換言之，如擅自佔地者就逆權管有提出的申索成功，被剝奪管有權的註冊擁有人的業權即告終絕。下文會說明南澳大利亞的制度以供討論。

(a) 擅自佔地者可向總註冊官提出申請，要求向他發出有關土地的業權證明書。[8]

(b) 總註冊官會安排將該項申請的通知在一份報章刊登最少一次，向他認爲擁有或可能擁有該土地的任何產業權或權益的人發出，以及以其他方式刊登或向其他人發出。[9]

(c) 該通知會附加不少於 21 天但不多於 12 個月的期限，從該通知首次刊登當日起計。除非有人提交知會備忘，否則總註冊官可在上述期限屆滿之時或之後，全部或局部批准發出業權證明書的申請。

(d) 任何人如聲稱在該土地享有任何產業權或權益（包括註冊擁有人），可在上述申請獲批准之前的任何時間，向總註冊官提交知會備忘，制止總註冊官批准上述申請。[10]

(e) 總註冊官如信納有關的知會備忘，會拒絕擅自佔地者的申請。[11] 總註冊官如不信納有關的知會備忘，可向知會備忘登記人發出通知，要求知會備忘登記人在該通知所

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6 澳大利亞所採用的土地註冊制度。

7 見《土地業權法令》（Land Titles Act ）（北領地），第 198 條；《1925 年土地業權法令》（Land Titles Act 1925）（澳洲首都地區），第 69 條，以及《1985 年時效法令》（澳洲首都地區），第 5(a)條。

8 《1886 年土地財產法令》（Real Property Act 1886）（南澳大利亞），第 80A 條。實際上，註冊官通常要求擅自佔地者提供已逆權管有有關土地達 30 年的證明。如有關時期少於 30 年，則必須有證據證明關乎無行爲能力的條文或其他延長時限的條文不適用於有關土地。見 A Bradbrook, S MacCallum and A Moore, *Australian Real Property Law*（Lawbook Co, 第 3 版，2002 年），第 673 頁，註釋 327。

9 《1886 年土地財產法令》（南澳大利亞），第 80E 條。

10 《1886 年土地財產法令》（南澳大利亞），第 80F(1)條。

11 《1886 年土地財產法令》（南澳大利亞），第 80F(3)條。

指明的時間內（不少於該通知發出後的六個月），在法院提出法律程序以確立他的業權。[12]

(f) 如知會備忘已經失效，或知會備忘登記人未能在法律程序中確立他的業權，只要擅自佔地者已符合普通法關於逆權管有的要求，總註冊官就會把當時有效的業權證明書註銷，並向擅自佔地者發出新的業權證明書。[13]

3.4 南澳大利亞關於擅自佔地者申請註冊爲新註冊擁有人的制度，與昆士蘭、[14] 新南威爾斯、[15] 維多利亞[16] 和西澳大利亞[17] 的制度相類似。有些司法管轄區的制度頗爲複雜，例如新南威爾斯的制度，但有關機制基本上是相同的：發出通知、註冊擁有人提交知會備忘、註冊官或法院作出裁定，以及爲反映上述裁定而更新土地登記冊。

3.5 塔斯曼尼亞則採取第二種做法。在時效期屆滿時，註冊擁有人會被視作以信託方式爲擅自佔地者持有有關土地。[18]

(a) 擅自佔地者然後可按認可格式向記錄官提出申請，要求作出將法定業權歸屬於他的命令。該項申請須以該土地的圖則或測量（連同外業紀錄）作爲支持，而有關的圖則或測量須經測量師核證爲正確的。[19]

(b) 在提出該項申請前，擅自佔地者須：

(i) 在一份於塔斯曼尼亞出版並於該土地所在的地區流通的報章，以認可格式發出擅自佔地者擬提出該項申請的通知；

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12 《1886 年土地財產法令》（南澳大利亞），第 80F(4)條。

13 《1886 年土地財產法令》（南澳大利亞），第 80G 及 80H 條。

14 《1994 年土地業權法令》（Land Titles Act 1994）（昆士蘭），第 185(1)(d)條和第 99 至 108B 條。

15 《1900 年土地財產法令》（Real Property Act 1900）（新南威爾斯），第 45D(1)條。亦見該法令第 45D 至 45G 條和第 74F 至 74R 條。申請只可就*"整幅土地"*提出，以防止就小塊的土地提出申請（第 45B(1)條）。見 A Bradbrook, S MacCallum and A Moore, *Australian Real Property Law*（Lawbook Co, 第 3 版，2002 年），第 674 至 675 頁。

16 《1958 年土地轉移法令》（Transfer of Land Act 1958）（維多利亞），第 42(2)(b)條和第 60 至 62 條。

17 《1893 年土地轉移法令》（Transfer of Land Act 1893）（西澳大利亞），第 68 條和第 222 至 223(A)條。

18 《1980 年土地業權法令》（Land Titles Act 1980）（塔斯曼尼亞），第 138W(2)條。

19 《1980 年土地業權法令》（塔斯曼尼亞），第 138W(4)及(7)條。

(ii) 向在關乎該土地的註冊紀錄的一頁上，註明在該土地或在該頁所記錄的按揭或產權負擔擁有權益的人，以認可格式發出該項申請的通知；

(iii) 向在該土地擁有可能已向記錄官提交但沒有註冊的權益的人，發出該項申請的書面通知；以及

(iv) 在提出該項申請前，安排在該土地的顯眼處張貼該通知的文本，爲期不少於一個月。[20]

(c) 任何人如聲稱在該土地享有任何產業權或權益，可在記錄官就該項申請作出歸屬令之前，以認可格式向記錄官提交知會備忘，制止記錄官批准該項申請。[21]

(d) 在對某項申請作出裁定前，記錄官須考慮有關聲稱的所有情況、各方的行爲和其他因素。[22]

(e) 記錄官可：

(i) 全部或部分拒絕某項申請，或就聲稱以信託方式持有的產業或就與該申請有關的其他事項提出要求；[23]

(ii) 作出命令，將法定產業歸屬於擅自佔地者。[24]

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20 《1980 年土地業權法令》（塔斯曼尼亞），第 138W(8)條。

21 《1980 年土地業權法令》（塔斯曼尼亞），第 138Z(1)條。

22 《1980 年土地業權法令》（塔斯曼尼亞），第 138V 條：“尤其是——
(a) 在有關期間內，申請人是否有當然權利享有對該土地的管有；及
(b) 是否有理由假定在有關期間內，申請人是藉武力或秘密地享有對該土地的管有，或是憑藉在該段期間之前或之內所訂立的書面或口頭協議而享有對該土地的管有（除非申請人能證明任何上述協議已在該段期間之前終止）；及
(c) 管有的性質和期間；及
(d) 對該土地所進行的改善，尤其是——
(i) 改善是於何時進行的；及
(ii) 改善是由何人進行的：及
(e) 申請人是否已圈圍該土地；及
(f) 在有關期間內，申請人是否有就該土地承認擁有權、繳付租金或支付其他款項，而申請人須出示最少另一人的證據，以支持有關申請。”

23 《1980 年土地業權法令》（塔斯曼尼亞），第 138W(11)條。亦見該法令第 138W(12)條：“如申請人未能以令記錄官滿意的方式，在合理時間內遵從記錄官所提出的任何要求，則記錄官可在作出歸屬令之前的任何時間，完全或部分拒絕有關申請。”

24 《1980 年土地業權法令》（塔斯曼尼亞），第 138X(1)條。亦見該法令第 138X(3)條：“記錄官在根據本條作出歸屬令時——
(a) 須在註冊紀錄作出記錄官認爲需要的記錄、註銷和更正，以執行該歸屬令，並將藉該命令而獲歸屬有關土地的人註冊爲該土地的擁有人；及
(b) 可爲作出上述的記錄、註銷和更正而收回任何業權證明書和批地書。”

加拿大

3.6 加拿大有 13 個普通法司法管轄區（包括聯邦層級）和一個大陸法司法管轄區。下文各段會討論五個主要的普通法司法管轄區：艾伯塔、不列顛哥倫比亞、馬尼托巴、安大略和薩斯喀徹溫。

非註冊土地

3.7 在艾伯塔、馬尼托巴和安大略，任何人提出收回非註冊土地的訴訟的時效期爲十年，從訴訟權產生的日期起計。[25] 在時效期屆滿時，該人對該土地的業權即告終絕，而逆權管有人必須提出訴訟，以“確認”[26] 他藉管有而取得的業權。[27] 逆權管有人必須證明他實際管有該土地，並具有排除其他人而管有該土地的意圖。[28]

3.8 在不列顛哥倫比亞，除《1996 年時效法令》（Limitation Act 1996）或任何其他法令有特別規定外，任何人不可藉逆權管有而取得土地的權利或業權。[29] 如有權管有土地的人在構成侵佔的情況下被剝奪管有權，或被終身權益擁有人或有權享有剩餘產業權的人剝奪管有權，則就土地的管有而提出的訴訟不受時效期規限，可隨時提出。[30] 六年的時效期適用於由以下人士就土地的管有而提出的訴訟：因後決條件被違反而有權進入土地的人，或根據可終止產業權的復歸不確定權而具有管有權的人。[31] 在時效期屆滿時，土地的業權即告終絕。[32]

3.9 在薩斯喀徹溫，《2004 年時效法令》（Limitations Act 2004）〔廢除《1978 年訴訟時效法令》（Limitation of Actions Act 1978）〕引入普遍適用的時效期制度。該法令第 5 條規定基本時效期爲“*兩年，*

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25 《時效法令》（Limitation Act），2000 年艾伯塔經修訂法規，c L-12，第 3(1)及(4)條；《訴訟時效法令》（Limitation of Actions Act），1987 年馬尼托巴經修訂法規，c L150，第25 條；《土地財產時效法令》（Real Property Limitation Act），安大略經修訂法規，c L 15，第 4 條。

26 《布萊克法律大詞典》（Black's Law Dictionary）（1999 年第 7 版）：確認業權訴訟（An action to quiet title）指藉着強迫敵對的申索人確立某項申索，否則便永遠不容提出該項申索的方式，以確立原告人的土地業權的法律程序。

27 *Gary v Richford* (1878) 2 SCR 431（加拿大最高法院）。*Canadian Encyclopedic Digest (Ontario)*（Thomson, Carswell，第 3 版）卷 19，第 192 段。

28 *Gorman v Gorman* (1998) 16 RPR (3d) 173（加拿大安大略省）。*Canadian Encyclopedic Digest (Ontario)*（Thomson, Carswell，第 3 版）卷 19，第 208 段。

29 《時效法令》，1996 年不列顛哥倫比亞經修訂法規，c 266，第 12 條。根據第 14(5)條，該法令並不影響在 1975 年 7 月 1 日前藉逆權管有而對土地取得的任何權利或業權。

30 《時效法令》，1996 年不列顛哥倫比亞經修訂法規，c 266，第 3(4)(a)及(b)條。任何管有財產的人爲該財產的業權或爲要求就該財產的業權作出某項聲明而提出的訴訟，亦不受時效期規限，可隨時提出（該法令第 3(4)(j)條）。

31 《時效法令》，1996 年不列顛哥倫比亞經修訂法規，c 266，第 3(6)(f)條。

32 《時效法令》，1996 年不列顛哥倫比亞經修訂法規，c 266，第 9(2)條。

從發現有關申索事項的日期起計”，但該基本時效期受第 7(1)條所列明的最終時效期規限，該最終時效期爲“*15 年，從有關申索所依據的行爲或遺漏發生的日期起計*”。

註冊土地

3.10 除了艾伯塔外，加拿大所有設有註冊土地業權的省份本質上都不容許逆權管有。在艾伯塔，擅自佔地者可向土地業權辦事處（Land Titles Office）提交經核證的判決書副本，宣布根據《訴訟時效法令》（Limitation of Actions Act）（1980 年艾伯塔經修訂法規）或根據《時效法令》（Limitations Act）所確立的法律責任豁免權，他享有有關土地的獨有使用權，或他對該土地的獨有管有獲得“確認”。[33] 註冊官會在有關的業權證明書記錄一項摘要，依據上述判決完全或部分註銷該業權證明書，並向擅自佔地者發出新的業權證明書。[34]

3.11 在不列顛哥倫比亞，在一項不能廢除的業權獲註冊後，任何人不可藉一段時間的管有而取得與註冊擁有人的業權相逆或對該業權造成減損的業權。[35] 註冊官不得接納一項完全或部分以逆權管有作爲依據的申請，但如有關申請獲《土地業權法令》（Land Title Act）准許，並受到根據《土地業權查詢法令》（Land Title Inquiry Act）所作的業權聲明支持，則不在此限。[36]

3.12 在馬尼托巴，在土地納入《1988 年土地財產法令》（Real Property Act 1988）的適用範圍後，任何人不可僅藉一段時間的管有而取得與註冊擁有人的業權相逆或對該業權造成減損的業權。[37] 但是，如在土地納入新制度時，任何人實際上正在逆權佔用並依法有權享有該土地，而且仍繼續如此佔用該土地，業權證明書對該人的業權而言屬於無效。[38] 薩斯喀徹溫的情況與馬尼托巴相類似。在首項註冊業權發出後，任何人不可藉管有而取得與註冊擁有人的業權或管有有關土地的權利相逆或對該業權或權利造成減損的權利、業權或權益，而註冊擁有人進入該土地或提出收回該土地的訴訟的權利，並不因其他人管有該土地而受到損害或影響。[39]

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33 《2000 年土地業權法令》（Land Titles Act 2000），艾伯塔經修訂法規，c L-4，第 74(1)條。

34 《2000 年土地業權法令》，艾伯塔經修訂法規，c L-4，第 74(2)條。

35 《1996 年土地業權法令》（Land Titles Act 1996），不列顛哥倫比亞經修訂法規，c 250，第 23(3)條。

36 《1996 年土地業權法令》，不列顛哥倫比亞經修訂法規，c 250，第 171 條。

37 《1988 年土地財產法令》，馬尼托巴經修訂法規，c R30，第 61(2)條。

38 《1988 年土地財產法令》，馬尼托巴經修訂法規，c R30，第 61(1)條。

39 《2000 年土地業權法令》（Land Titles Act 2000），薩斯喀徹溫法規，c L-5.1，第 21(1)條。

3.13 在安大略，對於根據《1990 年土地業權法令》（Land Titles Act 1990）註冊的土地，任何人此後也不可藉一段時間的管有而取得與註冊擁有人的業權相逆或對該業權造成減損的業權。[40] 但是，如在首位擁有人進行註冊時，任何人正管有有關土地，該法令容許就該人管有該土地的一段時間提出逆權管有的聲稱。[41] 換言之，該法令只承認在首次註冊日期時存在的管有業權，並明確防止任何人其後取得管有業權。[42]

英格蘭與威爾斯

3.14 在英格蘭與威爾斯，逆權管有的地位取決於擅自佔地者所佔用的土地是否已經註冊。

非註冊土地

3.15 截至 2012 年 7 月，英格蘭與威爾斯約有 20% 的土地仍屬非註冊土地。[43] 如土地並無註冊，收回該土地的訴訟的時效期爲 12 年，從訴訟權產生的日期起計。[44] 訴訟權當作在紙上擁有人被剝奪管有權或中止管有的日期產生。[45] 在時效期屆滿時，擁有人收回該土地的訴訟權和他的業權均告終絕。[46]

註冊土地

3.16 對於註冊土地，法律委員會雖然決定不建議全面廢除逆權管有的規則，但建議調整土地擁有人和擅自佔地者之間的平衡，以消除人們對該規則的疑慮，又同時保存該規則的好處。[47] 委員會構思出經修訂的逆權管有制度，試圖爲註冊土地求取上述的平衡。

3.17 《2002 年土地註冊法令》（Land Registration Act 2002）實施法律委員會的建議，對註冊擁有人給予更大保障，以防他人藉逆權管有而取得業權。在 *JA Pye (Oxford) Ltd v Graham* 一案中，[48] 霍普勳爵

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40 《土地業權法令》，1990 年安大略經修訂法規，c L5，第 51(1)條。

41 《土地業權法令》，1990 年安大略經修訂法規，c L5，第 51(2)條。

42 *Canadian Encyclopedic Digest (Ontario)*（Thomson, Carswell，第 3 版）卷 28，第 488 段。

43 出自英國土地註冊處的網站。在買賣物業或辦理按揭貸款時，都必須把有關物業註冊。但有些物業世世代代都留在同一家庭或組織手中，因此從來都沒有註冊。

44 《1980 年時效法令》（Limitation Act 1980）（英國），第 15 條。

45 《1980 年時效法令》（英國），附表 1，第 1 部，第 1 段。

46 《1980 年時效法令》（英國），第 17 條。

47 英格蘭法律委員會（English Law Commission），《廿一世紀土地註冊報告書：物業轉易的革命》（*Report on Land Registration for the Twenty-First Century, A Conveyancing Revolution*）（法律委員會第 271 號，2001 年），第 2.73 段。

48 (2003) 1 AC 419.

（Lord Hope）表示《2002 年法令》的效力會“*使管有註冊土地的擅自佔地者更難在違反擁有人意願的情況下，取得有關土地的業權。*”[49] 憑藉《2002 年法令》第 96 條，《1980 年時效法令》第 15 及 16 條所訂的時效期（使擅自佔地者在逆權管有土地達 12 年後可取得該土地的業權）不再適用於註冊土地。相反，註冊土地受《2002 年法令》附表 6 所述的新制度規限。[50] 按照這個新制度，擅自佔地者在逆權管有土地達十年後，可申請註冊爲擁有人。有關土地的註冊擁有人屆時會獲給予時間送達反通知書。在新制度下，註冊擁有人相當可能能夠阻止擅自佔地者完成對逆權管有的申請。[51]

3.18 《2002 年法令》附表 6 的這個新制度有如下主要特點：

(i) 任何人如在截至提出申請當日爲止，已逆權管有土地的註冊產業達十年，[52] 可向註冊官申請註冊爲該產業的擁有人。

(ii) 但根據新制度，申請在以下情況下會不獲批准：

- 註冊擁有人是敵人或是被扣留在敵人的領土。[53]
- 註冊擁有人因爲精神上的無行爲能力而不能作出所需的決定，或因爲精神上的無行爲能力或身體上的殘障而不能傳達上述決定。[54]
- 所涉及的土地產業權是以信託方式持有，但如各受益人的權益是一項管有中的權益，則屬例外。[55]
- 擅自佔地者是法律程序中的被告人，而該法律程序涉及對有關土地管有權的主張，或在過去兩年，擅自佔地者在管有土地的判決中被判敗訴。[56]

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49 出處同上，第 446 頁。

50 亦見修訂後的《2003 年土地註冊規則》（Land Registration Rules 2003）。英國的環境、食物及鄉郊事務部（Department for Environment, Food and Rural Affairs）也發布了《關於逆權管有公共用地和市鎮或鄉村草地的指引》（*Guidance Note on adverse possession of common land and town or village greens*），可從以下網站下載：www.defra.gov.uk。

51 英國土地註冊處發出的實務指引 4（截至 2011 年 10 月的版本），第 2 頁。

52 對於官方所擁有的前灘而言，則爲最少 60 年。《2002 年土地註冊法令》附表 6 第 13 段。

53 《1945 年時效（敵人和戰俘）法令》（Limitation (Enemies and War Prisoners) Act 1945）。《2002 年土地註冊法令》附表 6 第 8(1)段。

54 《2002 年土地註冊法令》附表 6 第 8(2)段。

55 《2002 年土地註冊法令》附表 6 第 12 段。

56 《2002 年土地註冊法令》附表 6 第 1(3)段。

- 如有關申請實際上是界線爭議，土地註冊處無法界定有關界線的確切位置。擅自佔地者應考慮申請更改其業權的圖則和／或鄰居的業權的圖則。[57]

(iii) 以逆權管有爲依據的註冊申請應附有載列了所需資料和證據的法定聲明。土地註冊處在接獲申請後，通常會安排該處的測量師視察有關土地，在進行視察之前，會先知會有關當事人。土地註冊處如認爲擅自佔地者相當可能有權申請註冊，會根據附表 6 第 2 段向下列人士發出通知：

- 受影響產業的註冊擁有人；
- 該產業上的任何註冊押記的註冊擁有人；
- （如該產業屬批租土地）任何上一級註冊產業的註冊擁有人；
- （如註冊擁有人是或可能是一家已解散的公司）國庫事務律師（Treasury Solicitor）；
- 任何已註冊爲須獲通知的人。[58]

(iv) 註冊擁有人可在 65 個工作天內反對該項申請，並／或要求按《2002 年法令》附表 6 第 5 段處理該項申請。

(v) 如註冊官沒有在 65 個工作天內接獲註冊擁有人或有關人士的反通知書，擅自佔地者便會獲註冊爲擁有人。[59] 實務指引說明，按照一般原則，擅自佔地者的註冊不會影響任何影響該產業的權益的優先次序。[60] 因此，擅自佔地者仍會受到約束前擁有人的相同產業權、權利和權益限制。

<u>反對</u>

(vi) 註冊擁有人（或有關人士）如想反對擅自佔地者的申請，必須根據諸如沒有事實管有、沒有必需的意圖或沒

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57 公眾指引 19 的規定。見英國土地註冊處實務指引 4。

58 《2002 年土地註冊法令》附表 6 第 2 段。

59 《2002 年土地註冊法令》附表 6 第 4 段。

60 《2002 年土地註冊法令》附表 6 第 9(2)段。如屬於影響額外財產的押記，有條文訂明如何分攤獲得保證的款項。

有所需的年期等理由而提出反對。註冊官如裁定該項反對並非是毫無根據的，會把該項反對通知擅自佔地者。如雙方無法達成協議，有關事宜必須轉交審裁官。[61]

反通知書

(vii) 除了發出反對通知外，註冊擁有人（或有關人士）也可向註冊官提交“反通知書”，要求根據《2002 年土地註冊法令》附表 6 第 5 段處理擅自佔地者的申請。如擅自佔地者沒有在文件中說明他是依賴第 5 段中三項條件的其中一項，註冊官在接獲反通知書時會拒絕擅自佔地者的申請。[62]

附表 6 第 5 段的三項條件

(viii) 如註冊擁有人送達反通知書，說明他希望擅自佔地者的申請會根據《2002 年法令》附表 6 第 5 段處理，擅自佔地者爲了獲註冊爲擁有人，就必須證明有下列三項條件的其中一項：

(1) (a) 因爲衡平法的不容反悔原則，註冊擁有人謀求剝奪他的管有權會是不合情理的；及

(b) 在有關情況下，擅自佔地者理應獲註冊爲擁有人；[63]

(2) 擅自佔地者因其他理由而有權獲註冊爲該產業的擁有人；[64] 或

(3) (a) 有關土地毗鄰擅自佔地者所擁有的其他土地；

(b) 上述兩者之間的正確界線沒有根據《2002 年土地註冊法令》予以釐定；

(c) 他在截至提出申請當日爲止，已逆權管有關土地最少十年，並合理地相信有關土地是屬於他的；及

61 《2002 年土地註冊法令》第 73 條。

62 英國土地註冊處實務指引 4，第 11 頁。

63 這項條件是爲了體現擁有人不容反悔（proprietary estoppel）的衡平法原則。

64 一個例子是擅自佔地者根據已故擁有人的遺囑或在已故擁有人並無遺囑的情況下有權繼承土地。

(d) 在提出申請當日之前，該項申請所關乎的產業已註冊超過一年。[65]

(ix) 在擅自佔地者的申請被拒絕後，註冊擁有人有兩年期限藉以下方式從擅自佔地者取回對有關土地的管有：取得法庭判決，或在取得法庭判決後將擅自佔地者逐出，或對擅自佔地者提出收回管有的法律程序。

(x) 如擁有人沒有按上述其中一種方式行事，而擅自佔地者從提出第一次申請當日起直至該兩年期限的最後一天爲止，一直逆權管有有關土地，擅自佔地者便可提出第二次註冊申請。

(xi) 法律委員會建議，擅自佔地者如能夠提出第二次申請，會自動獲註冊爲新的擁有人。但現有的安排是註冊擁有人（或有關人士）仍可反對擅自佔地者再次提出的申請。除非反對是毫無根據的，否則有關事宜會交由審裁官解決。

有關批租土地的事宜

3.19 對於逆權管有註冊的批租土地，英國土地註冊處在實務指引中解釋，擅自佔地者一旦管有批租土地，時效期就立即開始針對租客計算。然而，時效期不會針對業主計算，直至批租契屆滿爲止——除非逆權管有在批租契生效前已經展開。如屬這個例外情況，時效期會在批租契的有效期內繼續針對業主計算。

3.20 再說，如租客據用其他土地，法律會推定他是爲了業主的利益而這樣做。[66] 最少有一種意見認爲，這項推定意味着租客不能進行逆權管有，而任何根據《2002 年法令》附表 6 提出的申請都應由租客的業主提出。[67]

3.21 但是，如有證據證明租客的實際意圖是爲自己的利益而據用土地，可以推翻上述的推定。英國土地註冊處解釋，該處願意把已提出有關申請的事實視作爲這個意圖的充分證據，以便繼續處理有關申請。另有一種意見認爲，上述的推定只關乎何人在普通法上

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65 實務指引舉出在錯誤地方豎立分隔牆或圍欄的例子。

66 *Smirk v Lyndale Developments Ltd* [1974] 3 WLR 91。上訴法庭贊同副庭長彭尼奎克（Pennycuick V-C）在租客據用土地一點上的說法：[1975] Ch 317，第 337 頁。亦見 *Tower Hamlets v Barrett* [2005] EWCA Civ 923。

67 見暫委審裁官在 *Dickenson v Longhurst Homes Ltd* (REF/2007/1276)一案的裁決。

取得對有關產業的業權，沒有改變租客是在逆權管有土地這一事實，因此如申請是根據附表 6 提出的，上述的推定並不相關。

3.22 如註冊官接獲反對，除非他信納該項反對是毫無根據的，否則不能對有關申請作出裁定，直至該項反對得到處理爲止。如該項反對並非是毫無根據的，註冊官必須把該項反對通知擅自佔地者。如有關事宜不能由雙方藉協議解決，註冊官會把有關事宜交由審裁官解決。

過渡安排

3.23 《2002 年土地註冊法令》附表 12 規定，根據《1980 年時效法令》或根據《1925 年土地註冊法令》（Land Registration Act 1925）第 75 條所取得的逆權管有權利（先前的凌駕性權益）具有凌駕性的地位，爲期三年。實務指引 15[68] 解釋，從 2006 年 10 月 13 日起，只有申索人正在實際佔用有關土地，或擁有人在首次註冊時知悉該等權利，該等權利才會獲得保護。因此，取得管有業權但只是收取租金或收益的人必須申請註冊。[69]

巴斯特訴曼利安（Baxter v Mannion）[70]

3.24 在這宗最近的案件中，擅自佔地者巴斯特先生（Mr Baxter）根據《2002 年土地註冊法令》附表 6 第 1 段申請註冊爲一塊田地的擁有人，聲稱已逆權管有該塊田地達十年。法庭在案中澄清了新計劃多方面的內容。

3.25 該塊田地於 1996 年 8 月由曼利安先生（Mr Mannion）在拍賣會上以 15,000 英鎊購入。當時該塊田地一片荒蕪，曼利安購入該塊田地是因爲它的發展潛力。巴斯特居住在該塊田地附近，聲稱自 1985 年起，便一直使用該塊田地放牧他的馬匹，從無繳付分文。曼利安未能在訂明的 65 個工作天內交回訂明的表格，因此巴斯特獲註冊爲擁有人。曼利安其後根據《2002 年法令》附表 4 第 5(a)段提出申請。該段規定註冊官可更改註冊紀錄以“*更正錯誤*”，但沒有定義或法定指引，說明甚麼構成“*錯誤*”。曼利安聲稱將巴斯特註冊爲擁有人是一項錯誤，因爲巴斯特實際上從未逆權管有該塊田地達到所需的十年。暫委審裁官裁定巴斯特未能證明已逆權管有該塊田地達十年之久，因此應曼利安的要求更正有關“*錯誤*”。

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68 《凌駕性權益和這些權益的披露》（*'Overriding interests and their disclosure'*）（截至 2012 年 4 月的版本）。

69 第 5.7 段。

70 [2010] 1 WLR 1965, [2010] All ER 173.

3.26 巴斯特向法院提出上訴，辯稱附表 4 第 5(a)段所指的*"錯誤"*只限於程序性質的錯誤，而由於他已向曼利安妥爲送達所需的通知，因此曼利安不作回應就等於同意。可是，亨德遜法官（Henderson J）裁定註冊官更正錯誤的權力不但包括實質事項，也包括程序事項。他亦指出：

> "42. 首先，《2002 年法令》的一般政策是嚴格限制擅自佔地者可取得註冊土地的業權的情況，並對註冊擁有人的業權比以往法律給予更大保障……。根據這項政策，如註冊擁有人的土地第一次便有被擅自佔地者永久奪去的風險，而該擅自佔地者實際上從未逆權管有該土地，這會是非常不可思議。註冊擁有人因爲沒有送達反通知書而受到這樣的懲罰，也完全是不成比例，尤其是（如本案那樣）當中有情有可原的情況，這些情況即使不能完全寬宥沒有送達反通知書一事，仍有助於解釋沒有送達的原因。[71]
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> 43. 第二，巴斯特先生對《2002 年法令》的詮釋，無異於慫恿詐騙。這個詮釋可能會獎勵不誠實的申請人謊報自己使用有關土地的性質和範圍，使註冊官相信他一直逆權管有該土地……。
>
> 44. 第三，如不能符合逆權管有測試的擅自佔地者根據第 4 段所獲的註冊，不涉及可予更正的錯誤，看來前擁有人會無法根據《2002 年法令》第 103 條和附表 8 就其損失申索彌償。附表 8 第 1(1)段列出任何人有權申索彌償的所有關鍵情況，這些情況都需要有錯誤曾經發生。如無錯誤，申索彌償的權利就不能產生。對《2002 年法令》作這樣的詮釋，並不能在社會整體利益的需要和保障前擁有人基本權益的需要之間取得恰當平衡，因此會違反《歐洲人權公約》第一號議定書（First Protocol of the European Convention on Human Rights）第一條：見 *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45，第 53 段。所以，《1998 年人權法令》（Human Rights Act 1998）第 3 條會要求法庭盡可能對《2002

[71] 曼利安在作證時表示，他有兩名家人（唯一的兄弟和三星期大的孫子）先後去世，其後他好一段時間都感到不適。

年法令》採納一個使註冊紀錄可在該等情況下更正的詮釋。”

3.27 亨德遜法官也澄清舉證責任的問題，表示一般原則將會適用，即是如某一方爲了申索成功而須證明某一觀點，該方須負舉證責任。因此，擅自佔地者如根據附表 6 第 1(1)段提出註冊申請，便須負舉證責任。曼利安根據第 5(a)段申請“*更正錯誤*”，他就有責任證明巴斯特並無逆權管有該塊田地達到十年。

愛爾蘭[72]

3.28 相關的法例條文是《1957年時效法規》（Statute of Limitation 1957）第24條，該條規定“在本法令就任何人提出收回土地的訴訟所訂明的期限屆滿時，該人對該土地的所有權即告終絕。”該條文的前身是《1833年土地財產時效法令》（Real Property Limitation Act 1833）第34條。[73]

3.29 在愛爾蘭，*Rankin v M'Murtry*一案首次考慮各時效法令對批租產業的影響。[74] 根據愛爾蘭法律改革委員會[75] 的總結，在該案中，賀姆斯法官和吉遜法官（Holmes and Gibson JJ）認爲有關的批租產業已歸屬正在管有的人，[76] 奧拜恩（O'Brien J）法官則根據不容反悔原則（estoppel）作出判決。[77] 莊士敦法官（Johnston J）認爲，藉管有而取得的業權會相當於合法擁有人因有關法規的施行而失去的權益，並

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72 愛爾蘭法律改革委員會《關於藉逆權管有土地而取得業權的報告書》（*Report on Title by Adverse Possession of Land*）（2002 年 12 月）總結了這方面的法律。相關的資料摘錄在本部分。

73 3 & 4 Will 4 (1833) c 27。1957 年法令第 24 條重複 1833 年法令第 34 條的字眼。第 34 條規定，“在本法令就任何人作出收地或扣押，或發出命令反對聖職任命者提出反對理由的令狀，或提出其他訴訟或起訴所訂明的期限屆滿時，該人對在上述期限內本可分別藉作出或提出有關收地、扣押、訴訟或起訴而收回的土地、租金或受俸牧師推薦權的權利和所有權即告終絕。”

74 (1889) 24 LR Ir 290.

75 《關於藉逆權管有土地而取得業權的報告書》（2002 年 12 月）。

76 見賀姆斯法官在第 301 頁（出處同上）的判詞。他說：“就原擁有人而言，其享有有關產業權和權益的權利已告終絕，而有關產業權和權益則變爲歸屬於因爲其管有而使原擁有人的權利終絕的人”，但他對“國會法規所承認的物業轉易”（Parliamentary conveyance）這個詞不滿意。吉遜法官的判決理由較爲含糊。他說：“該法規並不使批租的年期終絕，而只是使被剝奪管有權的一方的權利終絕……假設法定時效已經屆滿，本席認爲被告人須被視爲已按某種方式（不論是法定的不容反悔原則、轉移或其他方式）成爲有關批租契的擁有人。”（第 303 至 304 頁）

77 莊士敦法官雖然沒有使用“不容反悔原則”這個詞，但表示身爲原告人的業主已通過自己的行爲把被告人視作爲他的租客，猶如被告人已就她已故丈夫的遺產取得遺產管理書一樣。因此，在批租契屆滿時，原告人不能以被告人沒有租客的身分作爲抗辯理由。出處同上，第 296 頁。

且會有相同的法律特徵，但是他似乎也信納業主不容否認擅自佔地者是有關土地的租客。[78]

3.30　不過，英格蘭上訴法庭於 1892 年在 *Tichborne v Weir* 一案[79] 的判決，似乎與愛爾蘭上訴法庭的判決互相矛盾。英格蘭上訴法庭須裁決的問題是：如被告人已取得出租房產的管有，而業主亦已收取被告人的租金，那麼業主能否根據批租契的維修契諾起訴被告人。上訴法庭一致裁定：

> "該法規的效力不僅是禁制不再管有的人取得補救，更是使該人的業權終絕。在此意義上，正在管有的人是憑藉該法令而持有業權，並非憑藉假設的業權轉移。"[80]

3.31　法律一直處於這個不妥當的狀態，直到愛爾蘭上訴法庭在若干年後就 *O'Connor v Foley* 一案作出裁決。[81] 受勳上訴法官費茲賓（Fitzgibbon LJ）說：

> "本席並不質疑 *Tichborne v Weir* 一案的權威。該裁決是由三位著名的上訴法庭法官作出，似乎從未受任何教科書或後來的案例質疑，本席謹認爲該裁決是正確的。但是，依照本席的意見，該裁決的效力只及於合約上的法律責任，並不影響有待本院裁決的本案。在本席看來，該裁決只是就以下事宜作出裁定：《時效法規》的實施只是使產業權終絕，而非轉讓該產業權（轉讓是受禁制的）；任何人如因逆權管有而有權在訂明期間內享有批租權益，不會因批租契承讓人的身分就契諾而被起訴，但如該人不容否認自己是承讓人的，則屬例外。"[82]

3.32　以上一段判詞雖然只是無約束力的附帶意見，但也屬於有說服力的案例，表明擅自佔地者相對於業主的地位並不如前者相對於租客的地位那樣容易解釋。*Ashe v Hogan* 一案也顯露出根據《時效法規》持有批租土地的人的地位並不穩固。[83] 在該案中，愛爾蘭上訴

78　出處同上，第 297 至 298 頁。
79　(1892) 67 LT (NS) 735.
80　出處同上，受勳上訴法官寶雲（Bowen LJ）在第 737 頁的判詞。
81　[1906] 1 IR 20.
82　[1906] 1 IR 20，第 26 頁。
83　[1920] 1 IR 159.

法庭裁定批租土地上的擅自佔地者的地位並不確定，因此不能強迫買家接受他的管有業權。

Perry v Woodfarm Homes Ltd 一案的裁決

3.33 *Perry v Woodfarm Homes Ltd*[84] 一案更全面地探討批租土地上的擅自佔地者的地位。該案是與據用有關，案情並不涉及不容反悔原則的問題，與上文所討論的 *Rankin v M'Murtry* 和 *O'Connor v Foley* 這兩宗案件不同。在討論 *Perry v Woodfarm Homes Ltd* 一案前，應留意英國上議院（最高上訴法庭）曾於 1962 年在 *St Marylebone Property Co Ltd v Fairweather*[85] 一案中裁定，措辭相類似的《1833 年土地財產時效法令》第 34 條和《1939 年時效法令》（Limitation Act 1939）第 16 條都具有使已被剝奪管有權的租客繼續保留批租產業的效力。該租客其後可將該批租產業退回給業主，從而使業主可以恢復管有。莫里斯勳爵（Lord Morris）持有強烈的異議意見，理由是上述結果會違反"不能給付自己沒有的東西"（*nemo dat quod non habet*）這項原則。

3.34 在 *Perry v Woodfarm Homes Ltd* 一案中，由於原告人的逆權管有行爲，有關租客的業權已受禁制。被告人很可能依據 *Fairweather* 案的裁決，接受已被剝奪管有權的租客轉讓批租權益。被告人其後在取得永久業權後，宣稱自己有權以永久業權持有人的身分將土地重收。被告人聲稱自己紙上的批租業權已經與永久業權合併，使被告人可憑藉自己的永久產業權而享有即時管有的權利。然而，愛爾蘭最高法院的大多數法官選擇依循 *Fairweather* 案中持異議的法官所提出的理由，裁定有關批租產業的承租人的業權已告終絕，該業權因而不能轉讓予永久業權持有人。[86] 裁決結果確認了愛爾蘭上訴法庭在 *Ashe v Hogan* 一案[87] 的觀點，即擅自佔地者所取得的不是批租產業本身，而是在批租契剩餘的租期內管有這些土地的權利。因此，在批租契的有效期內，該項權利會繼續作爲永久業權的產權負擔，使永久業權持有人不能收回這些土地。[88]

3.35 愛爾蘭法律改革委員會解釋，《1957 年時效法規》本身表明業主的權利不會因他的租客被剝奪管有權而受影響。業主在固定期限批租契的有效期內所享有的權利，包括強制執行契諾的權利和因任何違反事項而沒收批租權的權利，並不屬於"收回土地的訴

84 [1975] IR 104.
85 [1963] AC 510.
86 華殊法官和格芬法官（Walsh and Griffin JJ），亨奇法官（Henchy J）持異議。
87 [1920] 1 IR 159.
88 華殊法官在第 119 頁的判詞。

訟”的範圍。因此，業主不會因第 13 條所指的時效期屆滿而受影響。在 *Perry* 案中，最高法院確認此點，裁定業主仍可針對租客強制執行被違反的契諾，而且業主亦可因契諾被違反而沒收批租權。[89]

3.36 正如愛爾蘭法律改革委員會指出，雖然 *Perry* 案的裁決爲批租土地上的擅自佔地者提供某些保障，因爲業主和已被剝奪權利的租客不可進行在 *Fairweather* 案中成功對付擅自佔地者的那類共謀行爲。但是，由於擅自佔地者隨時可因爲已被剝奪權利的租客違反契諾而被沒收批租權，因此擅自佔地者的地位仍不穩固，他也不能強迫不願意的買家接受他的業權。爲了保護自己，擅自佔地者可提出向業主支付租金，或就其他違反事項作出補救，但重要的是，業主不一定要接受他的提議。況且，擅自佔地者也無權獲取關於批租契條款的資料。由於他很可能不知道批租契中的契諾，因此他根本不能採取防範措施，亦無法使買家相信批租權不會被即將沒收。擅自佔地者不能獲得對沒收批租權的寬免，[90] 他對有關法律行動所能提出的抗辯，只會是指業主可能受不容反悔原則約束。[91]

3.37 愛爾蘭法律改革委員會的結論是，雖然擅自佔地者在愛爾蘭法律中的地位並不如在英格蘭法律中那樣不令人滿意，但他們現有的法律也損害了一些業權。該委員會認爲有以下三項理由支持改革愛爾蘭這方面的法律：首先，大部分的市區土地都是根據長年期的批租契持有，在這些批租契中，很多的年期長達 999 年。在根據這類批租契持有的土地上的擅自佔地者和在永久業權土地上的擅自佔地者受到不同對待，這不是法律上的一種理想情況。第二，很多批租契均會使租客有權根據 1967 至 1978 年間多項《業主與租客（地租）法令》（Landlord and Tenant (Ground Rents) Acts 1967-1978）的條文而取得永久產權，但批租土地上的擅自佔地者因爲沒有取得批租產業權，所以不能繼承上述租客的權利。因此，在一定程度上，*Perry v Woodfarm Homes Ltd* 一案的裁決已使賦權予租客購置批租土地的永久產權的立法政策無法落實。第三，該裁決使有關的業權難以售出，因而減少了可供發展的土地數量，並使現有佔用人的地位懸而未決。

89 華殊法官在第 119 至 120 頁的判詞；格芬法官在第 130 頁的判詞。

90 *Tickner v Buzzacot* [1965] Ch 426.

91 *O'Connor v Foley* [1906] 1 IR 20.

新西蘭

非註冊土地

3.38 在新西蘭，收回土地訴訟的時效期爲 12 年，從訴訟權產生的日期起計，[92] 但與毛利人的傳統土地[93] 和根據《1952 年土地轉移法令》（Land Transfer Act 1952）所註冊的土地有關者除外。[94] 收回土地的訴訟權不當作產生，直至該土地處於逆權管有之下。[95] 在任何人提出收回土地的訴訟的時效期屆滿時，該人對該土地的業權即告終絕。[96]

註冊土地

3.39 根據《1952 年土地轉移法令》第 64 條，如土地是根據該 1952 年法令註冊的，使用人就不能藉着與註冊擁有人的業權相逆或對該業權造成減損的管有而取得業權。但是，第 64 條亦訂明該條文受《1963 年土地轉移修訂法令》（Land Transfer Amendment Act 1963）第 1 部規限。該部規定，儘管註冊擁有人存在，但擅自佔地者在逆權管有土地最少 20 年後，可向註冊官申請業權證明書。[97] 如一名或以上的聯權共有人或分權共有人管有任何土地，可構成對其他共有人的逆權管有。[98] 如註冊擁有人在擅自佔地者逆權管有該土地滿 20 年時並無行爲能力，擅自佔地者就無權提出申請，直至註冊擁有人不再無行爲能力或去世（以先發生者爲準）爲止，但如擅自佔地者已逆權管有該土地不少於 30 年，則不在此限。[99]

(a) 如註冊官信納擅自佔地者已按照《1963 年土地轉移修訂法令》的規定管有有關土地，則註冊官會以他認爲合適的格式，安排將該項申請的通知：

(i) 於他指明或批准的日期，在一份或以上他認爲合適的報章（包括最少一份於該土地所在的地區流通的報章）上刊登最少兩次；及

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92 《1950 年時效法令》（Limitation Act 1950）（新西蘭），第 7(2)條。
93 《1950 年時效法令》（新西蘭），第 6(1)條。
94 《1950 年時效法令》（新西蘭），第 6(2)條。
95 《1950 年時效法令》（新西蘭），第 13(1)條。
96 《1950 年時效法令》（新西蘭），第 18 條。
97 《1963 年土地轉移修訂法令》（新西蘭），第 3(1)條。
98 《1963 年土地轉移修訂法令》（新西蘭），第 3(3)條。
99 《1963 年土地轉移修訂法令》（新西蘭），第 4(1)條。

(ii) 向符合以下說明的人發出：註冊紀錄顯示該人擁有該土地的產業權或權益或對該土地有產業權或權益的聲稱，或註冊官認爲該人擁有或可能擁有該土地的產業權或權益或對該土地有或可能有產業權或權益的聲稱（而該通知提出警告，說明除非提交知會備忘，否則任何上述的產業權或權益會告失效）；及

(iii) 以他認爲合適的其他方式刊登或向他認爲合適的其他人發出。[100]

該通知會定出一個日期，除非知會備忘已在該日期或之前提交，否則註冊官可繼續考慮該項申請。[101]

(b) 在以下情況下，註冊官會拒絕該項申請：

(i) 根據連同申請而提交的證據或依據要求而提供的證據，註冊官並不信納擅自佔地者已按指明的方式在指明的期間內管有該土地；或

(ii) 擅自佔地者未能在指明的時間內，遵從根據《1963年法令》所提出的要求。[102]

(c) 任何人如聲稱在該土地享有任何產業權或權益，可在所定期限屆滿之前，以訂明格式提交知會備忘，制止註冊官批准該項申請。[103]

(d) 註冊官如信納知會備忘的簽立人是註冊擁有人，會拒絕該項申請。[104]

(e) 註冊官如信納擅自佔地者的申請，會向擅自佔地者發出業權證明書，並將其他業權證明書註銷。[105]

100 《1963年土地轉移修訂法令》（新西蘭），第7(1)條。
101 《1963年土地轉移修訂法令》（新西蘭），第7(3)條。
102 《1963年土地轉移修訂法令》（新西蘭），第6條。
103 《1963年土地轉移修訂法令》（新西蘭），第8(1)條。
104 《1963年土地轉移修訂法令》（新西蘭），第9(1)條。
105 《1963年土地轉移修訂法令》（新西蘭），第15及18條。

第 4 章　相關問題——測量和新界的土地界線

4.1　本章會討論與測量和新界的土地界線有關的問題。內文所探討的問題會爲本諮詢文件的進一步討論提供背景資料。

背景

4.2　新界的土地管理起源於十九世紀末，當時英國在 1898 年 6 月根據《北京條約》租借新界 99 年。李森（Nissim）敘述了這段歷史：

> "《北京條約》在 1898 年 6 月 9 日簽訂，使英國可從 1898 年 7 月 1 日起租借即將被稱爲新界的地區，爲期 99 年。事實上，英國直至 1899 年 4 月才實際佔領新界，而測量工作在同年 11 月展開。英國認識到在接管新界後，所要完成的最重要工作就是編配和註冊所有私人擁有的土地。有關的測量工作由從印度政府借調過來的已受訓人員進行，……
>
> 爲聲稱的業權進行註冊的工作最初由行政部門執行，直至由根據《1900 年新界（土地法庭）條例》成立的土地法庭接手爲止。上述的註冊工作與測量工作同時進行，而測量工作本身在 1903 年 6 月才告完成，此時已劃定了約 41 000 英畝土地的界線，涉及約 350,000 幅不同土地。……
>
> 新界被劃分爲 477 個丈量約份，各有一份由港督簽立的集體官契。如聲稱擁有業權的人以令土地法庭滿意的方式確立他的業權，該人的資料會連同他擁有的該塊土地當時的用途描述、有關地段的面積以及須繳付的地稅金額，記錄在集體官契的附表中與編配給該塊土地的地段編號相對之處。這些地段現稱爲舊批約地段。"[1]

[1] 李森（R Nissim），*Land Administration and Practice in Hong Kong*（香港大學出版社 1998 年出版），第 17 至 18 頁。

4.3 夏思義（Hase）曾描述如何爲擁有人進行註冊。[2] 在完成測量後，測量人員會以簡易方式識別實際的佔用人（對於每一個經識別的地段，如佔用人聲稱擁有有關土地，測量人員會要求該佔用人填寫簡單表格，並詢問當地村民有沒有人反對該佔用人的聲稱。如沒有人提出反對，便會把該佔用人的有關資料記錄入測量表格）。上述的程序由爲此目的而成立的土地法庭監察。如出現關於佔用人的爭議，土地法庭會循簡易程序舉行聆訊，以便在不同的聲稱之中選擇其一。以此方式識別的佔用人會獲接納爲最適宜就新官契註冊的人。

根據集體官契所批出的土地

4.4 在律政司司長訴永隆圍社區（*Secretary for Justice v Wing Lung Wai Community*）一案中，高等法院首席法官陳兆愷的判詞說明了此等集體官契的形式和效力：

> "官方藉〔集體官契〕向姓名載列於附表的承租人批給各幅土地，該各幅土地的地段編號、有關地段的面積、有關土地的描述、須繳付的地稅以及各份租契的條款，列明在附表中與個別承租人的姓名相對之處。載列於附表並獲批給附表所提述的該各幅土地的所有承租人，都會倚賴該集體官契。"[3]

4.5 在同一宗案件中亦有如下例子，展示集體官契的重要部分所慣常採用的形式，包括土地描述條款中的法律操作用詞，以及有關圖則：

> "本契約茲證明如下：鑒於由每名承租人以及代每名承租人分別支付、作出和履行下文所保留和載有的年租、契諾和約定條件作爲代價，英皇愛德華七世陛下特向每名承租人批給和批租位於香港殖民地新界經測量後列爲約份第 109 號的整塊或整幅土地，該塊或該幅土地已在本契約附表中與上述承租人的姓名相對之處列明和描述，並已按照該附表中與上述承租人的姓名相對之處所列的地段編號，在附連於本契約的測量

[2] 夏思義博士（Dr Hase），《新界土地註冊制度的起源》（"The Origins of the New Territories Land Registration System"），從下述網址下載：www.hkis.org.hk/hkis/cms_lsd/upload/NewsConf/nwevtb19_0.pdf。

[3] [1999] 3 HKC 580，第 582 頁 G 至 H 行。

約份第 109 號的圖則上更具體地劃定和描述，以及連同……標示在該圖則上。”[4]（表示強調的底線後加）

4.6 換言之，附表列明和載有所批出的該幅土地的描述，而該幅土地也在集體官契所附連的圖則上更具體地劃定和描述。採用“*在所附連的圖則上更具體地劃定和描述*”此慣用語句，對於集體官契擬轉移甚麼物業這個問題具有重要影響。受勳上訴法官布克萊（Buckley LJ）在 *Wigginton & Milner v Winster Engineering* 一案[5] 中對有關法律作出以下的權威說明：

> “法庭如要決定個別的轉易契轉移了甚麼物業，必須在整體上考慮該轉易契，包括構成該轉易契一部分的任何圖則。法庭必須在整體上從該轉易契確定有關意圖。如該轉易契規定其某一部分凌駕於另一部分，而在確定各方意圖的問題上該兩部分相互抵觸，法庭當然須執行上述規定。”

4.7 在永隆圍社區案中，香港上訴法庭採納了上述的段落。高等法院首席法官陳兆愷在該案說：“如在事實轉易了甚麼的問題上有所爭議，須根據其他相關情況對整個轉易契（包括土地描述條款和圖則）予以解釋。”[6]

4.8 在使用了“*在圖則上更具體地劃定*”這個法律操作用詞的個案中，法庭曾裁定圖則上對物業的描述凌駕於契據所載述的文字描述。在 *Eastwood v Ashton* 這宗英格蘭的案件中，[7] 法庭須裁定轉易契據是否已把一小塊狹長土地從賣方轉移至買方。該契約列明屬有關物業的房產“*已在本文件所附註的圖則上更具體地描述，並在該圖則上用紅色劃定*”。韋本勳爵（Lord Wrenburn）表示：

> “各位法官同袍，本席發覺圖則的描述是以‘所有上述的房產已更具體地描述’的措辭寫成。本席認爲‘更具體地描述’一詞排除了有關房產已被巨細無遺地描述的可能性。在本席看來，這個用詞表明先前的描述可能不足以確切劃定有關房產，而該圖則將會涵蓋所有不足之處（如有的話）。”

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4 出處同上，第 582 頁 I 行至 583 頁 B 行。
5 [1978] 3 All ER 436，第 445g 頁。
6 [1999] 3 HKC 580，第 588 頁 C 至 D 行。
7 [1915] AC 900 (HL).

4.9 在永隆圍案中，香港上訴法庭提及一系列關於類似詞句的案例，並贊同判決的理由如下：

> “在先前判決的案件中，如就相關轉易文件所附連的圖則使用了‘更具體地劃定’、‘更具體地描述’或‘更精確地劃定’之類的詞句，法庭都裁定按照有關轉易契的真實解釋和這些案件的情況，各方是有意並已同意對有關圖則給予優先考慮。然而，在每宗案件中，問題仍然是如何在整體上解釋相關文件，以確定各方的意圖。”[8]

4.10 在*Druce v Druce*這宗近期的案件中，[9] 英格蘭上訴法庭對法律的現況作如下的簡要說明：

> “如轉易契所附連的圖則只是作識別用途，轉易契的文字描述就會凌駕於圖則中的任何其他標示，此點已得到充分確定。另一方面，如有關物業是依據圖則而描述的，便以圖則爲準，見 *Eastwood v Ashton* [1915] AC 900。在該案所涉及的轉易契中，有關物業已‘在圖則內更具體地描述’。如上述兩個詞句一同使用，即是如圖則只是作識別用途，而且對有關物業的描述指該物業已在圖則內更具體地描述或劃定，那麼就如本席所說，圖則是否凌駕於轉易契本身的文字描述是轉易契的解釋問題。由於本席所舉出的詞句組合使用了‘只是’一詞，藉以毫不含糊地表明圖則的唯一用途是讓各方或法庭識別有關物業，因此本席認爲在大多數情況下，恰當的解釋是以文字描述爲準。”（表示強調的底線後加）

4.11 集體官契的界線出現問題，是因爲集體官契在法律上是根據丈量約份地圖所顯示的情況批出，而非按照有關地段實際的佔用情況批出。或可說集體官契的每名承租人事實上是按照現有的土地界線佔用根據集體官契批租予他的土地，因此集體官契理應依據簽立時的實際情況解釋。但是，集體官契並沒有採用“*只是作識別用途*”這個常用詞句。相反，集體官契各條款的草擬方式就如有關圖則是準確無誤，目的是反映該塊土地的真正位置一樣。根據現行法

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8 [1999] 3 HKC 580，第 588 頁 E 至 F 行。

9 [2004] 1 P&CR 26 424.

律，按照集體官契批出的土地的界線，就是在丈量約份地圖內列出的界線。

4.12 高義敦（Cruden）對新界集體官契的測量問題說明如下：

> "新界的發展也日益反映出，集體官契所根據的原有測量在準確程度上參差不一。當局從沒有就集體官契所顯示的界線對新界重新進行全面測量，最初的錯誤往往沒有得到糾正。……但是土地交易多年來經常由交易雙方自行處理，沒有尋求律師的意見或協助，這個因素亦令到情況更爲複雜。……
>
> 由於地價急升，加上擁有人和其他在土地擁有權益的人的認知不斷提高，因此土地交易雙方尋求律師協助的情況越來越普遍。現時交易雙方有更大機會發現舊有錯誤，並採取步驟加以糾正。但難題仍可繼續出現，當局早就應對新界重新進行大規模測量。"[10]

丈量約份地圖的問題

4.13 集體官契的丈量約份地圖繪製得相當倉卒，這些地圖按非常小的比例繪製，目的從來不是用來劃定地段的正確位置，而是識別某地段編號是指哪一個地段。[11] 這樣的地段最初約有300,000個，雖然很多後來已被收回，但今天仍有超過200,000個。估計有不少這樣的地段（估計約有三分之二）的確實位置並非在丈量約份地圖所顯示的位置上，而是離這些位置約5至20英尺不等。丈量約份地圖的準確度其實很高，但這些地圖並非按現代標準以科學方法繪製的測量圖。

4.14 不過，位於這些舊批約地段上的建築物，有一部分被視爲"*在地段以外興建*"或"*超越政府土地範圍*"，而在這兩類個案中，丈量約份地圖都被當作是經過科學的劃界測量而繪製成的。如有關建築物確是在1898年前建成的，或建築物雖是新建但卻是建在1898年前的原址上的，則不相符的情況就顯而易見。在這些個案中，事實上有關建築物並非"*在地段以外興建*"，而是有關地段"*並沒有準確地劃在建築物的位置*"。但是，即使舊批約地段上的

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10 高義敦（Gordon N Cruden），*Land Compensation and Valuation Law in Hong Kong* (1999年，Butterworths Asia)，第6頁。

11 小組委員會一名委員提供以下例子，說明丈量約份地圖對界線的描述是如何不準確：(a)在沙頭角區附近，一排十間 1898 年前的村屋被顯示爲只有五間；(b)在塔門丈量約份第269 約地段，一排與海岸平行的舊村屋被顯示爲朝向極爲不同的方向，並延伸入海；以及(c)在長洲，一排 1898 年前的村屋的共用牆被顯示爲連接兩幅牆對角的對角線。

建築物的確實位置並非如實地反映在丈量約份地圖上，現行法律仍接納有關測量爲是，而以該建築物爲非。

新批租約的圖則所存在的問題

4.15 新批租約（根據在1905年後批出的官契所持有的地段）與根據集體官契所持有的舊批約地段都有差不多相同的問題。這些地段是從未開發的政府土地分割出來。建議批出的新土地的位置會繪畫在圖則上，而申請人在申請過程中會要求政府把該塊土地批給他。如申請成功，有關的新圖則會附連於有關的批租約。從技術上來說，新批租約只是向附連的圖則所指明的土地批出租契的協議，已設想到土地實際的佔用情況未必與圖則所顯示的完全一致，因此有關合約已加入條款，使任何不一致的情況可在“官契簽立後”予以更正。

4.16 可惜，只有極少數的官契依據上述的新批租約正式簽立。慣常的做法是在承租人以令政府滿意的方式履行新批租約所規定的責任後（即履行建築契諾），官契便當作已經批出。因此，即使批地文件附連的圖則所顯示的界線與批出的土地實際的佔用情況並不一致，也永遠沒有機會在租契文件上予以更正，而這些不一致的情況亦往往沒有正式紀錄。一個涉及搬遷和重建舊鄉村（大埔魚角村的新村，見附件1）的個案可提供實例，說明新批租約的界線問題。在該個案中，有關的個別地段被過早批出。重建區計劃在尚未平整的梯形地上興建，但將會批出的土地已經一幅一幅地繪畫在圖則上。該圖則當時附連於有關的新批租約。上述的梯形地後來進行平整，但由於地理環境和工程上的限制，該地與附連於有關的新批租約的位置圖並不一致。

4.17 在屯門某個地區，很多新批租約地段在紀錄上的位置都與實際的佔用情況不同，附件2的圖則可加以說明。在黃竹灣的另一宗個案中，在地段界線於實地“*指示出來*”後，紀錄原先顯示的一幢屋宇被移至超過20米外的位置（見附件3a和3b）。事實上有很多類似的批地個案，當中所記錄的地段與竣工後的情況有所不同，但竣工後的情況卻實際反映出申請人的原有意圖，一個典型的例子可見於梅窩的圖則（附件4）。

4.18 似乎新批租約的圖則在繪製時出現問題，當局又沒有檢查後來的發展項目竣工後的情況。根據新界民政署的制度，在批出地段時會先在紙面上繪製批租約的圖則。劃界人員然後會實地“*指示*

出”地段界線，但該人員只會進行少許量度，也不會在地面上加上標記。獲批地人可根據他對地段位置的詮釋開始建屋，他可能受到自己的發展利益和風水問題所影響。這樣，在繪製原有圖則的時候，在其後指示出地段界線的時候，以及在實際施工的時候，都相當可能出現錯誤。因此，最終佔用土地的情況與批租約的圖則不同，實屬常見而非例外。後來當這些新批租約地段開始進行重建時，擁有人會（按現有做法）發覺政府以有關建築物“*在地段以外*”爲理由拒絕給予許可。

4.19 小組委員會的一名委員建議，除非有充分證據證明有關建築物曾在1898年後的某個時候重建，而且在該時候有關建築物建成比先前大並據用了四周的政府土地，否則應假設是測量出錯。在舊批約地段上，建築物的擁有人至少在有意重建他的建築物（也是他父親或祖先的建築物），但卻接獲政府通知因爲該建築物“*在地段以外*”而拒絕給予建築許可以後，才可知道他的建築物被視爲“*在地段以外*”。只要政府或法庭堅持把集體官契的丈量約份地圖視作爲某地段或某地段上的建築物的應有位置的證明，問題就會陸續出現。

4.20 事實是有關圖則沒有準確反映進行丈量約份測量時的土地佔用情況，以符合現今在界線方面的要求標準，但政府和法庭卻總是參考丈量約份地圖，作爲解決土地界線問題的依據。如把這個做法應用於有關的爭議，現時對土地的任何佔用如不符合丈量約份地圖的界線，都被視爲逆權管有，而在解決有關的界線問題時，也會當作爲逆權管有的案件來處理。[12]

對將會實施的註冊土地業權制度的影響

4.21 當《土地業權條例》（第 585 章）和註冊土地業權制度在適當時間實施後，紙上的業權便會與在土地“*所享有的業權*”不相符。由於丈量約份地圖（將成爲註冊的業權契據）所顯示的界線和地面上的實際界線不一致，註冊擁有人面對只能擁有他的部分物業的風險，因此現有的界線問題會變得更爲嚴重。

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12 小組委員會的一名委員認爲這個做法完全錯誤。依他看，有關問題出現是因爲對原有的佔用情況有失實陳述，解決辦法應是從源頭予以糾正，即對丈量約份地圖進行升級改良，而非採取任何另類措施。該委員認爲不宜把丈量約份地圖上的界線採納爲只可藉更正而修訂的唯一法定界線紀錄，原因有以下三項：(a)丈量約份測量的原意從不是作爲正式的界線測量；(b)聲稱有擁有權的土地擁有人在接納丈量約份地圖的界線時，沒有由測量師代表；以及(c)曾有措施嘗試改良至少部分的丈量約份地圖，也有著名測量師提議更新有關地圖，這些都顯示出不宜把丈量約份地圖用作界線紀錄。當初採納丈量約份地圖作紀錄之用，只是爲了行政方便，但可惜這個做法一直延續至今。

4.22 在現有的制度下，人們會按業權的現況承接前一位買方的業權。人們是通過轉易契取得所購買的土地權益。但是，在註冊土地業權制度下，人們只會取得註冊紀錄所顯示的業權。如存在逆權管有，該業權便會與實際狀況不符。由於賣方的業權不會"*轉易*"至買方，因此可能出現關於賣方藉逆權管有而取得的權利是否已轉移給買方的問題。

測量問題的可能解決方案

4.23 在考慮有關事宜後，我們認爲測量問題有多個可能的補救方法，包括：

(a) 重新測量舊批約地段和新批租約地段的界線；

(b) 政府與擁有人因法律的施行而以協議方式進行更改。

重新測量界線

4.24 有人曾建議由合資格的專業人員重新對有關地段進行完整和準確的測量；如屬可能的話，上述測量應在現有的政府測量制度以外進行。[13] 另一方面，其他委員指出重新進行測量的建議會帶來很大影響。除了調整測量圖上的新界土地界線在技術上是否可行這個問題之外，還應該考慮重訂法定界線在行政和財政上的影響。如要對所有土地進行全面測量，重新測量的工作必定牽連甚大。政府須委任適當的主管當局，以便對之前從未被準確測量的所有新界地段進行有系統的測量。政府亦須立法以容許在法例上更正有關地段的法定界線，並須根據有關的新法例設立審裁制度，裁決因新的測量工作而引起的爭議。在法律上，擁有人會聲稱他們因有關的土地測量而失去土地。政府須成立審裁機構以裁決土地界線的爭議，並須在合適的個案中支付補償。[14]

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13 政府已承認關於土地界線的問題，並已在一定程度上採取措施糾正。有人建議修訂《土地測量條例》（第 473 章），容許土地擁有人向地政總署署長提出申請，以裁定該擁有人所擁有地段的界線。我們知道這個建議不可能糾正所有界線問題，但仍有助於解決一些有問題的地段，尤其是如毗鄰的擁有人能夠同意新繪製的圖則。

14 《官契（薄扶林）條例》（第118章）是法例方面的例子，授權政府擬備圖則以取代根據集體官契所批出的租約的原有圖則。該條例第3條規定，"〔行政長官〕可在本條例的生效日期後，盡快指示〔地政總署〕署長擬備圖則，以便能爲各方面的目的由該圖則取代原有圖則。"得到地政總署署長批准或按法庭命令修訂的新界線圖，"就各方面而言，須當作爲原有圖則"（第11條）。任何人如認爲獲批准的圖則有錯誤之處，可向地方法院提出申請，以適用的形式或以法院認爲公正的其他形式修訂該圖則（第8條）。

以協議方式更改

4.25 小組委員會已得知上述問題之所以出現，部分是因爲測量工作做得不好，部分是因爲擁有人在進行交易時有意或無意中忽視不準確的圖則。在集體官契批出後所進行的交易中，有轉讓契載有不正確的描述。除了因以往的土地擁有人沒有在訂立物業交易前履行檢查土地位置的責任而針對他們尋求法律補救外，有關地段的政府租契事實上可能已因法律的施行而更改。

4.26 一般而言，在根據集體官契批出的舊批約地段和在新批租約地段（“*新批租約*”一詞包括各種政府租契、條件，以及其他關於新市鎮地段以外的新界地段的批地文件）興建建築物，必須獲政府批准。政府發出甚麼類別的文件，要視乎建造工程是在哪一個時期進行，這些文件有建築許可證、合格證明書、不反對入住書和暫准書（統稱爲“*批函*”）。

4.27 如建築物已在政府批准的情況下（由發出的批函證明）在某塊土地（“*受影響地段*”）上興建，而該塊土地並非集體官契或新批租約的圖則上所顯示的地段（“*不正確地段*”），有理由認爲在不正確地段的政府租契退回並由政府向受影響地段批出新租契時，不正確地段的政府租契已因政府與擁有人之間的協議和法律的施行而更改。

4.28 假設在集體官契或新批租約所附連的圖則上，受影響地段的一部分與另一人的地段重疊，如該人在圖則上所顯示的地段亦已因後來的交易而更改，就像受影響地段一樣，逆權管有似乎不會出現。

4.29 但是，如受影響地段或該地段的一部分與另一人的地段重疊，並且據用了該人的地段，而被據用地段的界線沒有藉政府的批准而改變或更改，逆權管有便會出現。如屬以上情況，政府可能因爲發出關於受影響地段的批函和不準確的圖則而須負上法律責任。

4.30 還有其他的法律問題須予以考慮，例如：

(i) 如受影響地段和“被據用”地段都已藉政府的批准而更改，那應以受影響地段的政府租契還是以被據用地段的政府租契爲準？

(ii) 受影響地段的政府租契可在被據用地段的政府租契批出之前或之後批出。這個因素會如何影響上一條問題？

(iii) 對於被據用的部分是否可以被逆權管有這個問題，仍未有完全肯定的答案。

4.31 一些舊批約地段可能沒有批函，或這些地段的擁有人可能在改變用途或進行建造工程前沒有徵求政府批准，而這些行爲獲得政府寬容。亦可能有一些個案是沒有進行建造工程，或政府在批函中不承認對有關地段的劃定或與界線有關的問題負有責任。在這些情況下，界線問題仍然存在。[15]

正確的做法

4.32 在考慮測量和土地界線問題可能的解決方案後，小組委員會認爲單單對界線重新進行全面測量並不能解決問題。擁有人如長時間根據“錯誤”的界線進行投資，會因此而遭受困苦。看來新界的土地界線問題，最好是在《土地業權條例》的實施過程中一併解決。

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15 一名委員指出，政府部門在審批土地事宜時都極爲小心，只限於審批權限內的特定項目，並毫無例外地否認任何對界線的推論。分區地政處所發出的合格證明書便是典型例子，該證明書包括以下的標準卸責聲明：

> “政府並未對該建築物的佔用界線進行測量。上文提及的合格證明，不得視爲顯示該建築物或該建築物的任何伸出物位於該地段的註冊界線之內。就此，對於因爲你興建該建築物而產生或與你興建該建築物有關的任何申索或損害賠償，政府明確否認負有任何法律責任。”

因此，不正確地段的政府租契可否因爲政府以批函形式向受影響地段批出新租契而視爲已被更改，仍無法完全確定。

第 5 章　《土地業權條例》（第 585 章）及關於逆權管有的政策

引言

5.1　香港尚未設有土地業權註冊制度。訂立此制度的法例雖已制定，但仍未實施。[1]

涉及非註冊土地及註冊土地的制度

5.2　關於業權註冊的新法例一日未實施，香港的土地註冊制度仍是一種根據《土地註冊條例》（第 128 章）而設立的契據註冊制度，用以記錄關於土地權益的文書，這是我們必須緊記的一點。契據註冊制度的目的，是利便追溯業權而非賦予業權。根據第 128 章所備存的登記冊，只是一套文書索引，故此第 128 章僅賦予已註冊的文書優先次序。每當有物業交易進行，買方律師均須檢視相關文書以查證業權。這程序在物業其後的每一宗交易，均須重複一次。此機制既費時又複雜，而且欠缺效率。業權可能難言明確，因爲業權明確與否可以純屬查證業權的律師的個人意見。不過，現存的註冊紀錄可以爲擁有權提供表面證據。[2]

5.3　在設有土地業權註冊制度的司法管轄區，註冊紀錄取代了業權契據，也取代了如業權非註冊便應記錄在土地押記註冊紀錄上的事項。有人曾說過，“*〔《1925 年土地註冊法令》（Land Registration Act 1925）〕的指導原則是，土地業權須只受註冊紀錄規管，確定土地業權亦須單以註冊紀錄爲準*”，[3] 土地業權只受凌駕性權益規限，這類權益未有記入註冊紀錄所以不受註冊紀錄保障，但對註冊土地的任何買方均具約束力。

5.4　英格蘭法律委員會（English Law Commission）曾列出註冊土地與非註冊土地之間的三大分別：

1　《土地業權條例》（第 585 章），該條例於 2004 年制定。

2　*Common Luck Investment Ltd v Cheung Siu Ming* [1988] HKLRD (Yrbk) 434.

3　*Abbey National Building Society v Cann* [1991] 1 AC 56，第 78 頁，奧利弗勳爵（Lord Oliver）的判詞。

"(1) 調查註冊土地的業權要比調查非註冊土地的業權簡單和快捷得多。

(2) 知情原則不適用於註冊土地。買方購入註冊土地的條件，是須受註冊紀錄記項所保障的產業權、權利及權益規限，同時亦須受凌駕性權益規限，但此外便沒有任何其他規限。

(3) 如某人已註冊爲註冊土地產業的擁有人，女皇陛下的土地註冊處（HM Land Registry）對該項業權作出保證，這意味着如有必要修正註冊紀錄以更正某個已發生的錯誤，任何因此而蒙受損失的人，均有權獲該註冊處發給彌償款項。"[4]

《土地業權條例》（第585章）

5.5 1988年，當時的註冊總署署長成立工作小組，考慮引入業權註冊制度，以改善物業擁有權的效率和安全性。政府於1994年向當時的立法局提交相關的條例草案，但該條例草案因立法局會期結束而失效。經條訂的條例草案於2002年12月刊憲，之後《土地業權條例》（第585章）（下稱"《業權條例》"）於2004年7月制定。實施《業權條例》的條件是政府必須進行全面檢討，並在建議實施日期之前先向立法會作出匯報。2007年5月，政府以委員會文件[5]的形式，向前規劃地政及工程事務委員會匯報，表示檢討發現有需要大幅修訂《業權條例》，以確保新制度可有效運作，此外亦須擬備修訂條例草案。

《土地業權條例》的修訂進展

5.6 據一系列的立法會委員會文件[6]所示，尚有多項重要事項須予決定方可完成草擬修訂條例草案以供審議。這些事項包括土地界線問題、土地由非註冊轉換爲註冊的機制，以及更正及彌償條文的修改。

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4 《廿一世紀土地註冊諮詢文件》（*Land Registration for the Twenty-first Century, A Consultative Document*）（1998年法律委員會第254號）第2.5段。

5 CB(1)1643/06-07(07).

6 日期由2008年至2011年。

土地界線問題

5.7 根據《業權條例》第 94 條，該條例所適用的土地的擁有人可向地政總署署長提出申請，要求釐定有關地段的界線。如該地段並無現有圖則或地政總署署長認爲該地段的現有圖則不可接受，地政總署署長可對該地段進行土地界線測量並擬備新圖則，或通知有關的土地擁有人委任一名認可土地測量師，對該地段進行土地界線測量並交付新圖則。如地政總署署長認爲新圖則可予接受，則可在該地段的擁有人同意之下安排將現有圖則或新圖則在土地註冊處註冊。

5.8 就日期爲 2009 年 10 月 7 日的委員會文件[7] 討論所見，《業權條例》第 94 條有以下問題：

(a) 根據《業權條例》第 94(4)條，如現有圖則或新圖則更改在土地註冊處內備存的土地界線圖上或在任何政府租契上所顯示的地段界線或面積或量度數值，地政總署署長不得釐定該地段的界線。第 94(6)條對“釐定”一詞作狹義界定，（就某界線而言）是指在更新該界線的過程中，按適用情況加入方位、界線尺寸及座標。不過，界線釐定涉及地段確實界線的確定，並非單是加入方位、界線尺寸及座標或更新舊資料。

(b) 第 94(4)條及第 94(6)條的條文與較舊批地條件所載的界線釐定慣常一般條件並不一致。該項條件規定：

> “在簽發官契前，……署長須釐定地段的界線（他所作的是最終決定）。如地段面積較地段詳情表所訂明者多或少，承批人就此而支付或獲發還的款項，會按署長所釐定的比率計算。……”

(c) 在釐定地段界線時，地政總署署長會按照現行的測量規格與精確度標準，運用最新的測量技術及測量設備進行量度。不過，現時量度任何兩個地界點的距離，很可能與比如說 50 年前利用舊有測量技術、粗陋測量設備及不同座標系統所量度出來的結果有輕微差別。鑑於很多現時存於土地註冊處並根據《土地註冊條例》（第 128 章）註冊的土地界線圖是在數十年前根據當時所存地圖製備，或甚至是由非政府專業土地測量師的人士製備，

[7] CB(1)2675/08-09(03).

倘若不容許地政總署署長在釐定地界的過程中對土地界線圖作細微修改，則地政總署署長可釐定界線的地段數目顯然不多。

(d) 《業權條例》第 94 條並沒有豁免地政總署署長可因資料不足（例如遺失圖據地段個案）而無須作出地段界線的釐定。《業權條例》第 94 條亦沒有條文訂明，倘若地政總署署長未能就安排現有圖則或新圖則在土地註冊處註冊而取得土地擁有人的同意時，有關的現有圖則或新圖則應如何處理。

《土地測量條例》（第 473 章）

5.9 《業權條例》適用於納入《業權條例》規管的土地。根據一份委員會文件，[8] 政府擬在《土地測量條例》（下稱"《測量條例》"）中引入釐定土地界線的條文，有關條文將同時適用於受《土地註冊條例》（第 128 章）規管的現有土地，以及納入《業權條例》規管的土地。就此而言，《業權條例》第 94 條將會廢除，並由透過制定《土地業權（修訂）條例草案》對《測量條例》作出的建議修訂所取代。

根據《測量條例》釐定土地界線的擬議制度

5.10 根據《測量條例》所擬設立的釐定土地界線制度，將會在《業權條例》第 94 條的基礎上制訂，並會同時適用於受《土地註條例》規管的土地和根據《業權條例》註冊的土地。土地測量監督的職能會作修訂，以加入釐定土地界線的職能。《測量條例》第 30(4)條現規定，認可土地測量師須在作出土地分割的相關文書遞交土地註冊處以供註冊後，將土地界線圖以及測量記錄圖存放於土地測量監督處。該項條文爲確保土地界線測量標準的監控工作的一致性並更具成效，會作修訂，以符合參照《業權條例》第 94 條而制定的新條文，從而規定在有關文書連同經核實及蓋章的土地界線圖一併遞交土地註冊處以供註冊前，認可土地測量師必須將土地界線圖、測量記錄圖及就土地界線測量所作的報告交付土地測量監督查核。

5.11 上一段所描述的"就土地界線測量所作的報告"（基本上與《測量條例》第 30(6)(d)條所描述的文件相同）是一份重要文件，載有所得的界線證據以及在某次特定土地界線測量中如何釐定

[8] 發展事務委員會及司法及法律事務委員會，CB(1)2675/08-09(03)，日期爲2009年10月7日。

土地界線的理據等資料，所以會被納入爲《測量條例》第 2 條所界定的“土地界線記錄”所指的項目之一。《業權條例》附表 3 第 146 條或會因此而須作修訂。

5.12 另外有建議認爲《測量條例》第31條應予修訂，讓土地測量監督可准許任何人士（而非只是認可土地測量師或其僱員）查閱任何土地界線記錄，並向任何人士提供任何土地界線圖、測量記錄圖及就土地界線測量所作報告的副本，但有關人士必須繳交訂明費用。《測量條例》第33(1)條會作修訂，以確保政府或任何人員均無須因履行釐定土地界線的職能而承擔任何法律責任。

5.13 對《測量條例》所擬作出的修訂，計劃會以相應修訂的形式包含在《土地業權（修訂）條例草案》之中。要求釐定土地界線的申請，會以收回成本的原則處理。對於地政總署署長認爲現有圖則可以接受的個案，土地擁有人將須繳付一筆費用，以償付地政總署署長在查索、審核和安排在土地註冊處註冊該圖則所涉及的成本。對於土地擁有人須委聘認可土地測量師進行土地界線測量的個案，地政總署署長會就查核、批准和安排在土地註冊處註冊由認可土地測量師擬備的圖則，按收回成本的原則收取費用。對於由地政總署署長進行土地界線測量的個案，土地擁有人將須繳付一筆費用，以償付地政總署署長在進行土地界線測量、擬備圖則和安排將圖則在土地註冊處註冊所涉及的成本。無論如何，土地擁有人必須承擔土地界線圖在土地註冊處註冊的相關費用。

更正及彌償安排[9]

5.14 2009 年就《業權條例》下的更正及彌償安排進行的公眾諮詢的結果顯示，回應者普遍支持保留《業權條例》第 82(3)條下的強制更正規則，使透過或由於欺詐而喪失業權的不知情前擁有人可恢復爲擁有人。另一方面，回應者同意在某些情況下會難以把受影響的物業歸還給前擁有人，故應對強制更正規則訂定下述例外情況 ——

(a) 如果受影響物業在欺詐情況被發現之前已交還政府作公共用途或已被政府收回；及

(b) 如果物業已被重新發展並售予多名新買家，而恢復前擁有人的業權將顯得有欠公允。

[9] CB(1)2434/10-11(01)，日期爲 2011 年 6 月 16 日。

5.15 香港律師會（下稱“律師會”）其後表示反對《業權條例》第82(3)條下的強制更正規則。律師會認爲，如果不知情的前擁有人因(i)透過或由於欺詐而喪失業權，以及(ii)業權註冊紀錄內的相關記項是來自無效的文書或虛假的記項，即可根據《業權條例》恢復爲擁有人，這將會驅使買家在業權註冊紀錄以外查核以往的交易資料，以在更大程度上確保其業權不會面臨風險。這會削弱業權的明確性，亦與簡化物業轉易程序的目標背道而馳。律師會反而建議採納業權即時不可推翻原則，亦即已管有土地及付出有值代價的真誠買家可享有不可推翻的業權。律師會又建議撤銷彌償上限（現時建議爲3,000萬元）和禁止對轉換前的欺詐個案作出彌償的規定。

5.16 另一方面，新界鄉議局（下稱“鄉議局”）強烈反對就強制更正規則作出任何改動。鄉議局關注的是，如果沒有強制更正規則，不知情的前擁有人便無法取回其由於欺詐而喪失的物業。因此，不知情的前擁有人在新制度下的處境便可能會變差，特別是當根據《業權條例》須作出的彌償不足以賠償有關物業的價值時，情況便更壞。此外，鄉議局認爲，新界地區內的擁有人對祖傳土地產業十分重視；若失去了的話，絕非金錢所能補償。鄉議局堅決認爲應保留強制更正規則。

5.17 爲回應及平衡持份者的不同意見和關注，政府提出一個新方案，分兩個階段進行自動轉換，並對更正及彌償安排作出適當的修改。在新方案下，當《業權條例》生效時，業權註冊制度連同“即時不可推翻”的規定會即時應用於新土地。[10] 對於《土註條例》土地，[11] 轉換程序會包括兩個階段的自動轉換（兩階段轉換機制）。在《業權條例》施行於新土地的日期起計的一段引進期[12] 之後，所有《土註條例》土地（受暫止註冊契約規限者除外）會進行第一階段的轉換（基本轉換），在一個指定日期自動轉到《業權條例》下。在基本轉換後 12 年內（過渡期），具基本業權的土地仍會受到續存權益[13] 所規限，而在基本轉換之後進行的新交易及確立的權益，將按《業權條例》所訂的方式和形式生效。

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10 “新土地”指由政府在《業權條例》生效當天或之後根據政府租契或政府租契協議授予的土地(《業權條例》第 20 條)。

11 “《土註條例》土地”（按照《業權條例》第 2(1)條爲此詞所下的定義）指屬政府租契標的並根據《土地註冊條例》（第 128 章）備有登記冊的土地。

12 我們需要引進期進行有關籌備工作，包括爲進行轉換而開發電腦系統，以及汲取業權註冊制度實施於新土地後的經驗。

13 續存權益實質上是指在基本轉換日期繼續存在的權益（不論已註冊抑或非註冊），而若然相關的土地依舊受土地註冊制度規管，這項權益是本可對當時的註冊擁有人強制執行的。

5.18 強制更正規則會適用於因欺詐而喪失物業的不知情前擁有人，令其恢復業權（除非不可能爲該名不知情的前擁有人恢復其業權）。因基本轉換後出現的欺詐而失去業權的擁有人可獲支付有上限的彌償。若註冊擁有人想保留強制更正規則，可選擇在過渡期內針對自己的物業註冊一份退出警告書。註冊退出警告書的作用是防止物業的業權自動完全轉換，使強制更正規則繼續適用。

5.19 在過渡期結束時，具基本業權的土地會進行最後階段的轉換（完全轉換）並會自動完全轉換爲註冊土地，除非該土地受制於 —

(a) 聲稱持有不可註冊續存權益的申索人所註冊的警告通知書；

(b) 土地註冊處處長基於擁有權未能確定而發出的抗完全轉換警告書；

(c) 擁有人爲免其物業的業權完全轉換成註冊土地而所註冊的退出警告書；或

(d) 就涉及更正的法律程序而所註冊的非同意警告書。

5.20 在完全轉換後，已管有註冊土地及付出價值的真誠購買人將可享有不可推翻的業權。未有受到任何註冊事項保障的續存權益，會受到其他註冊事項的規限。因基本轉換後出現的欺詐而無法恢復業權的前擁有人，可獲支付有上限的彌償。

5.21 與《業權條例》下的現有轉換機制相比，擬議的兩階段轉換機制的另一優勢，是《業權條例》的相關條文將會在基本轉換之後即時適用於《土註條例》土地，從而大幅提前業權註冊制度實施於該等土地的時間。不過，由於需要顧及持份者的不同意見，根據上述方案而作出的*完全轉換*，速度或會稍爲減慢。

5.22 政府於 2011 年 5 月 26 日召開《土地業權條例》督導委員會會議，讓持份者就擬議的兩階段轉換機制提出初步意見。律師會、鄉議局、消費者委員會、香港銀行公會、香港地產建設商會及香港按揭證券有限公司均有派代表出席。持份者普遍歡迎政府爲回應他們的不同意見和關注所作出的努力，並認爲擬議的兩階段轉換機制似乎可以作爲進一步討論的基礎，以推展土地業權的工作。

業權註冊的未來

5.23 雖然香港的註冊業權機制的細節尚未爲人所知，但世界上所有註冊制度的註冊業權作用都是大致相同的。註冊業權的核心價值，在於業權註冊紀錄除須受某些例外情況（例如凌駕性權益和涉及更改註冊紀錄的條文）規限外，本身便是註冊物業的擁有權及註冊權利和權益的不可推翻的證據，[14] 故此再無必要翻查多份文書以查證業權。如某人因業權註冊紀錄上某個由欺詐或土地註冊處處長的錯誤或遺漏所造成的記項而蒙受損失，此人有權獲得政府彌償。[15] 該筆彌償須由根據第 585 章設立的土地業權彌償基金撥付。[16]

5.24 第 585 章以其現有情況來說，是保留了逆權管有的概念。任何有關的註冊土地，均受凌駕性權益規限，而凌駕性權益基於其性質是無須註冊的，這類權益包括：

> "已取得或正在取得的該土地的任何權利，而憑藉《時效條例》（第347章），有關註冊擁有人的業權已告終絕或將於適當期間屆滿後終絕；" [17]

5.25 香港的註冊業權機制的未來形態仍會有很多變化。機制何時實施，以及逆權管有如何納入機制之中，現時均尚未明確。除非類似英格蘭《2002年土地註冊法令》（Land Registration Act 2002）第96條的逆權管有條文已予實施（該條在註冊業權機制中設立了新的通知制度），否則現有的逆權管有規則在註冊業權機制中可能仍然適用。

關於逆權管有的政策

5.26 爲回應 2006 年 2 月 8 日立法會會議上的提問，當時的前房屋及規劃地政局局長述明政府在逆權管有方面的政策。有關的提問和答覆摘錄如下，以供參考：

> **問題（一）**
>
> "鑑於現行法例規定政府土地被連續佔用 60 年後，便會變爲佔用人的土地，當局有沒有評估現時有多少幅原屬政府的新界土地因上述的規定及判決而變爲佔用人的土地；涉及的土地

14 第 29(4)、28、81 及 82 條。
15 第 84 條。
16 第 90 條。
17 第 28(1)(k)條。

面積和當局在地價及地租等方面的損失款額，以及當局有甚麼措施防止新界政府土地被非法侵佔；”

問題（二）

“有沒有任何政策或措施，以預防和應付因有關判決而引發就模糊或具爭議性的新界土地界線所提出的法律訴訟；”及

問題（三）

“當局有何措施更正出錯的土地界線紀錄，以避免誤把屬於私人土地的地段在有關紀錄上顯示爲政府土地，以致有關的業權人被視爲侵佔政府土地，而紀錄上顯示的私人土地則被丟空廢置？”

房屋及規劃地政局局長的答覆

“作爲背景資料，我需要簡介終審法院最近就一宗“逆權管有”新界私人土地訴訟所作出的裁決。

首先，透過法律程序申請“逆權管有”土地是有法律追索時限的，就政府土地而言，是提出訴訟權產生日期起計追算 60 年；而私人土地，則爲 12 年*。[18]

終審法院的裁決涉及處於新界私人地段的業主與逆權佔用者的個案而作出裁決。於一九九七年六月三十日前屆滿的新界土地契約根據《新界土地契約（續期）條例》（第 150 章）可續期，終審法院的裁決指出此舉並沒有產生新的業權，因此回歸後的期間應作連續計算。然而，由於第 150 章不適用於未批租的政府土地，因此終審法院的裁決並不適用於逆權佔用未批租的政府土地的個案。

現在讓我回答問題的各部分：

（一）根據《土地（雜項條文）條例》（第 28 章），霸佔未批租的政府土地作爲已用乃非法行爲，如佔用人在政府發出法定通知後，在無合理辯解下未有遵照通知而停止佔用該土地，即屬違法。一經定罪，可被罰款一萬元及監禁 6 個月。

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18 “*有關收回私人土地的追索時限業經修訂，現爲提出訴訟權產生日期起計追算 12 年，在 1991 年《時效條例》（第 347 章）經修訂前爲 20 年。”

香港特別行政區的總面積爲十一萬零一百七十三[19]公頃，由特區政府負責批租和管理。當中約三萬一千八百六十[20]公頃爲未批租土地，[21]大部分位於新界及離島地方。由於過去多年發展新市鎮及興建大型基礎建設工程而須進行的大規模清拆行動，非常顯注地減少了非法佔用政府土地的情況。

特區政府亦透過不同的方式及途徑，加強土地管制工作，以防止未批租的政府土地被侵佔。而對於一些已非法佔用政府土地的人士，地政處會採取法律行動，以收阻嚇之用。負責土地管制的人員，如在巡查時發現非法佔用政府土地情況，會採取適當行動，如援引第 28 章的規定，清除有關的佔用情況。在情況許可下，各區地政處亦可透過向佔用人發出短期租約，把非法佔用未批租政府土地的用途納入規管範圍內。此舉既可爲庫房增加收入，又可達到防止被侵佔的可能性。在有需要時，各區地政處亦會把容易被人非法佔用未批租的政府土地用鐵線網圍起，並於某些當眼地點豎立告示牌，警告欲非法佔用該些土地的人士。

如果要透過“逆權管有”方式，向法庭申領未批租的政府土地，舉證責任在於申索人身上，要使法庭信服申索人於有關年期時是不受干擾及不被挑戰地連續佔用有關政府土地。由於剛才提述的政府土地管制政策的實施，申索人要作出舉証的難度一定很高。

（二）及（三）由於問題第二及第三部分均與土地界線紀錄有關，我將合併回答：

新界集體官契所涵蓋的私人地段，稱爲舊批約地段，爲數超過 21 萬幅，是在 100 年前以圖樣方式測量，並繪成丈量約份圖，適合當時記錄業權和稅收之用。

由於數量龐大，要按照現行測量標準重新測量這些地段，所需資源非常龐大，爲時亦會甚長。根據香港測量師學會的估計，這樣的重新測量工作需動用約 19 億元，需時 10 年。

現時礙於資源所限，地政總署未能爲所有舊批約地段進行重新測量。儘管如此，該署在日常工作中，例如收回土地進行

19 2012 年 9 月的數字是十一萬零四百四十一公頃。
20 2012 年 9 月的數字是三萬二千二百七十六公頃。
21 此數字反映了未批租和未撥用的政府土地。

基建工程、處理土地發展、處理丁屋申請等，如遇到地段界線不清晰的情況時，會爲有關地段進行界線測量，並在有需要時更新地段界線記錄。長遠而言，在資源許可的情況下，該署會考慮進行多一些舊批約地段的重新測量工作。

地政總署在日常工作中，如發現地段界線與記錄不符時，可與有關地段業權人訂立修正契據，更新地段記錄。

但如有關業權人不同意修正，或地政總署無法找到有關業權人訂立修正契據，要確立重新測定的地段界線便會有困難。”

本章摘要

5.27 雖然政府和持份者曾努力推行業權註冊制度，但香港仍沿用制定於 1844 年的《土地註冊條例》（第 128 章）所訂立的契據註冊制度。由於尚有多項問題有待解決，其中包括新界土地界線問題以及更正及彌償安排，香港何時方可改爲採用業權註冊制度仍未明確。我們在第 7 章中所列出的建議，會考慮香港特有的土地註冊情況。

第 6 章　一些涉及逆權管有的法律議題

引言

6.1　應用逆權管有原則已造成一些問題，包括：

- 業主立案法團可否要求取得逆權管有；
- 多層建築物的其中一名共同業主可否剝奪另一名共同業主的管有權；
- 多層建築物的共同業主可否就公用地方申索逆權管有；
- 接續的擅自佔地者可否確立逆權管有；
- *Fairweather v St Marylebone Property Co Ltd* 案裁決的影響以及裁決是否適用於香港；
- 擅自佔地者及被剝奪管有權的業主在政府租契下的法律責任；及
- 逆權管有對祖地的影響。

這些議題會在本章中逐一討論。

業主立案法團可否要求取得逆權管有

6.2　據上訴法庭在明霸有限公司訴新蒲崗大廈業主立案法團及其他人案（*Shine Empire Ltd v Incorporated Owners of San Po Kong Mansion & Others*）[1] 中所言，業主立案法團似乎有可能成功取得逆權管有，但法庭不會輕易裁定某個業主立案法團（其法定職權爲管理公用部分並確保公契得獲遵從）會意圖違反公契而將私人物業據爲己有。

6.3　此案中涉及爭議的土地，是一幢建於 1968 年的大型商住兩用大廈的天台。在 800 份不可分割份數之中，有十六份是分配給面積約 16,800 平方呎的天台。原告人（上訴時爲答辯人）在 1987 年成爲該十六份的份數擁有人。根據公契，原告人有權取得天台的獨有管有權（天台由濶約 10 吋的矮牆圍住），並在天台之上加建一層

[1] [2006] 4 HKLRD 1.

樓面，但管理公司有通道權，可通往天台上的一些公共設施。不論是原告人抑或是其前任人，均從來沒有圍封天台亦沒有限制他人通往天台。原告人於 2001 年提出法律程序要求管有天台，而被告人（即大廈的業主立案法團）所提出的抗辯理由之一，是被告人已逆權管有天台 20 年。

6.4 在宣布判決時，上訴法庭法官袁家寧表示：

> "法庭不會輕易裁定某個業主立案法團（其法定職權爲管理公用部分並確保公契得獲遵從）會意圖違反公契而將私人物業據爲己有。這種行徑逾越了業主立案法團的法定權力和職責範圍，而有關的業主立案立案法團本來是有意圖在其法定職權範圍以外行事的可能性不高。的確無人提出可讓該法團如此行事的決議案作爲證據，而且也無人堅稱有此決議案存在。〔當然，被剝奪對土地的管有權，可能是基於擅自佔地者或甚至是業主立案法團的錯誤 —— 相信土地（即公用部分）屬其所有而產生：見 *Gray and Gray, Elements of Land Law*（第 3 版）267 頁所載的討論以及所提到的案例。〕不過，以該法團的情況來說，上述錯誤未有發生，而與訟雙方亦未有在法官席前就這個議題進行爭辯。"（第 28 段）

袁家寧法官續稱：

> "但本席認同一項符合業主立案法團正常活動的行爲，不一定代表它不可以是一項明確的剝奪管有權行爲。一個簡單的例子，便是在大廈的天台加建管理處。有關的議題仍然是：業主立案法團可有取得土地的實質控制，而其意圖是將土地據爲己有和使用？"（第 36 段）

6.5 袁家寧法官詳細解釋說，因此有必要審視所指稱的剝奪管有權行爲，而該等行爲可曾發生，可以從被告人所辯稱的行爲見到。袁家寧法官繼而分析業主立案法團所指稱的行爲，並裁定該等行爲不構成逆權管有。

多層建築物的其中一名共同業主可否剝奪另一名共同業主的管有權

6.6　由於管有是以整體而論，所以共同業主（聯權共有人或分權共有人）有權佔用整體土地或收取整筆租金或利潤，但此點本身不構成逆權管有。要觸發開始計算時效期，仍需出現剝奪權利的情況。[2] 如果其中一名共同業主長期獨享權益，則可推定已出現剝奪權利的情況。[3]

6.7　在黎惠娟訴黃守光案[4] 中，有關的土地是由 Lai Shau Yuen（下稱黎氏）及被告人黃守光於 1949 年 8 月 25 日以分權共有人的身分聯名註冊。黎氏於 2000 年 5 月 3 日去世，而原告人（黎氏的姪女）及 Wong Kwai Mui獲委任爲黎氏遺產的執行人。Wong Kwai Mui透過一份日期爲 2001 年 5 月 4 日的允許及確認書，放棄她對物業所具有的權益，並允許原告人擁有物業的產業權權益。有關土地之上建有一間房屋，並由黎氏佔用直至 1982 年爲止，而與物業有關的所有支出亦由黎氏負責支付。黎氏由 1982 年開始把該間房屋出租給一名周姓租客。原告人在黎氏去世之後，負責管理物業並向該名周姓租客收取租金。原告人又負責支付所有因物業而產生的支出，包括政府地租和差餉在內。原告人後來有意重建該間房屋，故此需要取得被告人（亦即另一名共同業主）的同意。原告人無法找到被告人，於是要求法庭宣布被告人對物業所擁有的權益已告終絕。

6.8　法庭裁定，由於被告人及黎氏是共同業主，故此須有剝奪權利（ouster）的情況出現才可視黎氏對物業的管有爲逆權管有。林文瀚法官在判決書第530頁說：

> "在一段很長的時間（由 1950 年代直至今日）之內，被告人完全沒有佔用或進入該物業。他完全沒有要求交代帳目，而多年以來亦無人向他繳付租金或利潤，他的業權也未有得到承認。黎女士及其租客是在不受打擾和安寧的情況下長期管有物業。此案與 *Doe d Fishar & Taylor v Prosser* (1774) 1 Cowp 217案沒有可區分之處。法庭可推定在此情況下已出現剝奪權利的情況，而本席亦會如此推定。"

2　C Harpum（主編），*Megarry & Wade: The Law of Real Property* (Sweet & Maxwell，2000 年第 6 版)，第 21-042 段。

3　*Doe d Fishar & Taylor v Prosser* (1774) 1 Cowp 217; *Doe d Hellings v Bird* (1809) 11 East 49.

4　[2004] 4 HKC 528.

6.9 黎惠娟案當然只涉及兩名分權共有人。在涉及多層建築物的情況中，一名分權共有人對物業的管有，必須相逆於所有其他共同業主才會產生管有業權。

多層建築物的共同業主可否就公用地方申索逆權管有

6.10 在重慶大廈業主立案法團訴Shamdasani案（*Incorporated Owners of Chungking Mansions v Shamdasani*）[5] 中，原告人是重慶大廈的業主立案法團。被告人是31個單位的業主，但這些單位之中卻有16個（下稱"問題單位"）未有顯示在大廈的原有圖則之上。這16個單位是建於公用部分的凹位，又或者是以據用走廊及電梯大堂的方式而建造。原告人提出訴訟，要求法庭作出禁制令（禁止被告人管有問題單位）及管有令，希望可依據1962年所訂立的契諾契據中的契諾，就建有問題單位的公用地方強制執行其權利。被告人的抗辯理由之一，是在現有法律程序於1988年2月8日展開之前，他本人及先前的業權持有人T，已剝奪了其他共有人對問題單位所具有的權利超過20年。因此，根據《時效條例》（第347章）第7(2)條，原告人的訴訟權是受到法規所禁制，而原告人對有問題的單位所具有的業權，亦已被第17條終絕。

6.11 法庭在駁回被告人以時效期爲理由所提出的抗辯時，裁定如能證明逆權管有是在原告人成立爲法團之後針對共有人而展開並持續爲期共達20年即已足夠，無須另外證明逆權管有在原告人（即業主立案法團）成立爲法團之後也針對原告人持續了20年。原告人沒有獨立訴訟權，只是獲賦行使共有人權利的獨有權利而已。《建築物管理條例》（第344章）是在1970年6月才制定，而原告人則於1972年才根據該條例成立爲法團。換言之，證明逆權管有在原告人成立爲法團後針對原告人而存在便已足夠，並無必要證明逆權管有也針對每一名個別共有人而存在。

6.12 爭議點是原告人成立爲法團之前的情況：究竟就1968年至1972年的一段期間而言，是否必須就所有共有人而個別證明曾有針對他們的逆權管有存在。高院暫委法官陳振鴻在處理此問題時表示：

> "分權共有人的權益是分開和獨立的，而時效期的作用是對自己的特有權利遭到侵犯的人個別提出訴訟的權利施加禁制，所以情況必然是：(a)時效期有可能針對不同的分權共有人而由不同的日期開始計算，以及

[5] [1991] 2 HKC 342.

（b）管有可能對部分分權共有人來說屬於逆權，但並非對全部分權共有人來說均屬逆權。……〔第353頁〕

因此，情況必然是逆權管有的展開日期，以及管有屬於逆權的情況，對土地的所有分權共有人來說未必全部相同。這個問題通常很少會出現，但在這宗案件中卻的確出現了。被告人必須證明，在原告人成立爲法團之前的時間，就未有轉讓給他的土地和建築物的其他不可分割份數而言，曾有針對每一名持有人的逆權管有存在。”〔第355頁〕

不過，被告人未能證明就建築物的其他不可分割份數而言，曾有針對每一名持有人的逆權管有存在。

6.13 因此，多層建築物的共有人似乎可以就公用地方申索逆權管有，但學者卻有不同的看法：

“由於每一名共同業主均有權使用公用地方，所以普遍認爲一名擁有人不能以另一名擁有人侵佔該等地方而起訴對方。基於同一理由，我們假定一名擁有人不能透過《時效條例》（第347章）第7(2)及17條的運作而取得公用地方的業權。……如一名共同業主把公用地方改建作爲己用，或不合理地干擾其他共同業主使用公用地方，可針對他而提出的適當訴訟，應是指控他違反公契中的明示或隱含條款。”[6]

6.14 在何文田大廈業主立案法團訴躍利投資有限公司案（*Incorporated Owners of Homantin Mansion v Power Rich Investment Ltd*）[7] 中，地下單位正外方的庭院，原本是劃爲公用地方的一部分，但被該單位的業主圍封超過20年。大廈的業主立案法團要求法庭發出清拆圍封構築物的強制令，以便其他單位的業主均可通往該庭院。地下單位的業主要求取得針對業主立案法團及其他單位業主的逆權管有。土地審裁處裁定，涉及多層建築物公用地方的逆權管有，會帶來重大影響和複雜問題，有可能非屬第347章第7(2)條的原來構思範圍之內。由於司法管轄權有疑問並且涉及重要的政策和法律議題，土地

6 Paul Kent, Malcolm Merry and Megan Walters, *Building management in Hong Kong*, Hong Kong: LexisNexis, 2002年，第301頁。

7 LT Case No BM 41 of 1996.

審裁處把申請轉交高等法院審理。[8] 不過，我們未能找到高等法院就此案所作出的裁決。

6.15 在 *Incorporated Owners of Man Hong Apartments v Kwong Yuk Ching & Ors* 案[9] 中，上訴人是有關大廈的業主立案法團，針對第一及第二答辯人（兩人爲夫婦關係）以及第三答辯人（一家以第一及第二答辯人爲董事及股東的公司）展開法律程序。訴訟涉及位於大廈公用部分的一個被指稱屬僭建的構築物，毗連第三答辯人店鋪的部分通道（下稱"涉案的通道部分"），而該店鋪由第三答辯人擁有，以前曾由第二答辯人以租客的身分佔用。上訴人聲稱該僭建構築物及其佔用通道的情況，違反了公契及第344章第34I條。答辯人在抗辯書中表示，他們及其先前的業權持有人已逆權管有了涉案的通道部分，所以上訴人的業權已告終絕。因此，上訴人的申索是受到時限禁制，而上訴人亦已失去根據公契可強制執行有關契諾的所有權利。區域法院法官裁定，答辯人已成功證明有逆權管有存在，故此判答辯人勝訴。上訴人向上訴法庭提出上訴，而上訴法庭則以逆權管有以外的理由推翻原有裁決。[10]

接續的擅自佔地者可否確立逆權管有

6.16 第347章第13(2)條訂明：

> "凡收回土地的訴訟權已產生，而其後在該權利受禁制之前，有關土地已停止在逆權管有下，則該訴訟權不再當作已產生，而新的訴訟權亦不當作產生，除非與直至該土地再度處於逆權管有下。"

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8 "要解決這問題，非經深思熟慮不可。本席認爲《時效條例》的條文，並非特意針對多層建築物公用地方的特定逆權管有問題。本席希望這個涉及重要政策的問題，可以透過法規解決，有必要時可在廣泛諮詢公眾後修訂《時效條例》，而不是以法官提出理據來支持裁決的方式解決。本席傾向於認爲，逆權管有如涉及受《時效條例》規管的公用地方，便不應獲得批准，但這看法不一定對。年紀較長更有智慧的法官在有機會研究本案後所提出的意見，必然可令公眾以及政府的行政部門得益。" LT Case No BM 41 of 1996, 李宗鍔法官判詞第 6 段。

9 [2001] 3 HKC 116.

10 上訴法庭裁定，有關的契諾是與店鋪有關，而公契所有條文下的利益和責任均屬明示，並且旨在隨同所有共同業主的土地一起生效。店鋪與涉案的通道部分，毫無疑問須受公契所載的條款約束，而原告人作爲大廈的業主立案法團，是可以強制執行該等契諾的。即使被告人能夠確立逆權管有，涉案的通道部分仍須受公契約束。關於時效期的法規，不適用於因公契條款遭違反而提出的申索，因爲這類法規不等同於普通法的訴訟權。在衡平法中，構成疏忽延誤（laches）的要素，是已過去了好一段時間，以及出現了一些可令強制執行此類申索有欠公平的情況。被告人未有指出任何可令案中的延誤成爲致命傷的情況，而原告人提出訴訟並無時限。

這項條文規定逆權管有必須爲連續性，此規定看來甚爲明確。如果是由兩名或以上的人接續地管有有關的土地，則情況會較爲複雜。

擅自佔地者所作出的業權處置

6.17　擅自佔地者的業權是以管有爲基礎，這業權相對於世上所有人來說都是妥善的，但相對於業主則不然。擅自佔地者可以把土地的權利，如同自己的妥善權利一樣給予其業權繼承人。[11] 如S逆權管有了O的土地，而S的管有業權又透過轉易（不論是否有代價）、遺囑或無遺囑繼承而轉讓了給A，則這管有被視爲屬連續性。O針對A所具有的訴訟權，會在S（亦即A的先前業權持有人）取得管有之日產生。換言之，O向A提出訴訟以收回土地的時限是由該日起計。[12] 因此，A可把S管有土地的時段和自己的相加。舉例來說，如S逆權管有了O的土地七年，然後把自己的權利出售給A，則O的訴訟權會在A逆權管有了土地五年之後受到禁制。

擅自佔地者遭另一名擅自佔地者剝奪管有權

6.18　如S1逆權管有了O的土地，而在時效期完結之前，S1遭S2剝奪管有權，則S1可在由S2取得管有之日起計的時效期內，向S2提出訴訟以收回土地。[13] 如O想收回土地，O向S2提出訴訟的權利究竟是在何時產生卻未有定論：可由S1開始取得管有之日起計，亦可由S2開始取得管有之日起計。澳大利亞[14] 及加拿大[15] 的案例典據所支持的看法，是S1與S2之間的接續管有，可視爲一項針對O的連續性逆權管有。英國有部分學者以*Willis v Earl Howe*案[16] 爲依據，也是採取此看法。不過，佐丹（Jourdan）認爲法官在這宗案件中的說法只屬附帶意見，而由於其中一名擅自佔地者由始至終均管有土地，所以並無需要就接續的擅自佔地者此議題作出裁定。[17]

6.19　在*Tsang Tsang Keung v Fung Wai Man* 案[18] 中，高院暫委法官姬大維指出，按照第347章第13(2)條所用字眼的一般涵義，逆權管有必

11　C Harpum（主編），*Megarry & Wade: The Law of Real Property*（Sweet & Maxwell，2000年第6版），第21-021段。

12　*Mount Carmel Investments Ltd v Peter Thurlow Ltd* [1988] 1 WLR 1078.

13　*Asher v Whitlock* (1865) LR 1 QB 1. S Jourdan, *Adverse Possession*（Butterworths，2003）年，第6-40及20-31段。

14　*Shelmerdine v Ringen Pty Ltd* [1993] 1 VLR 315, 第341頁。

15　*Afton Band of Indians v AG of Nova Scotia* (1978) 85 DLR (3d) 454, 第463頁。

16　[1893] 2 Ch 545. C Harpum（主編），*Megarry & Wade: The Law of Real Property*（Sweet & Maxwell，2000年第6版），第21-022段。

17　S Jourdan, *Adverse Possession*（Butterworths，2003年），第6-41段。

18　HCA 11328/1996.

須爲連續性，但無須由始至終均屬有關擅自佔地者所爲，因爲該擅自佔地者有可能是從先前的擅自佔地者手中取得逆權管有。姬大維法官採用了張澤佑法官在*Ng Lai Sum v Lam Yip Shing & Anor* 案中的說法：

> "……法律明確指出，第二名擅自佔地者可把首名擅自佔地者管有土地的時段與自己的相加，以完成管有土地的時段：*Megarry & Wade*，第1036頁。……
>
> 受勳上訴法官基爾（Kay LJ）在*Willis v Earl Howe* [1893] 2 Ch 545一案第553頁中清楚述明，'連續性的逆權管有，如已達到法定時段，則即使是由多名並非互相透過對方提出申索的人士接續地作出，依本席之見，也會對真正的業主構成禁制。'"[19]

6.20 姬大維法官又指出，如有間斷，逆權管有會在首先有人放棄管有的一刻終止。上訴法庭確認張澤佑法官在*Ng Lai Sum* 案中的裁決，那就是兩段逆權管有的時間可以相加起來。[20] 但我們必須指出，在上述兩宗案件中，接續的擅自佔地者並非互相對立。[21]

放棄管有

6.21 一般的情況是，如接續的管有者要把他們的各自管有時段合計，則整段管有時間必須爲連續性。如S1逆權管有了O的土地並在時效期屆滿之前放棄管有，然後S2又逆權管有了土地，那麼S1顯然不能把O的業權終絕。[22] 由於S1已不再管有土地，他沒有土地管有者的權利，亦不能以自己曾管有土地一事作爲業權的證據。因此，S1不能向S2收回土地。[23] 以S2與O兩人之間來說，如S2與S1所各自管有土地的時段之間有間斷，S2不能把兩段逆權管有的時間相

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19 HCA 2963 of 1998，第 8 頁。

20 CACV 57/2000.

21 在 *Wong Kar Sue v Sun Hung Kai Properties* [2006] 2 HKC 600 一案中，接續的擅自佔地者並非互相對立。高院暫委法官麥卓智同樣裁定，接續的擅自佔地者各自管有物業的時段可以相加起來。在這宗案件中，擅自佔地者因爲有向租客收取租金，所以是逆權管有物業。

22 "如擅自佔地者在時效期屆滿之前放棄管有……。擅自佔地者在放棄管有之前的逆權管有時段，不會計算在內。如擅自佔地者之後重收土地，在擅自佔地者逆權管有土地達到整段時效期之前，業主的權利不會被終絕：《1980 年時效法令》（Limitation Act 1980）附表 1 第 8(2)段。"法律委員會，《21 世紀土地註冊：諮詢文件》（*Land Registration for the Twenty-First Century: A Consultative Document*），法律委員會第 254 號，1998 年，第 10.4 段註釋 15。

23 S Jourdan, *Adverse Possession*（Butterworths，2003 年），第 6-37、20-48 及 20-56 段。*Mount Carmel Investments Ltd v Peter Thurlow Ltd* [1988] 1 WLR 1078.

加起來。[24] 在該間斷期間，O可重新取得土地的管有。當S2取得逆權管有時，新的訴訟權會產生並歸於O。如S2在S1管有土地後立即取得逆權管有，而期間沒有任何間斷，則情況如何並不明確。

6.22 另一種情況則是S1逆權管有了O的土地並在時效期屆滿之後放棄管有，然後S2又逆權管有了土地。在此情況中，S1已把O的業權終絕，問題是S1可否向S2要求取得管有權，而答案是不明確的。有人認爲，如擅自佔地者管有土地的時間超逾了時效期便會產生一項不可推翻的推定，謂擅自佔地者會取得土地的合法業權[25]，但這項推定卻在*Taylor v Twinberrow*案[26]中被推翻了。佐丹也指出，適用於對有爭議的土地具有權益的不同人士的時效期，有可能各有不同。[27] 在他來看，如果說12年過去便會改變擅自佔地者的管有業權的基本性質，實在是過於簡單的說法。反之，英格蘭法律委員會在該會與土地註冊處共同發表的報告書中卻述明：

> "擅自佔地者一旦憑藉《1980年時效法令》所訂期限的逆權管有而取得業權，該業權不會只因擅自佔地者之後不再管有土地而失去。擅自佔地者會永遠是土地的擁有人，除非並直至另外有人透過逆權管有取得物業的業權爲止。"[28]

英格蘭法律委員會並無引述任何典據案例以支持此說法。不過，有一宗澳大利亞案件（*Kirk v Sutherland*[29]）是支持此說法的。案件中，一名擅自佔地者透過逆權管有取得一小幅土地的業權，然後便離開

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24 第347章第13(2)條。C Harpum（主編），*Megarry & Wade: The Law of Real Property*（Sweet & Maxwell，2000年第6版），第21-023段。S Jourdan, *Adverse Possession*（Butterworths, 2003年），第6-37段。

25 這是上訴法院民事法庭庭長科曾斯哈廸（Cozens-Hardy MR）在 *Re Atkinson and Horsell's Contract* [1912] 2 Ch 1案中所採取的做法。他說："每當你發現有人管有某物業，管有便是絕對擁有權的表面證據，一俟你終絕了所有其他人質疑此點的權利，這表面證據便成爲絕對證據……。"在 *Perry v Clissold* [1907] AC 73 案第 79 頁，麥納頓勳爵（Lord Macnaghten）說："……如在適用於案件的時效法規所訂明的期限內，合法的業主不站出來並透過法律程序以維護其業權，其權利便會永遠終絕，而當時管有其物業的業主則會取得絕對的業權。"

26 在 *Taylor v Twinberrow* [1930] 2 KB 16案第 22 頁，受勳上訴法官斯克魯頓（Scrutton LJ）指出，擅自佔地的被告人所提出的關於時效期內逆權權管有所起作用的論點並不正確："……較真確的看法是：應用有關法規以賦予業權只能起消極作用；它終絕了遭剝奪管有權的業主的權利和業權，而佔用人之所以得到業權，是因爲他管有土地已成事實，也因爲其他人把他逐出土地的權利已被削弱。"S Jourdan, *Adverse Possession*（Butterworths，2003年），第20-17及20-58段。

27 S Jourdan, *Adverse Possession*（Butterworths，2003年），第20-59段："舉例來說，根據一項授產安排而有權在剩餘年期擁有相關土地的人，如其權益尚未歸他們管有，則超過 12 年的管有不會對他們構成禁制。至於受租契規限的土地，超過 12 年的管有，會對承租人的業權構成禁制，但不會對業主的業權構成禁制。"

28 法律委員會，《21世紀土地註冊：諮詢文件》，法律委員會第254號，1998年，第10.4段。

29 [1949] VLR 33.

了。多年之後，他簽立轉易契把這幅土地轉讓給被告人。維多利亞最高法院裁定，這名擅自佔地者仍然擁有這幅土地的業權，可以就這幅土地訂立妥善的轉易契。”[30]

Fairweather v St Marylebone Property Co Ltd 一案[31] 裁決的影響以及裁決是否適用於香港

6.23 這宗案件的主要議題是，在承租人的業權遭擅自佔地者於法定時效期屆滿時終絕後，承租人可否透過向出租人退回批租契而令出租人得以要求取得土地的管有權並以此方式來終絕擅自佔地者的業權。

案情

6.24 在 1894 年之前，第 311 號及第 315 號這兩幅相連物業，是由一名永久業權持有人持有。他在後園建造了一間小屋，其中有四分之三位於第 315 號的花園，而四分之一連同入口則位於第 311 號的花園。物業於 1894 年出租給多名不同的承租人，年期是 99 年。第 311 號的分租承租人 M，在 1920 年時曾修葺小屋，將之用於自己的業務。M在 1929 年買入第 311 號的主批租契，並且無間斷地佔用小屋直至 1951 年爲止。與訟雙方均同意 M 佔用小屋是相逆於第 315 號佔用人的權利，而根據《時效法規》，這佔用已足以令 M 可針對他們而取得業權。上訴人其後成爲第 311 號的承租人。答辯人在 1959 年買入第 315 號的永久業權，但須受相關的 99 年期批租契規限。這份批租契沒多久便退回給他們，與第 315 號的永久業權合併，於是答辯人成爲第 315 號的永久業權持有人。

6.25 答辯人要求管有小屋位於他們花園的該部分面積，並聲稱由於第 315 號的批租契已退回給他們，他們有權驅逐上訴人。上訴人則反駁在該份 99 年期批租契的整段租期屆滿之前，驅逐權都不會產生。

英國上議院的裁決

6.26 英國上議院（最高上訴法庭）裁定，第 315 號的批租契（包括小屋所在地點），在批租契於 1959 年退回之時已告“*終*

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30 “如該項裁決在法律上是妥善的話，即表示時效期屆滿會徹底改變擅自佔地者的業權性質，所以擅自佔地者其後放棄管有，並不會毀滅自己的業權。” S Jourdan, *Adverse Possession*（Butterworths，2003 年），第 20-60 段。

31 [1963] AC 510.

止”，而在此事發生的一刻，永久產權擁有人管有出租物業的權利亦告產生。由於相逆於出租人的逆權管有未有達到整段時效期，答辯人有權得到小屋位於第 315 號花園的部分面積。韋傑夫勳爵（Lord Radcliffe）及鄧寧勳爵（Lord Denning）列明裁決理由如下：

> “……受某段年期規限的永久產權擁有人，具有復歸或剩餘的產業權或權益，故此他那針對出租土地擅自佔地者的訴訟權，須當作在該段年期所代表的在先產業權或權益終止以致他本人的產業權或權益須歸由他管有之日產生。因此，對本案的裁決來說，最重要的是決定相關批租契須視爲在哪個日期終止。這份批租契由於是優先於答辯人的永久產權權益，所以亦優先於答辯人的管有權。”（韋傑夫勳爵）（第 537 頁）；及
>
> “……批租契持有人對小屋所具有的業權，相對於擅自佔地者來說是已告終絕，但相對於永久業權持有人來說則仍屬妥善。在本席來說，這似乎是唯一可以接受的看法。若採納此看法，即表示在批租契終止之前是不會對永久業權持有人開始計算時限的——這樣做才算公平。這也表示在開始計算時限之前，永久業權持有人應有權根據契諾要求批租契持有人作出補救（這是他的應有權利），他也可以基於租賃權遭沒收而重收物業（這是他應該可以做的事情）：見 ***Humphry v. Damion***；永久業權持有人也可以根據‘中斷租期’條款發出終止租契通知書或遷出通知書（視屬何情況而定）。此外，這也表示如批租契持有人能夠誘使擅自佔地者離開小屋——又或者擅自佔地者離去而批租契持有人重新管有物業——那麼批租契持有人會立刻回復原來情況，有權享有涉及小屋的利益，但也要肩負小屋批租契所帶來的責任。凡此種種，在本席來看均屬極爲合理，但要達到這個地步，則即使有擅自佔地者的存在，批租契持有人的業權，仍須相對於永久業權持有人來說屬於妥善……。”（鄧寧勳爵）（第 545 頁）

6.27　韋傑夫勳爵進一步解釋，如承租人的土地業權就任何目的以及在任何方面均告終絕，這會對出租人有何不公平之處：

> “承租人的產業權或權利或業權或權益——就此而言本席不相信此等用字有何重要分別——假如相對於其業主的確已告終絕，所得的結論難免會是業主相對於擅自佔

地者的管有權，是在該事發生之時產生。擅自佔地者未有取得承租人的年期或產業權，而永久產權擁有人與管有土地者之間亦不存在任何關係。以本案來說，業主的訴訟權本來是在 1932 年產生，並在 1944 年便遭到永久禁止：而關於此點，雖然承租人在整段期間內均有繼續按照租契支付租金，但業主卻既無方法亦無理由可以知道部分物業已發生被剝奪管有權的情況或時限已開始對他計算。這情況看來大有問題；不過，如果承租人的產業權是就所有目的而言均告終絕，那麼該項產業權也必定同時‘終止’（即《1874 年法令》第 2 條及《1939 年法令》第 6(1)條所指之意）。這種情況顯然不公平，但每當現有批租契屬長年期而出租的物業在批租契生效期間已有部分或甚至全部遭逆權管有 12 年或以上，便會出現這種情況。”（第 538 頁）

6.28 他繼而指出，如業主被剝奪強制執行批租契中的契諾的權利，則不合情理的情況更加嚴重：

“如承租人的產業權或業權就所有目的而言遭到毀滅，則承租人與業主之間的產業權相互關係會隨之而消失。如產業權相互關係不再存在，則約束承租人的契諾亦不再存在，因爲這些契諾是基於產業權相互關係而存在的：如現時的承租人是批租契的承讓人（如有關的年期是長的話，他很可能會是批租契的承讓人），業主便會發現立法機關所採取的有關措施，已剝奪了他的權利，令他無法就已被擅自佔地者擅佔的土地強制執行一些對他來說有重要性的契諾；導致他被剝奪此權利的事件事實上已發生，他本人卻得不到任何賠償，而且也沒有收到任何應向他發出的通知。至於擅自佔地者，則有權相對於業主而言繼續管有物業，並且沒有個人法律責任繳付租金或履行契諾。這個法律機制似乎不可思議。”（第 539 頁）

6.29 韋傑夫勳爵故此得出結論，認爲各項《時效法令》中關於“*終絕*”的條文，不會毀滅承租人與業主之間的產業權，而承租人是可以向出租人提出退回批租契的。他強調問題並非在於“*不能給*

付自己沒有的東西”的原則是否有例外，而是在於這項原則是否適用於有關情況。他認爲這項原則並不適用於有關情況。[32]

6.30 鄧寧勳爵同意韋傑夫勳爵的看法，都是不接受下述說法：批租契持有人對小屋的業權已完全終絕（不單是對擅自佔地者來說已完全終絕，對永久業權持有人來說也同樣是完全終絕），批租權益已全然消失，而永久業權持有人有權得到土地：

> “本席完全不接受〔這些說法〕。接受〔這些說法〕即表示在本案中，永久業權持有人本會在 1932 年〔承租人針對擅自佔地者所具有的訴訟權是在這一年喪失時效〕便有權管有小屋，而時限本會由 1932 年開始對〔永久業權持有人〕計算，以致在 12 年之後亦即 1944 年時，永久業權持有人對小屋的業權便告終絕。這不可能是對的，而且也沒有人曾認真地提出此看法。在 100 宗個案之中，有 99 宗都是永久業權持有人對擅自佔地者正佔有物業一事並不知情。如永久業權持有人的業權可於批租契生效期間在自己不知情的情況下被侵蝕掉，這會是絕對錯誤的。正確的看法是，永久業權是《1939 年法令》第 6(1)條所指的復歸產業權，而在批租契尚未終止之前，時限不會對永久業權持有人開始計算……
>
> 基於此點，批租契持有人在退回批租契之日顯然是有一些東西可以退回。相對於永久業權持有人來說，他仍然擁有小屋的業權，可以把它退回給永久業權持有人。“*不能給付自己沒有的東西*”的原則，完全不適用於本案。”（第 544-545 頁）

異議判決

6.31 不過，莫理斯勳爵（Lord Morris of Borth-y-Gest）卻基於“*不能給付自己沒有的東西*”（*nemo dat quod non habet*）的原則而作出異議判決：

> “在擅自佔地者於批租契生效期間繼續管有物業達到法定期限的情況中，如果可以說承租人只是失去了相對於擅自佔地者的物業管有權，則承租人又怎能針對該擅自佔地者而把管有權交給出租人？……

[32] [1963] AC 510，第 540 頁。

各承租人不曾管有小屋那位於第 315 號的部分面積或擁有管有權，他們亦未有取得該部分面積的管有或管有權，所以他們無法把該部分面積的管有權交給原告人。因此，本席認爲原告人無法證明他們有權驅逐被告人。”（第 550 頁）

他強調案中的所謂批租契退回，未有給予答辯人可要求管有第 315 號有關部分的訴訟權，因爲承租人無法把一些他們不曾擁有的東西（管有權）交給答辯人。[33] 莫理斯勳爵又說：

“如擅自佔地者繼續管有物業達到法定期限，則承租人的業權、產業權或權益會告終絕。但這並不表示已發生了一些事情，以致解除了承租人根據合約須對出租人承擔的責任，又或者在租契年期屆滿時可在任何方面影響或加強出租人收回管有權的原先權利。如承租人的業權、產業權或權益的終絕，可以被視爲《1939 年法令》第 6(1)條所指的‘終止’，則這終絕，不會是第 6(1)條所指的那種可令出租人的未來產業權或權益現在便須歸由出租人管有的‘終止’。由於出租人與承租人之間並無任何安排，承租人根據合約所須承擔的責任，不但會繼續下去而且還會在合約生效期間繼續下去。”（第 554 頁）

對“Fairweather”案裁決的評論

6.32 *Fairweather* 案的裁決曾受到猛烈批評。愛爾蘭最高法院的多數法官在 *Perry v Woodfarm Homes Ltd* 案[34] 中拒絕遵從這項裁決，而學者普遍均贊同不應動搖“*不能給付自己沒有的東西*”原則的看法：

“因此，雖然 T 相對於 S 而擁有的業權並非妥善的業權，但他可以針對 S 而賦予 L 妥善的業權令 L 可更快速地取得管有權。由於就 L 與 T 之間而言批租契仍然有效，所以有人說這是必然的後果。不過，這種推理方式似乎有問題，因爲它未有考慮到 T 已全部喪失了驅逐 S 的權力以致根本無法賦予 L 這方面的權力。相對於 S 來說，T 所持有的批租契，不論是根據 T 還是 L 的說法，都不再是妥善的業權，而容許有人說這租契是妥善的業權，便會違反一項基本原則，就是無人能

33 [1963] AC 510，第 552 頁。

34 [1975] IR 104.

夠賦予他人一項較自己所擁有者爲妥善的業權（“*不能給付自己沒有的東西*”）。如果 L 當時有權終止 T 的批租契，則情況會不一樣，因爲 L 當時便可以主張直接屬於自己的至高無上業權，無須透過 T 才可取得的權利行事。英國上議院的裁決，是把擅自佔地者的法定業權歸入受禁制者（T）的權力，讓第三方（L）可以驅逐擅自佔地者，所以是嚴重損害了擅自佔地者的法定業權。因此，《1980 年時效法令》對批租土地所起的作用已遭大幅削弱。”[35]

6.33 基於“*不能給付自己沒有的東西*”原則，如果租客相對於第三方來說已喪失了相關土地的業權，他便無法透過退回批租契而給予業主一項相對於第三方來說屬於妥善的業權，韋德（Wade）教授對此情況也有批評。[36] 他同意莫理斯勳爵的看法，認爲除非租客退回批租契，否則 *Fairweather* 案中的業主無權要求即時管有物業，而租客亦無權退回自己不曾擁有的東西。[37] 韋德教授解釋說，業主是透過租客而作出上述要求，所以業主受到擅自佔地者產業權的規限，程度與租客所受到的相同，亦即是說業主同樣要待到租契年期完結方可收回物業。[38] 他又指出在 *Fairweather* 案中，多數法官的意見未有解釋何以“*不能給付自己沒有的東西*”原則不適用於該案。韋德教授在批評 *Fairweather* 案的裁決時，表示《時效法令》對批租土地的效用並未有遭到剝奪：

“如果被剝奪管有權的租客可賦權業主把擅自佔地者攆走，那麼 12 年的逆權管有會令擅自佔地者無所得益。同樣地，業主可透過接受舊租契的退回和批出新租契而重新確立租客的地位。業主和租客以這種方式合謀，通常會符合他們的利益，因爲他們共同所得的權力，要比他們各自獨享的權力相加起來爲大。這就是整件事情的弔詭之處。通過採取退回批租契的方式，業主和租客可以合力打造一項業權，並且可以把欠妥善的權利變爲妥善。”[39]

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35 C Harpum（主編），*Megarry & Wade: The Law of Real Property*（Sweet & Maxwell，2000 年第 6 版），第 21-062 段。

36 HWR Wade, "Landlord, Tenant and Squatter", (1962) 78 LQR 541，第 549 頁。李啓新勳爵（Lord Nicholls of Birkenhead）在 *Chung Ping Kwan v Lam Island Development Co Ltd* [1997] AC 38 案中，稱韋德教授的意見爲“*有力的批判*”，見第 47 頁 F 段。

37 HWR Wade, "Landlord, Tenant and Squatter", (1962) 78 LQR 541，第 550 頁。

38 HWR Wade, "Landlord, Tenant and Squatter", (1962) 78 LQR 541，第 551 頁。

39 HWR Wade, "Landlord, Tenant and Squatter", (1962) 78 LQR 541，第 554-5 頁。

韋德教授在總結時，特別強調“*不能給付自己沒有的東西*”原則的論據：

> “請恕我直言，*Fairweather* 案中的少數意見之所以得到認同，是因爲它比較符合我們在土地擁有權方面的通用法律。關於時效的成文法，是構成該範疇法律的必要部分，我們必須賦予擅自佔地者的業權適當效力。這項業權，對被剝奪管有權的永久業權持有人來說是完全有效。它對被剝奪管有權的批租契持有人來說也應同樣有效，程度以產業權的性質所容許者爲準。因此，擅自佔地者的業權，不應弱於任何其他對批租契在有效年期內的權益有合法申索權的人，例如承讓人或分租客。指擅自佔地者的業權屬於次等而原因是他未有取得“國會法規所承認的物業轉易（Parliamentary conveyance）”，這種說法並不合乎邏輯。國會可以透過其他方式來賦予某人妥善的業權，而在各項《時效法令》中，國會是透過終絕被剝奪管有權的一方的業權來這樣做的。此外還有一項最有力的論據，那就是容許某人把自己的欠妥善業權轉移給另一人以將之起死回生，是有違產權法的基本原則。“*不能給付自己沒有的東西*”原則，乃是無法規避的真理。”[40]

6.34 英格蘭法律委員會也質疑，爲甚麼業權已被終絕的租客能夠有效地向業主退回批租契：

> “作爲一份合約來說，批租契在出租人與承租人之間當然確實仍屬有效，而租客顯然可以放棄履行與批租契相關的義務，但這不會影響有關的批租產業。即使事實上無人擁有或可以處置這批租產業，它也繼續存在（擅自佔地者當然擁有獨立的永久業權，但對批租契來說卻並無該項業權）。愛爾蘭最高法院正是基於這個原因而在 *Perry v Woodfarm Homes Ltd* [1975] IR 104 案中拒絕遵從 *Fairweather* 案的裁決。”[41]

6.35 在另一方面，支持 *Fairweather* 案裁決也大有人在。庫克（Cooke）相信這項裁決是正確的。[42] 她詳細解釋說案中的租客未有

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40 HWR Wade, "Landlord, Tenant and Squatter", (1962) 78 LQR 541，第 559 頁。

41 法律委員會，《21 世紀土地註冊：諮詢文件》(*Land Registration for the Twenty-first Century, A Consultative Document*)（1998 年法律委員會第 254 號），註釋 88。

42 E Cooke, "Adverse Possession – Problems of Title in Registered Land" (1994) 14 LS 1，第 7 頁。

賦予業主管有權，只是移除了妨礙業主行使自身管有權的障礙物。她同意韋傑夫勳爵的以下說法：

> "在此案中，承租人所退回的是他所管有附於永久產權上的產權負擔，這項產權負擔是體現於租契的年期。承租人所退回的只是這項產權負擔，再沒有別的東西。本席認爲直至退回的時候，這產權負擔令永久產權擁有人無法針對擅自佔地者主張自己的管有權。"[43]

她以比喻的方式對此情況作出生動的描述：租客已不再持有門匙，但他可以不擋在門前，讓業主能夠使用自己的門匙。[44]

6.36 佐丹也指出，*Fairweather*案的多數裁決是有不少理據支持的，並且依然有效，即使有了《1980年時效修訂法令》（Limitation Amendment Act 1980）對相關法律作出修訂，但這項法令並未有改變*Fairweather*案的裁決所定下的法律。[45] 英國法律改革委員會（Law Reform Committee）對*Fairweather* 案裁決意見分歧，所以沒有就如何改變這項裁決作出任何建議。[46]

香港法庭如何看待"Fairweather"案的裁決？

6.37 高院上訴法庭法官李安霖在 *Yeung Kong v Fu Mei Ling Mary* 案中指出：

> "《時效條例》與《時效法令》兩者在相關條文上並無重大差別，所以就有關條例的真正涵義和效力而言，上訴法庭須受 *Fairweather* 案的多數裁決約束 —— *de Lasala v de Lasala* [1979] HKLR 214; [1980] AC 546."[47]

上訴法庭法官祈彥輝同意李安霖法官的說法，他在 *Lai Moon Hung & Anor v Lam Island Development Co Ltd* 案[48] 中表示，經考慮韋德教授的批評

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43 [1963] AC 510，第 540 頁。

44 E Cooke, "Adverse Possession – Problems of Title in Registered Land" (1994) 14 LS 1，第 7 頁，註釋 31。亦見這個比喻所得的回應："由於租客的權益已告終絕，所以不清楚爲甚麼他能夠這樣做"，載於 C Harpum（主編），*Megarry & Wade: The Law of Real Property* (Sweet & Maxwell，2000 年第 6 版)，第 21-062 段註釋 87。

45 S Jourdan, *Adverse Possession*（Butterworths，2003 年），第 24-68 段。

46 Law Reform Committee，《訴訟時效最後報告書》（*Final Report on Limitation of Actions*），1977 年，第 3.46 段。

47 [1994] 2 HKC 1，第 3 頁。亦見 *Cheuk Chau Co Ltd v Chau Kwan Nam & Ors*（HCMP 274/82，未有彙報）。

48 [1994] 2 HKC 11，第 20-21 頁。

以及愛爾蘭最高法院對 *Fairweather* 案裁決的不願遵從後，*Fairweather* 案裁決對香港法庭是有約束力的。

6.38 在 1997 年後，終審法院在 *Chan Tin Shi v Li Tin Sung* 案[49] 中贊同 *Fairweather* 案的裁決，認爲租客的"*業權*"只是相對於擅自佔地者而言已告終絕，相對於業主而言卻依然存在，所以租客仍須就批租契的契諾而負上法律責任。不過，終審法院未有評論租客可否透過退回批租契而讓業主得以驅逐擅自佔地者：

> "〔'*Fairweather* 案'裁決〕是權威案例，示明如果原有批租契已被退回，〔業主便可以〕在較早的日期〔驅逐擅自佔地者〕。〔業主〕自己可以即時取得管有權，又或者訂立新的批租契重新批出土地讓租客可以取得管有權。在這些法律程序中，法庭無須裁定該種做法是否正確，因爲在這些上訴案件中，所有法律程序都是在舊的批租契的年期屆滿之後才展開的。"

6.39 我們必須指出 *Fairweather* 案裁決所受到的批評，只是針對裁決的某一部分，該部分確認被剝奪管有權的租客把租契退回業主從而令擅自佔地者無法取得業權的權利。*Fairweather* 案的裁決，是否適用於以卸棄形式作出的批租契退回這點並不清晰，但理論上並無任何理由說這方面的情況會有所不同。

6.40 正如眾所認同，如果被剝奪土地管有權的業主應該可以基於沒收租賃權或時間過去而終止租約，則擅自佔地者便不可以針對業主主張他的擅自佔地者業權，而業主則可以向被剝奪管有權的租客批給另一份租契，被剝奪管有權的租客便可取得新的業權以驅逐擅自佔地者。

6.41 有批評指被剝奪管有權的租客，不應該可以與業主合謀透過退回租契令擅自佔地者的權利無效而從中得利。這批評雖然不無道理，但也沒有理由任由租契所訂的契諾不獲遵行，以促使或令到業主可透過沒收租賃權來終止租契從而阻止租客直接這樣做。

6.42 *Fairweather* 案裁決明示地再次確認了一項原則，那就是成功的擅自佔地者不會成爲業權被終絕的租客的承讓人。此點對香港的發展商帶來了一些難題，這個問題會在下一章作詳細討論。

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[49] [2006] 9 HKCFAR 29，第 20 段。

擅自佔地者及被剝奪管有權的業主在政府租契下的法律責任

6.43 由於香港實施土地年期批租制度，我們似乎有必要研究在擅自佔地者終絕了紙上擁有人（即原來的政府土地承租人或繼後的承讓人）的業權後，擅自佔地者和紙上擁有人在政府租契下有甚麼法律責任。

原來的政府土地承租人和繼後的政府土地承租人的法律責任

6.44 如被剝奪管有權的業主是原來的政府土地承租人的承讓人，問題是原來的政府土地承租人，是否仍須根據政府租契就發生於他已把租契轉易後的契諾遭違反事件負上法律責任。在普通法中，即使原來的政府土地承租人無須就契諾遭違反而負上個人法律責任，以及原來的契諾條款亦已更改，但基於在整段批租年期內有效的合約相互關係，原來的政府土地承租人仍須受契諾所約束，並且有權強制執行契諾。[50] 批租契的原有雙方，基於合約相互關係，即使已把自己的權益轉讓，之後仍須就契諾而負法律責任。繼後的政府土地承租人，作爲批租契的承讓人，與政府之間的是產業權相互關係而非合約相互關係。根據 *Spencer* 案[51] 所列明的原則，批租契的承讓人可能須就批租契契諾的遭違反而對出租人負法律責任。舉例來說，原來的政府土地承租人（T1）的承讓人（T2），把批租契轉讓給另一人（T3）而這人又被擅自佔地者剝奪管有權。在把批租契轉讓了給 T3 之後，T2 與政府之間已再無產業權相互關係。產業權相互關係反而是存在於 T3 與政府之間。[52] 結果是 T2 無須再根據政府租契而受契諾所約束，並且不再有權強制執行契諾。不過，T1 與政府之間的合約相互關係未有受到影響。

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50 *Centrovincial Estates Plc v Bulk Storage Ltd* (1983) 46 P & CR 393. S Nield, *Hong Kong Land Law*（朗文出版社，1998 年第 2 版），第 14.2 段：“就所有實際目的而言，他們可以置身事外，但在法律上來說，他們的合約責任尚未完結。事實上，他們已成爲繼後的承讓人繼續履行契諾的擔保人。”亦見 M Merry, *Hong Kong Tenancy Law*（Butterworths，第 3 版，1997 年），第 119 至 120 頁，以及 Sihombing and M Wilkinson, *Hong Kong Conveyancing – Law and Practice*（Butterworths），卷 1(A)，XII，第 330 及 333 段。

51 (1583) 5 Co Rep 16a. 如屬以下情況，出租人可對租契的承讓人採取行動：（1）契諾“涉及和關係到”有關土地；（2）契諾的用意爲隨土地而轉移（契諾隨土地而轉移的推定，載於第 219 章第 39 及 40 條；（3）存在有產業權相互關係；以及（4）租契和轉讓契獲法律承認，因爲它們是經蓋章而訂立，又或者是以口頭或書面方式訂立而年期不超越三年。S Nield, *Hong Kong Land Law*（朗文出版社，1998 年第 2 版），第 14.3.1.1(a)至(d)段。C Harpum（主編），*Megarry & Wade: The Law of Real Property*（Sweet & Maxwell，2000 年第 6 版），第 15-030 段。Riddall, *Land Law*（LexisNexis，第 7 版，2003 年），第 441 頁。

52 M Merry, *Hong Kong Tenancy Law*（Butterworths，第 3 版，1997 年），第 120 頁。

6.45　實際上，承租人可以要求自己的承讓人應允履行政府租契中的契諾，而承讓人在把自己的權益轉讓時，又會要求自己的承讓人作出相同的契諾，故此存在着一連串的契諾，以保障原來的政府土地承租人（在上述的例子中是指T1），並把法律責任轉傳給違反契諾的一方。這種做法很普遍，而就政府租契的轉讓來說，上述契諾是隱含於法規之中。[53]《物業轉易及財產條例》（第219章）第35(1)(a)條訂明：

> "(a) 在任何根據政府租契而持有的全部土地權益的轉讓中，須隱含附表1第I部所述由轉讓人作出的契諾及由獲轉讓的人作出的契諾……"

附表1第I部訂明：

> "B. 由承讓人作出
>
> 承讓人及任何藉着承讓人而得業權的人，由轉讓契日期或轉讓契所述的日期起，須在所有時候繳付地稅或(視屬何情況而定)經分攤的地稅，並須遵守及履行載於政府租契及任何公契內而又是承租人須遵守及履行的所有契諾(如地稅已經分攤，則繳付全部地稅的契諾除外)、協議及條件，但只限於該等地稅、契諾、協議及條件與所轉讓的土地有關者。"

6.46　法定契諾旨在爲政府租契的轉讓人（在上述的例子中是指T1）提供保障，讓他無須肩負政府租契之下的法律責任，因爲他即使已把自己的權益轉仍須繼續負法律責任。[54] 第219章第41(8)條訂有進一步的條文以保障轉讓人：

> "在任何人停止擁有受某契諾影響的土地的產業權或權益後，該契諾即不再約束該人，但就該人在停止擁有該產業權或權益前違反該契諾的事項而言，該人仍受該契諾約束。"

這項條文的目的是，承租人在把自己的批租年期轉讓他人之後，應該無須再就批租契諾而負法律責任，但他在持有批租契期間所作出的違反契諾事項除外。按照第41(2)條，第41條適用於符合以下情況的契諾，不論有關契諾在效用上是積極性還是限制性的——

53　S Nield, *Hong Kong Land Law*（朗文出版社，1998年第2版），第14.2.1(b)段。

54　J Sihombing and M Wilkinson, *Hong Kong Conveyancing – Law and Practice*（Butterworths），卷1(A)，XII，第330及333段。

(a) 關乎契諾承諾人的土地；

(b) 契諾的負擔明訂爲或用意爲隨契諾承諾人的土地轉移；及

(c) 明訂爲及用意爲使契諾受益人及其業權繼承人的土地得益，或使藉着或透過契諾受益人或其業權繼承人而取得該土地業權的人的土地得益。

6.47 尼爾特（Nield）認爲，承租人所作出的批租契諾應該會符合這些條件，所以會解除原來的政府土地承租人（在上述的例子中是指 T1）的責任，令他無須爲發生於他已把自己的權益轉讓後的違反契諾事項而負法律責任。[55] 第 41(2)條所訂明的第一項條件是契諾關乎契諾承諾人的土地：契諾關乎一些須予作出或不得作出的事情，而這些事情並非只屬個人方面，而是涉及或關乎契諾承諾人所持有的土地（第 41(2)(a)條）。第二項條件是契諾明訂爲或用意爲隨契諾承諾人的土地轉移（第 41(2)(b)條）。第 40 條訂明，與契諾承諾人的土地有關的契諾，除非明訂有相反用意，否則須當作由契諾承諾人代其本人、其業權繼承人以及藉着或透過契諾承諾人或其業權繼承人而取得業權的人作出。第三項條件則是，契諾明訂爲及用意爲使契諾受益人及其業權繼承人的土地得益，或使藉着或透過契諾受益人或其業權繼承人而取得該土地業權的人的土地得益（第 41(2)(c)條）。第 39 條訂明，與契諾受益人的土地有關的契諾，除非明訂有相反用意，否則須當作由契諾承諾人向契諾受益人及其業權繼承人，以及藉着或透過契諾受益人或其業權繼承人而取得業權的人作出。爲符合這項條件，出租人的復歸權可構成一項獨立的土地權益。構成會因契諾而得益的土地者，正是出租人的復歸權。[56] 尼爾特認爲，出租人可基於這個理由，針對與自己既無合約相互關係亦無產業權相互關係的分租承租人強制執行契諾。

6.48 因此，如果尼爾特的看法是正確的話，那麼在擅自佔地者終絕了紙上擁有人（在上述的例子中是指 T3）的業權後，原來的政府土地承租人（T1）爲履行第 41(2)條所訂的條件，是可以引用第 41(8)條令自己無須爲發生於他已停止擁有土地的權益之後的違反契諾事項負上法律責任。值得注意的是，第 39 至 41 條適用於在其生效日期前或之後訂立的契諾。[57] 繼後的政府土地承租人是否須負法

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55 S Nield, *Hong Kong Land Law*（朗文出版社，1998 年第 2 版），第 14.2.1.1(c)段。亦見 M Merry, *Hong Kong Tenancy Law*（Butterworths，第 3 版，1997 年），第 120 至 123 頁。

56 S Nield, *Hong Kong Land Law*（朗文出版社，1998 年第 2 版），第 15.3.2.1(d)(2)段。

57 第 39(2)、40(3)及 40(10)條。

律責任（如有的話），則視乎他是否爲遭擅自佔地者剝奪管有權的紙上擁有人。T2 無須就契諾而負任何法律責任，因爲他與政府之間並無產業權相互關係。T3（即遭擅自佔地者剝奪管有權的紙上擁有人）的業權，相對於擅自佔地者而言已告終絕，但相對於政府而言依然妥善，所以 T3 仍須就契諾而負上法律責任。[58] 不過，有鑑於 *Fairweather* 案的裁決，T3 難以提出爭辯，說自己符合第 41(8)條的規定，“*已停止擁有土地的產業權或權益*”。

6.49 原來的契諾承諾人（即上述的例子中的 T1）之所以須負法律責任，是因爲合約相互關係這項確立已久的原則之故，而第 219 章第 41(8)條所訂的規定，是否能起減損這項原則的作用，卻有疑問。在 *Sky Heart Ltd v Lee Hysan Co Ltd* 案[59] 中，終審法院裁定第 41 條的用意並不是更改所有的舊有法律規則及衡平法規則，從而令到即使第 41(5)條已有言明，不伴隨土地而獨立存在的契諾（covenant in gross）仍然不會隨土地而轉移，以便原來的契諾受益人（當其時已將土地轉讓）可以強制執行契諾。終審法院所關注者是，並無特別需要更改當時涉及強制執行不伴隨土地而獨立存在的契諾的舊有法律，故此裁定第 41 條未有更改相關的法律。同樣地，就第 41(8)條而言，顯然也有道理說並無政策上的理由，需要更改涉及原來的契諾承諾人在合約相互關係原則下所須負的法律責任的法律。第 41 條的用意只是處理契諾隨土地轉移的事宜，作用是確保第 41(5)條對相關法律所作出的更改，不會影響下述人士的法律責任：此人之所以須負法律責任，純粹因爲他曾經一度因身爲原來的契諾承諾人的業權繼承人而須負法律責任。

原承租人在續期或展期的租契下的法律責任

6.50 尼爾特認爲，如租契透過法規的實施而得以繼續生效，原承租人的法律責任未必會延伸至續期或展期的租契，最少在原有租契如此訂明之前是情況如此。[60] 在 *City of London Corporation v Fell* 案[61] 中，被告租客就原告業主所擁有的商鋪訂立了一份由 1976 年 3 月 25 日起計“*爲期十年*”的租約。1979 年 6 月，被告人在原告人同意之下把租約的剩餘未屆滿年期轉讓給一間公司，但被告人在該段剩餘的年期內仍有法律責任繳付租金，並且履行和遵守租客的契諾及條件。這份爲期十年的租約於 1986 年 3 月 24 日屆滿，但承讓人公

58 *Fairweather v St Marylebone Property Co Ltd* [1963] AC 510，第 545 頁（鄧寧勳爵）及第 539 頁（韋傑夫勳爵）。

59 (1997-98) 1 HKCFAR 318.

60 S Nield, *Hong Kong Land Law*（朗文出版社，1998 年第 2 版），第 14.2 段。

61 [1994] 1 AC 458.

司依據《1954年業主及租客法令》（Landlord and Tenant Act 1954）第II部的條文繼續佔用商鋪，直至1987年1月23日之時才把商鋪退回，欠下原告人一筆未繳租金。原告人就拖欠的租金，向身爲原承租人的被告人提出法律程序。

6.51 英國上議院（最高上訴法庭）裁定，被告人並無合約上的責任必須繳付1986年3月24日之後期間的租金，因爲被告人只是立約繳付租金直至該日爲止。租約是可以作爲財產的一種而獨立存在於訂立它的合約之外，如果原租客的法律責任已解除或以其他方式消失，租約所批給的年期卻並非必然消失，而承讓人亦非必然無須就契諾而負法律責任。轉讓租約時，原租客所作契諾的條文仍附連於租約的年期，這是因爲該等條文涉及和關係到有關土地（而不是因爲原租客仍然存在，他雖然已停止擁有出租土地的權益卻仍須根據合約履行自己曾在契諾之下作出的承諾）。因此，被告人無須就承讓人公司的違反契諾事項負上法律責任，繳付在被告人的十年合約年期屆滿後產生的租金。

6.52 不過，在 *Chan Tin Shi v Li Tin Sung* 案[62] 中，終審法院似乎認爲新界契約雖然通過《新界土地契約（續期）條例》取得法定續期，但集體官契的原承租人仍有法律責任繳付須在已續期的年期內付給政府的租金。在這宗案件中，與訟雙方卻未有向終審法院引述 *City of London Corporation v Fell* 一案[63]。不過，終審法院在 *Chan Tin Shi* 案中所作出的裁決，理據在於《新界土地契約（續期）條例》的作用，是重新釐定在原有政府租契下所批給的年期，而不是在原來租期完結時批給政府土地承租人新的年期。因此，*City of London Corporation v Fell* 案[64] 看來不會對 *Chan Tin Shi* 案的裁決有任何影響。

擅自佔地者的法律責任

6.53 在佔有土地達到法定的時效期後，擅自佔地者便有權得到被逐承租人（被剝奪管有權的擁有人）的批租契剩餘年期，但擅自佔地者不是批租契的承讓人，所以與出租人（政府）既無合約相互關係亦無產業權相互關係。因此，在普通法中，擅自佔地者無須就被逐承租人的政府租契中的契諾而負法律責任，但若然契諾在衡平法上可作爲限制性契諾而予以強制執行，則屬例外。[65] 如政府租契

62 (2006) 9 HKCFAR 29，第41頁G段。.

63 [1994] 1 AC 458.

64 同上。

65 *Tichborne v Weir* (1892) 67 LT 735. S Nield, *Hong Kong Land Law*（朗文出版社，1998年第2版），第7.5.2.3段。C Harpum（主編），*Megarry & Wade: The Law of Real Property*（Sweet & Maxwell，2000年第6版），第21-067段。

載有沒收批租權的條款，則未有繳付地租或履行其他契諾可令政府有權沒收批租契，並向擅自佔地者要求取回土地的管有權，即使擅自佔地者並無責任遵從契諾，情況也是一樣。[66] 擅自佔地者沒有針對沒收批租權申請濟助的權利。[67] 按照梅加里及韋德（*Megarry & Wade*）的說法，情況應是"*非註冊批租土地的逆權佔用人，幾乎必然須繳付租金。*"[68]

6.54 除了引用普通法之外，有些人可能會試圖引用第 219 章第 41(3)條，希望可使擅自佔地者負上法律責任：

> "(3) 即使有任何法律規則或衡平法規則的規定，除第(5)款另有規定外，契諾須隨土地轉移，且除在契諾各方之間可予強制執行外，契諾受益人及其業權繼承人，以及藉着或透過該人或該等人士而得土地業權的人，均可向土地的佔用人、契諾承諾人及其業權繼承人，以及藉着或透過該人或該等人士而得土地業權的人，強制執行契諾。"

6.55 第 41(3)條和第 41(2)條相加的作用，是令積極性契諾（須受第 41(5)條規限）負擔和消極性契諾的負擔均須隨土地而轉移。結果是契諾承諾人的業權繼承人（例如買家和獲得契諾承諾人在去世或破產時傳交土地的人）、透過契諾承諾人或其業權繼承人而取得業權的人（例如承租人），以及甚至是純粹佔用土地的人（例如特許持有人或擅自佔地者），均須就契諾而負法律責任。[69] 不過，這項規定須受第 41(5)條規限，而該條訂明：

> "不得只憑藉本條的規定而向以下人士強制執行積極性契諾——
>
> (a) 契諾承諾人或其業權繼承人的承租人，或藉着或透過契諾承諾人或其業權繼承人而得業權的人的承租人；或

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66 S Nield, *Hong Kong Land Law*（朗文出版社，1998 年第 2 版），第 7.5.2.3 段。C Harpum（主編），*Megarry & Wade: The Law of Real Property*（Sweet & Maxwell，2000 年第 6 版），第 21-067 段。

67 *Tickner v Buzzacott* (1965) Ch 426. C Harpum（主編），*Megarry & Wade: The Law of Real Property*（Sweet & Maxwell，2000 年第 6 版），第 21-067 段。

68 C Harpum（主編），*Megarry & Wade: The Law of Real Property*（Sweet & Maxwell,，2000 年第 6 版），第 21-067 段。

69 S Nield, *Hong Kong Land Law*（朗文出版社，1998 年第 2 版），第 15.3.2 段。J Sihombing and M Wilkinson, *Hong Kong Conveyancing – Law and Practice*（Butterworths），卷 1(A)，XII，第 345 及 376 段。

(b) 任何藉着或透過上述承租人而得業權的人；或

(c) 只因本身是土地佔用人的人。”

6.56 由於此款已有訂明，土地的承租人或佔用人（例如擅自佔地者）無須憑藉第 41 條的規定而就違反積極性契諾對契諾受益人負法律責任。[70] 積極性契諾是支出金錢、作出事情或在其他方面性質積極的契諾（第 41(6)條）。因此，擅自佔地者似乎無須根據第 41 條而負繳付地租的法律責任。

不合情理的情況

6.57 有法官認爲這種情況不合情理，因爲紙上擁有人（政府土地承租人）已被擅自佔地者剝奪管有權，他的業權相對於擅自佔地者來說已告終絕，但相對於政府（出租人）來說卻仍屬妥善，所以他仍須就政府租契中的契諾而負法律責任。這個議題會在下一章作詳細討論。[71]

逆權管有對祖地的影響

6.58 我們希望指出祖地在逆權管有議題中的特有情況。在 *Leung Kuen Fai v Tang Kwong Yu T'ong or Tang Kwong Yu Tso* 案[72] 中，暫委法官林文翰作出多項裁定，其中包括以下各項裁定：

(a) 就祖地而言，相關的信託是一項爲“祖”的成員而設的信託，並非一項爲達到某些目的而設的信託；雖然法庭未有打算就尚未出生的“祖”的成員是否在“祖”的財產中佔有權益作出裁決，但法庭會保護該等財產。[73]

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70 S Nield, *Hong Kong Land Law*（朗文出版社，1998 年第 2 版），第 122 頁：“但承租人基於其他理由而須就積極性契諾所負的法律責任不受影響。如承租人違反其租契所載的積極性契諾，基於合約相互關係，他須就此而對業主負法律責任，而基於產業權相互關係，他須就此而對業主的承讓人負法律責任。基於產業權相互關係，承租人的承讓人也須就租契所載的積極性契諾遭違反一事負法律責任。在另一方面，根據 *Tulk v Moxhay* (1848) 2 Ph 744 案所訂的法則，分租承租人可能須就消極性契諾而負法律責任，但根據本條的規定，不能強令分租承租人就其主租契所載的積極性契諾而負法律責任。”亦見 *Annotated Ordinances of Hong Kong（LexisNexis – Butterworths）*，第 219 章，第 178 頁，以及 J Sihombing and M Wilkinson, *Hong Kong Conveyancing – Law and Practice*（Butterworths），卷 1(A)，XII，第 377 段。

71 見之後第 7.33 – 7.39 段。

72 [2002] 2 HKLRD 705.

73 判決書第 27 及 30 段。

(b) 現有成員在“祖”的土地財產中具有實益權益，而上述權益是《時效條例》第 10(1)條所指的土地的衡平法權益。[74]

(c) 雖然在一般的情況中，採取行動者會是“祖”的司理，但由於“祖”的成員的身分是受益人，他們也可以針對陌生人而提出申索，要求取得祖地的管有權。[75] “祖”的成員自己可以展開法律程序，但可能須將司理加入爲被告人。

(d) “祖”的新生成員並不是透過另一人作出申索（此詞須按《時效條例》所指者理解）[76]，如某成員因未成年而無行爲能力，《時效條例》第 22 條就延長時效期所訂的條文，會適用於該名未成年的成員，但《時效條例》第 22(1)條所訂明的例外情況，全都不適用，事實上，時效期會在該名成員達到成年歲數後延長六年。[77]

(e) 每當有新成員出生，祖地即產生一項新的衡平法權益。根據第 7(2)及 22 條，新的時效期會開始計算。新的時效期會在該名成員不再是未成年人後六年才屆滿。[78]

(f) 由於《時效條例》第 10(2)條的規定，只要最少還有一名收回土地的權利不受禁制的實益擁有人存在，受託人（或司理）的業權即不會終絕。[79]

6.59 *Leung Kuen Fai v Tang Kwong Yu T'ong or Tang Kwong Yu Tso* 案[80] 在 *Wong Shing Chau v To Kwok Keung* 案[81] 中，獲上訴法庭考慮而案中的裁決也得到確認。因此，實際上對於祖地來說，除非有人可以顯示“祖”已完全後繼無人，否則擅自佔地者的業權是無法確立的。即使擅自佔地者有辦法終絕某個祖堂的全部現有成員的業權，這個“祖”往往仍有可能在日後增添新成員。關於此點，即使可在生理角度顯示現有成員不可能生兒育女，也不表示“祖”不會有新成員加入，因爲仍然會有人可以根據中國法律和習俗而有權繼承“祖”的成員的權益。

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74 判決書第 32 段。
75 判決書第 33 及 42 段。
76 判決書第 43 段。
77 判決書第 37 段。
78 判決書第 45 段。
79 判決書第 46 段。
80 同上。
81 CACV 20 of 2008.

本章摘要

6.60　　在本章中，我們已研究過香港逆權管有法律在施行上的各種特有議題。經考慮之前各章所載的資料，我們會在下一章列出建議。

第 7 章　建議

引言

7.1　就本諮詢文件之前各章所見，逆權管有具話題及爭議性。舉例來說，在 *JA Pye (Oxford) Ltd* 案[1] 中，遭逆權管有的 25 公頃土地固然價值不菲，而訴訟的結果也較難預料。法官在初審時裁定永久業權擁有人的業權已經終絕，因爲擅自佔地者（當初是放牧協議[2] 的特許持有人）已在懷有所需的管有意圖下事實上管有土地達到規定的年數。上訴法庭推翻了原訟法庭的裁決，裁定擅自佔地者未有表明所需的管有意圖，而主審法官根據環境證據來推斷擅自佔地者的心中想法，不理會擅自佔地者所提供的直接證據，這是錯誤的做法。因此，永久業權擁有人未有被剝奪管有權，而時限期亦從未開始計算。

7.2　上訴法庭的裁決之後遭英國上議院（最高上訴法庭）推翻。上議院解釋，若要管有土地，擅自佔地者必須行使符合所需程度的實質管有和控制，並且必須表明有管有土地的意圖。擅自佔地者必須有意在合理而又切實可行的範圍內排除世上其他人對土地的管有，紙上業權擁有人也包括在內。所需的實質控制程度，是視乎多項因素而定，其中包括土地的性質及其使用方式。此外有必要顯示擅自佔地者一直是以佔用土地的擁有人的方式來對待土地，而且並無他人這樣做。即使擅自佔地者願意就佔用土地而付款，這一點並不重要。[3] 而且也沒有必要顯示擅自佔地者是有意圖擁有土地或取得土地的擁有權。

7.3　事件的爭訟之後在歐洲人權法院（European Court of Human Rights）繼續，永久業權擁有人指英格蘭的逆權管有法律違反《歐洲人權公約》（European Convention for the Protection of Human Rights and Fundamental Freedoms）。[4] 歐洲人權法院前第四部門的審判庭，以 4 比

1　見之前第 1.22 – 1.26 段及第 2.23 – 2.31 段的討論。

2　放牧協議在 1983 年 12 月 31 日屆滿，土地的擁有人拒絕續約並要求格林姆(Graham)離開。格林姆在 1984 年獲准收割乾草。格林姆之後繼續佔用土地，但他這樣做是未經批准的。

3　這方面與香港的案例法並不相同。見 *Wong Tak Yue v Kung Kwok Wai and Another* [1998] 1 HKLRD 241。

4　見之前第 2.26 段。

3 的多數裁定英格蘭的逆權管有法律剝奪了原告人的土地，並且破壞了公眾利益與原告人安寧地享用管有的土地之間的恰當平衡。[5]

7.4 不過，歐洲人權法院大審判庭以 10 比 7 的多數裁定未涉及違反《歐洲人權公約》。[6] 社會有需要對申索設定某種時限，但同時亦有需要保障個人的財產權，在兩者之間取得平衡顯然是一個要小心處理的問題。

7.5 有評論者曾把逆權管有描述爲搶掠土地。逆權管有也曾受到法庭的一些負面批評。在 *JA Pye (Oxford) Holdings Ltd v Graham* 案[7] 中，廖柏嘉法官（Neuberger J）不情願地判擅自佔地者申索得直，有權取得位於伯克郡（Berkshire）的 25 公頃土地，他之後有以下意見：

> "一般而言，支持訂立時效期的常見理由，是人們不應可以無限期不行使他們的權利，而這種說法，最少一般來說是沒有人可以質疑的。然而，如像本案那樣，土地擁有人因無需即時使用土地，不介意讓其他人暫時侵入該土地，本席看不出有何公義原則，可以讓侵入者有權不付分文而從土地擁有人手中取得該土地，而理由只是侵入者曾獲准在該土地停留 12 年。"

逆權管有應否在現行的非註冊土地制度之下予以保留？

香港的土地業權是以管有爲基礎

7.6 雖然《土地業權條例》（第 585 章）已於 2004 年制定，而政府和持份者亦曾致力於實施該條例，[8] 但香港現時所實施的土地註冊制度仍是一種受《土地註冊條例》（第 128 章）規管的契據註冊制度。契據註冊制度只記錄影響某一物業的文書，並非業權的保證。即使某人已在土地註冊處註冊爲物業的擁有人，也不一定是物業的合法擁有人，因爲他的業權可能會有不明確或不妥善之處。

7.7 換言之，非註冊土地的業權是相對的，而業權誰屬最終是視乎土地由誰管有而定。因此，根據第128章把文書註冊雖然可利便追溯業權卻不會賦予業權。此外，非書面的衡平法權益是不可註冊的，而紙上業權擁有人所依據的是來自經註冊文書的業權，所以紙

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5 見之前第 2.27 段。
6 見之前第 2.28 – 2.31 段。
7 [2000] CH 676.
8 見之前第 5 章的討論。

上業權擁有人可能仍須受到非書面的衡平法權益所規限。因此，雖然香港有根據《土地註冊條例》（第128章）而設立的文書註冊制度，香港的土地業權仍然主要是以管有爲基礎。夏正民法官在裕傑發展有限公司訴律政司司長一案（*Harvest Good Development Ltd v Secretary for Justice*）[9] 中對這看法解釋如下：

> "3. 故此在香港的土地法中，基本原則爲管有是業權的根源。除非有人能證明自己擁有更妥善的業權，否則管有土地的個人會被推定爲對批租土地有擁有權。非註冊土地的業權是相對的，而業權誰屬最終是視乎土地由誰管有而定。最有權享有土地的人，是對土地有最佳管有權的人。……
>
> 11. 本席對以上一點的進一步解釋是，英格蘭與威爾斯的土地法——以及香港的土地法——基本上是一套關於管有的法律，而不是一套關於擁有權的法律。正如賀輔明勳爵在 *Hunter v. Canary Wharf Ltd* [1997] AC 655 案第 703 頁中所言：
>
> > '獨有管有權，不論是在法律抑或事實上，亦不論是現在抑或未來，都是英格蘭土地法的根基所在。正如 *Cheshire and Burn's Modern Law of Real Property* 第 15 版（1994 年）第 126 頁所言：
> >
> > '所有土地業權最終都是以管有爲基礎，因爲佔有了土地的人的業權，是凌駕於所有其他未能證明自已對佔有土地（seisin）具有更大權利的人。佔有土地是業權的根源，故此我們可以說就土地而言，英格蘭沒有關於擁有權的法律，有的只是關於管有的法律，而這說法並非過分誇大。' "
>
> （表示強調的底線後加）

現有的逆權管有法律符合《基本法》原則和人權法原則

7.8 在之前的第 2 章[10] 中，我們討論到逆權管有的法律是否符合《基本法》第六條和第一百零五條，即私有財產權應受到保護、而財產的取得、使用、處置和繼承權利，以及財產被依法徵用時得

[9] [2007]4 HKC 1.

[10] 之前第 2.37 – 2.43 段。

到補償的權利應受到保護。在裕傑發展有限公司訴律政司司長案[11]中，夏正民法官裁定《時效條例》第 7(2)及 17 條符合《基本法》第六條和第一百零五條。他又認爲由於香港沒有業權註冊制度，《時效條例》第 7(2)及 17 條所載的逆權管有機制，明顯是爲達到合法目的而設。[12]

7.9 歐洲人權法院曾考慮過英格蘭的逆權管有法律〔包含於《1980 年時效法令》（Limitation Act 1980）及《1925 年土地註冊法令》（Land Registration Act 1925）之中〕是否與《歐洲人權公約》相容。[13] 我們討論到歐洲人權法院大審判庭裁定上述兩項 1980 年和 1925 年的法令是在涉及土地的使用和擁有權的情況中，作爲規管時效期的通用土地法中的一環而適用於申請人公司，不是基於《歐洲人權公約》第一條所指的“剝奪管有”而適用，而是基於對土地“使用的控制”而適用。大審判庭又裁定在 *JA Pye (Oxford) Ltd v the United Kingdom* 案中，公眾利益方面的訴求與有關人士的利益之間的“恰當平衡”未有受到破壞。[14]

7.10 歐洲人權法院又認爲，時效期本身以及業權於時效期完結時終絕均涉及到整體公眾利益。歐洲人權法院也指出，大部分成員國均設有某種形式的機制，可按照與普通法制度中的逆權管有相類似的原則來轉移業權，而這類轉移不涉及向原擁有人支付賠償。

7.11 我們研究過歐洲人權法院大審判庭的異議判決。[15] 這項判決指出了一項事實，那就是有關的土地是註冊土地，其業權誰屬不是視乎誰管有土地，而是視乎誰已註冊爲土地的擁有人。

香港的情況

7.12 在本諮詢文件的較前部分，我們曾探討過支持逆權管有的理據，分別是：

- 防止陳舊的申索——因爲逆權管有是時效法律的一環，也因爲時間的過去會增加調查相關申索的困難。

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11 HCAL 32/2006，沒有彙報。

12 第 184 段。

13 見 *JA Pye (Oxford) Ltd v the United Kingdom* 案。申請號碼：44302/02。2005 年 11 月 15 日及 2007 年 8 月 30 日（歐洲人權法院）。

14 更詳盡的討論，見之前第 2.28 - 2.31 段。

15 見之前第 2.31 段。

- 避免土地不被開發和荒廢——因爲如果土地擁有權與管有不相符，土地會變成無法出售。

- 避免在有錯誤時造成困苦——因爲如果擅自佔地者基於擁有權或界線方面的錯誤而花費金錢改善土地，在不符合“擁有人不容反悔”原則（proprietary estoppel）的要求時，擅自佔地者也可以提出逆權管有的申索。

- 利便非註冊土地的物業轉易——因爲讓在不受爭議的情況下長期管有土地的人能以擁有人的身分處置有關土地是符合公眾利益的做法。而非註冊土地的買方所必須查究的業權年期，是與時效期直接相關的。

7.13 經常有人說利便物業轉易，是支持逆權管有非註冊土地的最有力理據。賣方所必須證明自己擁有業權的年期，是與時效期極之相近的。第 219 章以前規定賣方須證明自己擁有業權的年期不少於 25 年，而當時的收回土地訴訟時效期是 20 年。時效期於 1991 年 7 月 1 日縮減至 12 年，根據第 219 章證明自己擁有業權的年期亦隨即縮減至 15 年。

7.14 如某人的業權是欠妥善的紙上業權但又希望能處置自己的權益，則管有業權在此類案件中便會有用，而即使是在賣方擁有妥善紙上業權的普通案件中，管有業權也確實有用。按照《物業轉易及財產條例》（第 219 章）第 13 條，除非有相反的用意，否則賣方須證明自己擁有業權爲期最少 15 年，並且須由業權有妥善根源之時開始計算。賣方可能會因業權轉傳曾有間斷令擁有權鏈斷裂，以致無法證明自己擁有妥善業權。有時候一幅分割爲多塊的土地會有部分紙上業權擁有人因各種原因（例如戰爭、移民或無嗣而亡）而無法尋獲，這會阻礙了整幅土地（包括分割而成的各塊土地在內）的發展。不過，如果上述各塊土地已由擅自佔地者長期、無中斷地管有，以致該等失蹤的紙上業權擁有人已遭剝奪管有權，則逆權管有的概念會有助整幅土地的發展。在這種情況中，賣方可以管有業權爲依據來進行買賣，這類業權雖然有欠妥善，但卻“可以輕易地出售”。[16]

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16 陳柱恒及其他人訴萬潤壽案（*Chan Chu Hang & Ors v. Man Yun Sau*）[1997] 2 HKC 144，郭美超法官在判決書的第 150 頁說：“在此類個案中，合約應載有一項特定條件，表明所出售的是管有業權。賣方應以法定聲明來補充證明其業權，表明自己已在不受干擾的情況下管有物業多年，而所有其他人的權利都是不獲承認的。這類業權雖然有欠妥善，但卻可以輕易地出售：見上文 *Sihombing and Wilkinson*, *Bamsley*，第 331-332 頁。
上文所述的一般情況，會受到兩項條件限制。第一項條件是，如果物業已長期、無中斷地被某人管有、享用及處理，則可以產生一項合理的推定，那就是此人擁有永久產權上

7.15　再者，逆權管有可利便非註冊土地的轉易，因爲妥善的業權也不是完全無懈可擊的。賣方在證明自己擁有妥善的業權時，須借助多項法定推定。[17] 某項推定可能會在交易完成之後被發現出錯，以致曾被認爲是妥善的業權會變得有欠妥善或甚至大有問題。在這種情況下，管有業權可提供機制，讓相關的土地可以進行交易。

7.16　在香港來說，逆權管有原則在協助推動物業轉易方面的價值，可能會較其他司法管轄區（例如英格蘭與威爾斯）爲低，因爲在香港我們所面對的必然是批租土地。由於在香港出售土地事實上是等於出售和購入政府租契，如果賣方所擁有的只是擅自佔地者的業權，則買方是否必須接受該項業權，頗成疑問。這是因爲擅自佔地者的業權所涵蓋的該部分土地，可能會有被業主（通常是政府）沒收批租權的風險。不過，如果擅自佔地者的業權所涵蓋的土地只佔出售土地的一小部分而該部分土地被業主重收的風險又極低，則我們往往可以說該部分土地的可在市場買賣業權已經確立。

7.17　我們又討論過土地界線問題[18] 以及常見的丈量約份地圖或新批租約圖則與新界土地具體界線不符的問題。地界糾紛是常見之事，特別是在多處地方均由集體官契涵蓋的新界地區。[19] 附連於集體官契的丈量約份地圖所劃定的某幅土地的地段界線與具體佔用界線不符是時有聽聞之事。[20] 買方通常會視察有關的土地以確定佔用

的絕對業權。見 *Cottrell v Watkins* (1839) 1 Beav 361, 第 365 頁。因此，買方可以被迫接受以管有爲基礎的業權，但在此類情況中，賣方除了必須證明管有外，也要證明管有的源頭，以承認管有是在權益受到限制的期間取得。根據《時效條例》，在無行爲能力的個案中，即使可以證明無行爲能力維時超逾最長的 30 年時效期，時效期也僅以 30 年爲限，所以賣方也必須證明時效期未有因《時效條例》第 9 條的運作而延長（第 9 條是處理復歸權益的事宜）。見上文 *Williams on Title* 第570-571 及 *Bamsley* 第 333 頁的討論。第二項條件是妥善的業權可以是部分以文件爲基礎而部分以管有爲基礎。如果妥善的業權可以追溯到業權欠妥的日期，由該日開始的管有是可以糾正欠妥之處從而強迫買方接受業權的：見 *Re Atkinson and Horsell's Contract* [1912] 2 Ch 1; 上文的 *Bamsley* 第 332 頁。”（表示強調的底線後加）

17　法定推定有多個例子。根據第 219 章第 13(4)條，與土地有關的業權文件、按揭文件、聲明書或授權書，如訂立的日期不少於 15 年，除非相反證明成立，否則其所載的事實陳述須推定爲真實。第 22 條訂立了可予推翻的行爲能力推定，而第 23 及 23A(1)條則訂立了可予推翻的妥爲簽立推定。此外也有一些有利於賣方的不可推翻推定，例如第 13(4)及 23A(2)條。

18　見之前第 4 章。

19　在回應劉秀成議員的提問時，房屋及規劃地政局局長說：“新界集體官契所涵蓋的私人地段，稱爲舊批約地段，爲數超過21萬幅，是在100年前以圖樣方式測量，並繪成丈量約份圖，適合當時記錄業權和稅收之用。”《立法會會議過程正式紀錄》（2006年2月8日）。

20　在回應林偉強議員的提問時，房屋及規劃地政局局長說：“……100年前確曾進行測量工作，是有這樣的圖則，我們亦有正式紀錄。不過，由於當時的丈量約份圖的主要作用是記錄業權和作稅收之用，所以並不精細。這當然會引起問題。……如果擁有這幅土地的人認爲有需要，並有這樣的紀錄，地政總署會替他重新進行測量。在雙方同意下，可訂立

界線，而這界線可能從地段的大小、形狀及例如圍欄、圍牆、堤壆、道路、水道等特色已可知其情況如何。[21] 賣方也可能會盡自己所知或所信向買方描述有關土地的界線。[22] 實際上，買賣雙方通常會議定土地會按照*實地*的具體佔用界線而出售，而不是按照於二十世紀之初以非先進儀器製備的丈量約份地圖所示的地段界線而出售。[23] 如果所出售的土地有部分地方是位於具體界線而非丈量約份地圖所示的界線之內，賣方便無法給予買方該部分地方的妥善業權。小組委員會注意到，逆權管有通常是這類土地業權問題的唯一實際解決方法。

建議 1

經審慎考慮香港的情況，包括現有的以管有爲基礎的非註冊土地機制、新界土地界線問題，以及法庭已裁定《時效條例》的現有逆權管有條文符合《基本法》此一事實，我們認爲現有的逆權管有條文應予保留，因爲這些條文可爲部分關於土地業權的問題提供實際解決方法。

逆權管有應否在未來的註冊土地制度之下予以保留？

7.18 在本諮詢文件的第 5 章，我們討論過《土地業權條例》（第 585 章）及實施該條例所遇到的一些問題。我們明白建議的註冊業權機制會作出修改或甚至是重大的改變，但我們相信列出我們對逆權管有應如何配合香港的註冊業權機制的看法會有幫助。

7.19 就已註冊的業權而言，業權主要是建基於已予註冊的事實之上，而不是建基於管有之上。逆權管有原則，會與註冊土地業權

修正契約，將新紀錄記錄在案。……由於基建工程、收地、建設丁屋及土地發展等，我們每年均接獲400宗這類個案。任何人認爲有這樣的需要，均可透過程序進行這方面的工作。”《立法會會議過程正式紀錄》（2006年2月8日）。

21 具體界線很容易因各種原因而改變，例如天氣因素所導致的土蝕，或鄰居基於錯誤或貪念而據用了土地。

22 買方很少會訂明土地界線必須由土地測量師按照丈量約份地圖所劃定的地段界線而在地上劃定，作爲買方購入土地的條件。

23 一幅受集體官契涵蓋的土地，如按照丈量約份地圖所示的地段界線而出售便可能會有問題。第一，丈量約份地圖所示的地段界線並非可以確定該幅土地的位置，因爲不同的土地測量師可能會得出不同的結論。第二，賣方可能會發現所出售的土地有部分地方是位於丈量約份地圖所示的界線而非具體界線之內。在此情況下，賣方可能難以就該部分土地，交出空置土地的管有權或移交妥善的業權。

不可推翻的基本概念背道而馳。在很多設有業權註冊制度的普通法司法管轄區，逆權管有不是已被廢除便是受到相當程度的限制。

7.20 把逆權管有原則不加限制地應用於註冊業權制度，顯然是沒有足夠理據支持的。註冊業權制度若要行之有效，那些爲自己業權註冊的人，應可依據業權已予註冊的事實來保障自己的擁有權，除非有令人信服的理由顯示情況不應如此，則屬例外。註冊本身應是針對逆權管有的一種保障方式，但這保障不應是全無限制的。

建議 2

我們建議，逆權管有的法律應在未來的註冊土地制度之下重新訂定。註冊本身應是針對逆權管有的一種保障方式，但這保障不應是絕對的。這是爲了達到註冊土地制度的目的——只有註冊能夠轉移或賦予業權。

在註冊土地制度之下處理逆權管有申索的建議機制概要

7.21 我們已探討其他設有業權註冊的司法管轄區中處理逆權管有的各種不同機制。有一些司法管轄區保留了與適用於非註冊土地的規則相同的規則，[24] 而另一些則完全廢除了逆權管有。[25] 其他司法管轄區則已對逆權管有的應用施加限制。[26]

7.22 在各個已對逆權管有的應用施加限制的司法管轄區中，我們相信《2002 年土地註冊法令（英格蘭與威爾斯）》（Land Registration Act 2002（England and Wales））附表 6 所採納的條文，可以在確保註冊紀錄冊資料完備、保障私有產權，以及令逆權管有的法律在有令人信服的理據時只可用於範圍極窄的情況三者之間取得適度平衡。基礎的原則是，單憑逆權管有不能令註冊產業的業權終絕。

7.23 我們已在第 3 章中列出規管管有業權的註冊事宜的詳細機制。[27] 這機制的要點會在下文列出。除了一些例外情況[28] 和手續規限外，擅自佔地者如已逆權管有產業達十年，便可向註冊官申請註

24 塔斯曼尼亞、維多利亞及西澳大利亞。

25 澳洲首都地區、北領地。

26 英格蘭與威爾斯、新南威爾斯、昆士蘭、南澳大利亞、新西蘭及不列顛哥倫比亞。

27 第 3.16 – 3.28 段。

28 例外情況包括註冊擁有人精神上無行爲能力、土地的產業權是以信託方式持有，又或者註冊擁有人是敵人或是被扣留在敵人的領土。見之前第 3.18 段。

冊爲註冊產業的擁有人。土地註冊處會安排視察有關土地；如擅自佔地者很可能有權提出申請，土地註冊處會向產業的擁有人以及有關人士發出申請通知。[29] 如申請無人反對，擅自佔地者便會獲註冊爲擁有人。

7.24 不過，如果註冊擁有人向擅自佔地者送達反對通知書，則除非擅自佔地者可證明《2002 年土地註冊法令》附表 6 第 5 段所列出的三項條件其中之一，否則申請會失敗。

"第一項條件

(a) 因爲衡平法的不容反悔原則（estoppel），註冊擁有人謀求剝奪申請人的管有權會是不合情理的，及

(b) 在有關情況下，申請人理應獲註冊爲擁有人。

第二項條件

申請人因其他理由而有權獲註冊爲產業的擁有人。[30]

第三項條件

(a) 有關土地毗鄰申請人所擁有的土地，

(b) 上述兩塊土地之間的正確界線未有根據第 60 條予以釐定，

(c) 在截至提出申請當日爲止，申請人（或先前的業權持有人）已逆權管有有關土地最少十年，並且合理地相信有關土地是屬於他的，及

(d) 在提出申請當日之前，申請所關乎的產業已註冊超過一年。"

7.25 在擅自佔地者的申請被拒絕後，註冊擁有人有兩年期限藉以下方式從擅自佔地者取回對有關土地的管有：取得法庭判決，或在取得法庭判決後將擅自佔地者逐出，或對擅自佔地者提出收回管有的法律程序。如業權擁有人沒有按上述其中一種方式行事，而擅自佔地者從提出第一次申請當日起直至該兩年期限的最後一天爲

29 之前第 3.18(iii)段。

30 例如擅自佔地者根據已故擁有人的遺囑或在已故擁有人並無遺囑的情況下享有此權利，又或者擅自佔地者已支付買價但法定產業權卻未有轉移給他。

止，一直逆權管有有關土地，擅自佔地者便可提出第二次註冊申請。如有人對擅自佔地者的第二次註冊申請提出反對，有關事宜會轉交審裁官裁決。在再計算逆權管有所需的十年時間和提出反對的65個工作天期限後，擅自佔地者只有在提出第二次申請前已不受干擾地逆權管有有關土地最少12年，第二次申請才可成功。

7.26 換言之，正如英格蘭法律委員會的相關文件[31]所解釋，在新制度之下，擅自佔地者在佔用有關土地達到所需的年數後，只在以下情況才可獲註冊爲擁有人：

(a) 註冊擁有人失蹤而且無法尋獲——如註冊擁有人放棄土地或已去世但無人採取行動將產業清盤，便會出現這種情況。雖然擅自佔地者在某種意義上可以說是“土地竊賊”，但逆權管有的法律最少可確保土地仍可買賣而不致淪爲荒廢。

(b) 有“註冊紀錄以外”的交易而註冊紀錄冊的資料並不完備——可能發生的例子包括：(i)農夫與鄰居根據一項君子協定交換土地，但未有爲易地一事註冊；以及(ii)註冊擁有人去世，物業交由女兒處理，但未有採取行動爲業權註冊。英格蘭法律委員會解釋，在此類個案中，註冊紀錄冊未能反映業權的真實情況，所以完全有理由讓佔用土地的人註冊爲擁有人。

(c) 根據業權擁有人不容反悔原則（proprietary estoppel），註冊擁有人反對擅自佔地者的申請是不合情理的——申請人須證明(i)註冊擁有人曾以某種方式鼓勵或任由申請人相信擅自佔地者擁有有關土地；(ii)由於相信情況如此，申請人作出了對自己有損的行爲，而註冊擁有人對此事是知情的，以及(iii)註冊擁有人剝奪申請人所具有的權利會是不合情理的。

(d) 申請人是毗鄰物業的擁有人，並在錯誤但合理地相信自己是有關土地的擁有人的情況下已逆權管有了有關土地。

[31] 法律委員會第254號，Cm 4027，1998年9月，第X部；以及法律委員會第271號，HC 114，2001年7月，第XIV部。

建議 3

我們建議，當香港設有註冊業權制度時，單憑逆權管有不應足以令註冊產業的業權終絕。註冊擁有人的權利應受到保障。舉例來說，如註冊擁有人因爲精神上的無行爲能力而不能作出所需的決定，或因爲精神上的無行爲能力或身體上的殘障而不能傳達上述決定，則擅自佔地者的申請不會獲准。不過，上述保障不會是絕對的。在建議的機制之下：

- 業權已註冊的土地的擅自佔地者，只可在連續逆權管有該土地 **10** 年後才有權申請註冊。

- 註冊擁有人會獲通知擅自佔地者已提出申請，並可對申請提出反對。

- 如註冊擁有人未有在規定時間之內提出反對，逆權管有人便可獲註冊。

- 如註冊擁有人提出反對，逆權管有人的申請便會失敗，除非他能證明以下其中一種情況：**(a)** 基於衡平法的不容反悔原則，註冊擁有人謀求剝奪擅自佔地者的管有權是不合情理的，而在該情況下，擅自佔地者理應獲註冊爲擁有人；**(b)** 申請人基於其他原因有權獲註冊爲業權的擁有人；或 **(c)** 擅自佔地者在錯誤但合理地相信自己是毗鄰土地的擁有人的情況下已逆權管有該土地。

- 如擅自佔地者未有被逐出並繼續逆權管有土地再多兩年，則擅自佔地者會有權提出第二次申請，而有關事宜會轉交審裁官裁決。

廢除“隱含特許”原則

7.27　目前的情況是：大體而言，擁有人的意圖“*在實際上無關緊要*”。[32] 然而，如擅自佔地者使用土地的方式與擁有人對該土地的未來計劃相符，法庭以往並不願意裁定存在逆權管有。受勳上訴法官布蘭威（Bramwell LJ）說：

> “如要剝奪原擁有人的管有權而廢止其業權，擅自佔地者的行爲必須與該擁有人爲實現他使用土地的預定目的而享用土地的方式相抵觸。”[33]

在後來的一宗案件中，受勳上訴法官霍德森和賽勒斯（Hodson LJ and Sellers LJ）均同意受勳上訴法官布蘭威上述的附帶意見。[34]

7.28　在 *Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd*[35] 一案中，上訴法庭的多數法官把 *Leigh v Jack* 一案視爲訂立了以下規則：除非擅自佔地者對有爭議的土地的使用與擁有人的目的相抵觸，否則擅自佔地者不能對該土地進行逆權管有。上訴法庭民事法庭副庭長鄧寧勳爵（Lord Denning MR）更進一步裁定，除非擅自佔地者對土地的使用與擁有人的目的相抵觸，否則擅自佔地者會被視爲依據真正擁有人所授予的隱含特許而管有該土地。擅自佔地者在知道土地不屬於他的情況下使用有關土地，暗示他假設擁有人會准許他使用有關土地。在 *Treloar v Nute* 一案，[36] 彭尼奎克爵士（Sir John Pennycuick）在宣告上訴法庭的判決時提及上述案件所確立的原則，但裁定根據該案的事實，有關原則並不適用。

7.29　另一方面，斯萊德法官（Slade J）對隱含特許原則表示懷疑。[37] 英國法律改革委員會（Law Reform Committee）也建議廢除隱含特許原則。[38]《1980 年時效（修訂）法令》（Limitation Amendment Act 1980）實施這項建議，而有關的條文則編訂爲《1980 年時效法令》（Limitation Act 1980）附表 1 第 8(4)段。

32　*Buckinghamshire County Council v Moran* [1990] Ch 623，受勳上訴法官納斯（Nourse LJ）在第 645 頁的判詞。

33　*Leigh v Jack* (1879) 5 Ex D 264, at 273.

34　*Williams Bros Direct Supply Ltd v Raftery* [1958] 1 QB 159，分別在第 169 頁和第 165 及 173 頁的判詞。在 *Tecbild Ltd v Chamberlain* (1969) 20 P & CR 633，受勳上訴法官薩克斯（Sachs LJ）在第 642 頁引用並贊同受勳上訴法官賽勒斯的判詞。

35　[1975] QB 94, CA.　*Gray v Wykeham-Martin and Goode* [1977] Bar Library Transcript No 10A 也採取隱含特許的相同處理方式。

36　[1976] 1 WLR 1295.

37　*Powell v McFarlane* (1979) 38 P & CR 452，第 484 至 485 頁。

38　Law Reform Committee，《訴訟時效最後報告書》，（1977 年）Cmnd 6923（司法大臣在 1952 年成立法律改革委員會）。

"就裁定佔用土地的人是否在逆權管有該土地一事而言，不得單憑該人的佔用與擁有人目前或未來對該土地的享用沒有抵觸這一事實，便假定該人的佔用因法律的隱含規定而得到後者准許。

如根據某個案的實際事實，裁斷某人對任何土地的佔用得到擁有人的隱含准許是有理可據的，本條不得視爲影響上述的裁斷。"

7.30 應用"隱含特許"原則有兩方面的困難。首先，該項原則需要考慮紙上業權擁有人打算把土地用作甚麼用途。在很多個案中，業主基本上是甚麼都沒有做，因此要確定業主的意圖會很困難。就這些個案而言，紙上擁有人其後自圓其說的陳述並無多大價值。在其他情況下，因爲擁有人不知道土地正在被人逆權管有，所以並沒有關於擁有人意圖的證據。在另一些個案中，紙上擁有人更是無法找到。除了難以確定擁有人的意圖外，某項用途是否與紙上擁有人的意圖"相抵觸"也是一個有爭議的問題。

7.31 另一個應用"隱含特許"原則的難處，是該項原則已被 *Pye* 案推翻。*Pye* 案澄清了問題的關鍵在於管有的事實，而不是管有的性質。雖然 *Pye* 案在香港並無約束力，但該案提出了令人信服的理由。*Pye* 案解釋，*Powell v McFarlane* 一案（1977 年）已準確闡明有關法律，並說明了"事實管有"和"管有意圖"這兩方面的要求。況且，*Powell v McFarlane* 一案考慮了《1939 年時效法令》，而香港的相關條文仍是以該 1939 年法令爲依據。現在英格蘭《1980 年時效法令》已說明了有關要求，把問題解釋得一清二楚。

7.32 因此，如根據《1980 年時效法令》附表 1 第 8(4)段制定一項條文，可清楚明確地表明隱含特許原則在香港不再適用。我們建議應在香港制定一項與《1980 年時效法令》附表 1 第 8(4)段相類似的條文。

建議 4

我們建議"隱含特許"原則應予廢除，並建議應在香港制定一項條文，訂明：

"就裁定佔用土地的人是否在逆權管有該土地一事而言，不得單憑該人的佔用與擁有人目前或未來對

該土地的享用沒有抵觸這一事實，便假定該人的佔用因法律的隱含規定而得到後者准許。”

*Chan Tin Shi & Others v Li Tin Sung & Others*一案的裁決[39]

7.33 在前一章中，我們討論了終審法院在 *Chan Tin Shi* 案的裁決。[40] 該案涉及《新界土地契約（續期）條例》（第 150 章）第 6 條。上述條例在《聯合聲明》簽訂時通過，目的是使所有將在 13 年內屆滿的新界土地契約能夠續期至 2047 年 6 月 30 日。一些在批租土地地段的擅自佔地者提出申請，要求法庭作出他們已逆權管有有關土地超過 20 年的聲明，但契約持有人反對有關申請，理由是契約持有人可根據該條例所設立的新業權而非現有業權，令有關申索失敗。

7.34 上訴法庭[41] 判契約持有人勝訴。副庭長羅傑志表示：

> “我們或可說關於時效的法規會帶來實益，因此應以寬鬆而非嚴格的方式予以解釋。但本席認爲，這樣並不表示對與土地擁有權有關但與時效完全無關的法規的解釋，必須有利於擅自佔地者。他們畢竟是以侵入者的身分開始佔用土地，所以是犯錯者。由於擅自佔地者在佔用土地時不會繳交租金，而《續期條例》的目的之一，就是制定一些爲保障最終業主（即政府）的收入而議定的條文，因此這樣的解釋就顯得更爲合理。”[42]

7.35 在上訴時，終審法院所要考慮的問題是《新界土地契約（續期）條例》（第 150 章）第 6 條是否具有就政府租契設立新產業權的效力。在解決這個問題時，非常任法官賀輔明勳爵和烈顯倫應用字面解釋的規則解釋《續期條例》第 6 條英文本“extended”一詞。曾有論者指出，[43] 可以從《續期條例》中文本所使用的“續期”一詞，得知“extended”一詞的準確涵義。[44] 如連同《聯合聲明》附件三的條文一起理解，便可清楚知道“可續期”的涵義是指“renewable”，因此“可續期”的英文翻譯似乎與此不符。

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39 (2006) 9 HKCFAR 29; [2006] 1 HKLRD 185.

40 見之前第 6.52 段。

41 副庭長羅傑志及上訴法庭法官郭美超和袁家寧。

42 第 21 段。

43 黃佩翰，“新界僭佔人的業權：Extended 與 Renewed 的辯證”《香港律師》，2006 年 5 月，第 34 至 40 頁。

44 《基本法》已把中文的地位提升爲法例的主要語文：見第九條。

7.36　終審法院裁定《新界土地契約（續期）條例》的效力，是重寫根據原有政府租契所批出的年期，而不是在原有的租契年期屆滿時向政府租契授予新的年期。這項裁決產生一個不合情理的結果。由於年期只是續期而沒有設立新的產業權，致使舊有的年期僅是簡單地延續至 2047 年 6 月 30 日，因此原擁有人會繼續有法律責任每年按應課差餉租值的 3% 繳交地租。如擅自佔地者沒有繳交地租或潛逃，原擁有人便可能被判須負法律責任。非常任法官烈顯倫在第 34 至 55 頁解釋這個不合情理的情況：

> "法庭作出聲明確立擅自佔地者的管有業權後，擅自佔地者可藉改善土地而大大提高物業的價值。這樣會增加該物業的應課差餉租值，但每年按應課差餉租值的 3% 繳交地租的責任，卻落在已被剝奪管有權的註冊擁有人而非擅自佔地者身上。有關物業位於大埔邊緣，包括約 121,000 平方呎的土地。雖然部分土地目前空置，其餘則用作低級耕種，但沒有甚麼能阻止上訴人〔擅自佔地者〕把整個地段圍上並改建爲豪華的鄉郊住宅，又免負任何繳交地租的責任。……"

7.37　爲解決這個不合情理的情況，我們曾考慮應否制定一項法定推定，表明擅自佔地者在時效期內剝奪紙上擁有人的管有權後，須根據政府租契視爲有關土地的紙上業權擁有人的承讓人，以使擅自佔地者須就契諾而負上法律責任。我們在仔細考慮這項建議後，認爲不適宜這樣做。這是因爲建議的法定轉讓會牽涉複雜問題，也因爲我們在反覆思量後，認爲這個不合情理的情況並不如表面上那麼嚴重。夏正民法官在關於逆權管有概念是否合憲的司法覆核中表示：

> "15.　<u>實際上，影響並不總是如乍看來那麼嚴重</u>。《差餉條例》（第 515 章）（原文照錄）規定，契約持有人和物業單位的佔用人均有法律責任繳交差餉；如沒有協議，差餉須由佔用人繳交。對於差餉和地租，契約持有人均有權要求佔用人償還契約持有人所繳交的款額。當然，契約持有人在要求佔用人償還款項時，必須接受佔用人的狀況就是一如他們看見的。無疑很多時，契約持有人會發現佔用人是一名幌子而已。……
>
> 159.　在有關機制下，契約持有人不但失去管有業權；他在失去管有業權後，還須繼續負上關於土地的

責任：他或須繳交差餉，支付地租，並履行其他契諾責任。正如本席在本判詞的開頭（第 15 段）說：不利情況或不如乍看來那麼嚴重。……”[45]（表示強調的底線後加）

建議 5

小組委員會知道，已被剝奪管有權的註冊擁有人須繼續就政府租契的契諾負上法律責任，而這樣不合情理的情況是有可能出現的。然而，我們不建議制定一項法定推定或法定轉讓，使逆權管有人變成須根據政府租契的契諾而負上法律責任。

測量和土地界線問題

7.38 我們在第 4 章闡述新界的測量和土地界線問題，並在第 5 章討論解決土地界線問題的建議。[46] 普遍認爲新界的土地測量工作備受歷史問題困擾，要根據圖則斷定土地界線總是困難重重。不論法定界線在地面上的真正位置如何，逆權管有的法律可被視爲解決有關問題的可行辦法。

7.39 有一點應予注意，“逆權管有”的案件實際上是源於不準確的“丈量約份地圖”或新批租約圖則。丈量約份地圖或新批租約圖則上的界線無法輕易在地面上識別出來。儘管個別的土地擁有人可能會安排專人繪製測量圖，並把有關圖則提交土地註冊處或測繪處，但這些測量圖沒有指向丈量約份地圖或新批租約圖則作交互參照，並且不獲賦予確定的法律地位。曾有人建議對新界土地重新進行全面測量，認爲這樣可解決有關問題。由於蒙受不利的人可能會藉訴訟或其他方法討回損失，因此小組委員會認爲單單重新進行測量並不能解決有關問題。政府將需要制定法例，而新界的土地界線問題最好是在《土地業權條例》的實施過程中一併解決。

建議 6

我們建議，應促請政府加倍努力解決新界的土地界線問題。然而，我們認爲單單對界線重新進行全面測

[45] 裕傑發展有限公司訴律政司司長（HCAL 32/2006）。

[46] 見之前第 5.9 至 5.13 段。

量並不能解決有關問題，因爲按重新測量的界線而蒙受損失或不利的人可能不會接受新的界線。在我們看來，新界的土地界線問題，最好是在《土地業權條例》的實施過程中一併解決。

Common Luck 案的裁決

7.40 我們在第 1 章[47] 討論了 *Common Luck Investment Ltd v Cheung Kam Chuen* 一案。[48] 該案定下了關於以下問題的法律：如按揭人拖欠付款但仍然管有按揭物業，承按人收回物業管有權的權利在何時根據《時效條例》第 7(2)條喪失時效？該案的案情、判決和一些學術分析已在第 1 章闡述。

7.41 香港律師會的物業委員會曾就上述問題發表意見。[49] 物業委員會的委員在考慮另一項問題[50] 時指出，就按揭的各方的關係而言，法庭對《時效條例》條文的解釋有混亂或含糊之處。他們的意見如下：

- 在一些案件中，[51] 按揭人能依據《時效條例》第 7 及 19 條禁制承按人提出申索，但終審法院卻在 *Common Luck Investment Ltd v Cheung Kam Chuen* 一案中採用不同的方式解釋按揭人根據《時效條例》所享有的權利，並得出完全不同的結論。

- 物業委員會關注到，如終審法院的裁決是正確的，承按人只要沒有做任何事情以強制執行其權利，不履行責任的管有按揭人就會被視爲以特許持有人的身分佔用物業，那麼承按人針對按揭人而取得管有權的權利，永遠都不會根據《時效條例》的條文而受法規禁制。另一方面，如管有承按人有權依據《時效條例》第 14 條聲稱按揭人的衡平法贖回權已受法規禁制，這就會產生按揭人在所有情況都是輸家的不妥當情況。

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47 見第 1.31 至 1.38 段。

48 [1999] 2 HKC 719.

49 CB(2) 1297/99-00 (01)，2000 年 3 月 2 日。

50 在承按人、按揭文件或兩者都不知所蹤的情況下，依據《時效條例》的條文而尋求作出按揭不再有效的聲明的方法。

51 *Tang Kun Nin Tony v Tang Chun Chack*（HCMP 761/1991，沒有彙報）[1992] HKLY 588；*Castle City Ltd v Choi Yue Development Ltd* [1995] 2 HKC 593；*Broada Ltd & Another v Chow Cheuk Yin* [1997] 3 HKC 168。在每宗案件中，承按人都因爲《時效條例》第 7 及 19 條而被禁止提出強制執行按揭的訴訟。

- 物業委員會發覺難以把終審法院的裁決與其他裁決和《時效條例》的條文協調。他們認爲這是適當時間向政府表達他們所關注的問題，使政府能仔細檢討終審法院就《時效條例》的條文所作的裁決。

7.42 小組委員會同意物業委員會的觀點。小組委員會亦大致贊同夏普載於本諮詢文件之前的分析。[52] 就《時效條例》而言，存在逆權管有的唯一要求，是針對管有有關土地的人的訴訟因由應已產生。顯而易見，按揭人如拖欠付款，便已符合上述要求。因此，在時效期屆滿後，承按人的權利會喪失時效。

建議 7

就承按人針對按揭人而取得按揭物業管有權的權利而言，我們建議應通過法例，以清楚說明時效期在按揭人不履行其責任當日起開始計算。

逆權管有對祖地的影響

7.43 新界的一些土地是由“祖”所擁有。“祖”是家庭組織，爲敬奉祖先的目的而擁有土地。[53] 在一個“祖”中，同一祖先的所有男性後裔都有權在生前享有土地權益。

7.44 我們曾在先前的章中探討逆權管有法律在祖地的適用範圍。[54] 根據《時效條例》，如以信託形式持有的土地被陌生人逆權管有，受託人對法定產業的業權並不受影響，直至***所有***受益人的權益都已喪失時效爲止。再者根據《時效條例》，18 歲以下的土地擁有人展開收回土地的訴訟的時效期不是訴訟權產生後的 12 年，而是該擁有人滿 18 歲後的六年。我們討論了“祖”是爲當其時的成員而設的信託，而“祖”的現有成員在土地享有《時效條例》第 10(1)條所指的衡平法權益。由於“祖”的成員具有受益人的身分，因此他們可向祖地的逆權管有人索回管有權。每當有一名新成員出生，就

52 見第 1.33 及 1.36 至 1.38 段。

53 “祖”是傳統的土地信託而不是法律實體（*Tang Yau Yi Tong v Tang Mou Shau Tso* [1996] 2 HKLR 212）。

54 見之前第 6.58 至 6.59 段。

有一項新的衡平法權益在祖地產生，而新的時效期也會開始計算。[55] 因此，根據現有法律，要在祖地確立逆權管有是不可能的。[56]

建議 8

我們知道在實際的情況下不能在祖地確立逆權管有。然而，我們看不出有需要改變關於這個問題的法律。

*Fairweather v St Marylebone Property Co Ltd*一案的裁決

7.45 在前一章中，[57] 我們討論了 *Fairweather* 案[58] 的裁決。該案裁定，在時效期屆滿而承租人的業權已被擅自佔地者終絕後，承租人可藉著把批租契退回而使業主能夠索回對土地的管有。我們討論了支持 *Fairweather* 案裁決的理由，以及對該裁決的批評。至於因出租人和承租人的共謀行爲而令人覺得有不公平的情況（這是批評 *Fairweather* 案的焦點），有關問題在香港並不存在，因爲身爲出租人的政府一直拒絕接受“管有業權地段”作退回和交換之用。

7.46 除了上述的法律爭論外，*Fairweather* 案的裁決也在香港產生了政府不接受“管有業權地段”作退回之用這個實際問題。*Fairweather* 案的裁決再次明確肯定以下原則：成功的擅自佔地者不能成爲業權已被終絕的租客的承讓人。由於從擅自佔地者得到業權的人不會享有由政府租契所批出的年期，因此政府不願意接受該人退回土地。在一些個案中，發展商已爲重新發展而集合多幅土地後，卻可能遇到無法找到其中幾幅土地的紙上業權擁有人的問題。他所能做的只是取得管有人（擅自佔地者）的業權。由於擅自佔地者不能把政府租契轉讓予該發展商，因此該發展商也不能把具有擅自佔地者業權的土地退回給政府，以獲得政府重批租契作重新發展之用。結果是新界涉及“管有業權地段”的換地活動陷於停頓。

7.47 因此，有土地發展商建議修訂有關法律，使成功的擅自佔地者被當作藉法定轉讓而獲轉讓他已取得擅自佔地者業權的土地的批租契。小組委員會的多數委員不贊同這項建議。發展商在這方面所遇到的困難，其實不比以下情況困難：發展商想取得一幅位置優

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55 《時效條例》第 7(2)及 22 條。

56 但是，“祖”能夠取得土地的管有業權。*Chow Tin Sang v Citehero International Ltd* HCA 2315/2009，沒有彙報。

57 見第 6.23 至 6.42 段。

58 [1963] AC 510.

越的土地作重新發展之用，但卻無法說服該幅土地的紙上業權擁有人。無論如何，如已被剝奪管有權的土地的直接業權是在政府土地承租人的租客或分租客手上，當作進行的法定轉讓也無法解決有關問題。小組委員會的多數委員也看不出有任何理由，將適用於被剝奪管有權的土地是由政府土地承租人從政府直接持有這一情況的法律，與適用於土地是由根據私人租賃協議持有這一情況的法律區分開來。

7.48　亦曾有人提出建議，政府如認爲不適宜接受“管有業權地段”作退回和交換之用，可考慮向這些地段發出“不反對書”或“暫准書”，以解決 *Fairweather* 案所引致的問題。但是，如有關的出租人不是政府而是一個分租客，上述建議便不會適用。目前，我們看不出有甚麼理據，支持採納一個區分發展商和其他土地使用者的兩級制度。

7.49　因此，雖然我們知道發展商的憂慮是真實和有理由的，但我們不會在這一問題上提出建議。小組委員會反而想強調上文所論述的 *Fairweather* 案的裁決在施行上所引起的問題，並促請政府考慮制定適當的行政措施解決有關問題。

總結

7.50　小組委員會邀請公眾就上述各項建議發表意見。上述各項建議代表小組委員會檢討逆權管有法律的一項嘗試。香港目前依賴的契據註冊制度是受到 1844 年制定的《土地註冊條例》（第 128 章）所管制，而這項檢討是因應這個背景而進行的。我們希望當局爲《土地業權條例》（第 585 章）進行持續和範圍更廣泛的檢討時，可考慮我們就逆權管有所提出的觀點。

第 8 章　建議摘要

（本諮詢文件下列建議的討論見第 7 章）

<u>建議 1</u>：　逆權管有應否在現行的非註冊土地制度之下予以保留？（第 7.6 – 7.17 段）

經審慎考慮香港的情況，包括現有的以管有爲基礎的非註冊土地機制、新界土地界線問題，以及法庭已裁定《時效條例》的現有逆權管有條文符合《基本法》此一事實，我們認爲現有的逆權管有條文應予保留，因爲這些條文可爲部分關於土地業權的問題提供實際解決方法。

<u>建議 2</u>：　逆權管有應否在未來的註冊土地制度之下予以保留？（第 7.18 – 7.20 段）

我們建議，逆權管有的法律應在未來的註冊土地制度之下重新訂定。註冊本身應是針對逆權管有的一種保障方式，但這保障不應是絕對的。這是爲了達到註冊土地制度的目的 —— 只有註冊能夠轉移或賦予業權。

<u>建議 3</u>：　在註冊土地制度之下處理逆權管有申索的建議機制概要（第 7.21 – 7.26 段）

我們建議，當香港設有註冊業權制度時，單憑逆權管有不應足以令註冊產業的業權終絕。註冊擁有人的權利應受到保障。舉例來說，如註冊擁有人因爲精神上的無行爲能力而不能作出所需的決定，或因爲精神上的無行爲能力或身體上的殘障而不能傳達上述決定，則擅自佔地者的申請不會獲准。不過，上述保障不會是絕對的。在建議的機制之下：

- 業權已註冊的土地的擅自佔地者，只可在連續逆權管有該土地 10 年後才有權申請註冊。
- 註冊擁有人會獲通知擅自佔地者已提出申請，並可對申請提出反對。
- 如註冊擁有人未有在規定時間之內提出反對，逆權管有人便可獲註冊。

- 如註冊擁有人提出反對，逆權管有人的申請便會失敗，除非他能證明以下其中一種情況：(a) 基於衡平法的不容反悔原則，註冊擁有人謀求剝奪擅自佔地者的管有權是不合情理的，而在該情況下，擅自佔地者理應獲註冊爲擁有人；(b) 申請人基於其他原因有權獲註冊爲業權的擁有人；或(c) 擅自佔地者在錯誤但合理地相信自己是毗鄰土地的擁有人的情況下已逆權管有該土地。

- 如擅自佔地者未有被逐出並繼續逆權管有土地再多兩年，則擅自佔地者會有權提出第二次申請，而有關事宜會轉交審裁官裁決。

<u>建議 4</u>： 廢除“隱含特許”原則（第 7.27 – 7.32 段）

我們建議“隱含特許”原則應予廢除，並建議應在香港制定一項條文，訂明：

“就裁定佔用土地的人是否在逆權管有該土地一事而言，不得單憑該人的佔用與擁有人目前或未來對該土地的享用沒有抵觸這一事實，便假定該人的佔用因法律的隱含規定而得到後者准許。”

<u>建議 5</u>： *Chan Tin Shi & Others v Li Tin Sung & Others* 一案的裁決（第 7.33 – 7.37 段）

小組委員會知道，已被剝奪管有權的註冊擁有人須繼續就政府租契的契諾負上法律責任，而這樣不合情理的情況是有可能出現的。然而，我們不建議制定一項法定推定或法定轉讓，使逆權管有人變成須根據政府租契的契諾而負上法律責任。

<u>建議 6</u>： 測量和土地界線問題（第 7.38 – 7.39 段）

我們建議，應促請政府加倍努力解決新界的土地界線問題。然而，我們認爲單單對界線重新進行全面測量並不能解決有關問題，因爲按重新測量的界線而蒙受損失或不利的人可能不會接受新的界線。在我們看來，新界的土地界線問題，最好是在《土地業權條例》的實施過程中一併解決。

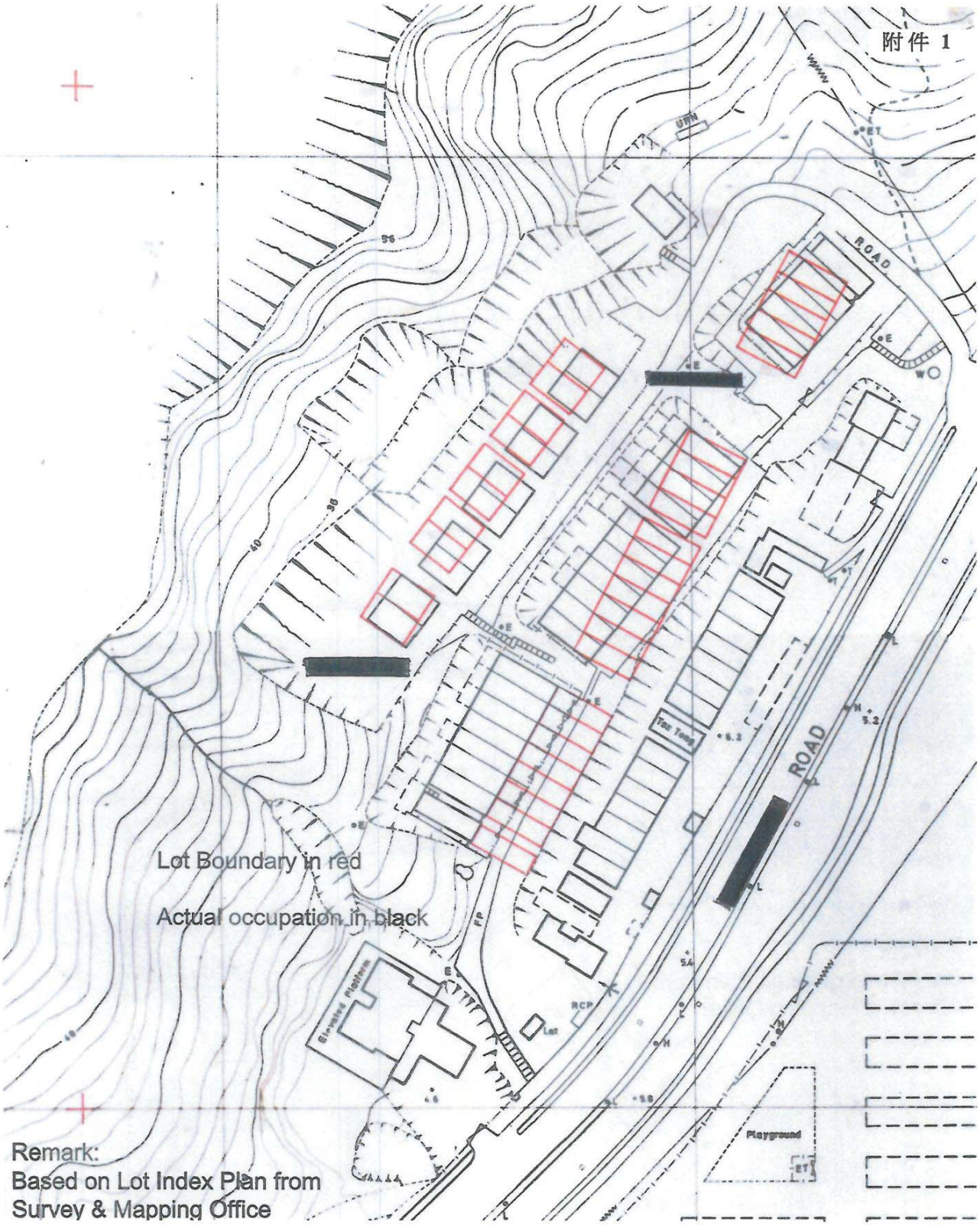
<u>建議 7</u>： *Common Luck* 案的裁決（第 7.40 – 7.42 段）

就承按人針對按揭人而取得按揭物業管有權的權利而言，我們建議應通過法例，以清楚說明時效期在按揭人不履行其責任當日起開始計算。

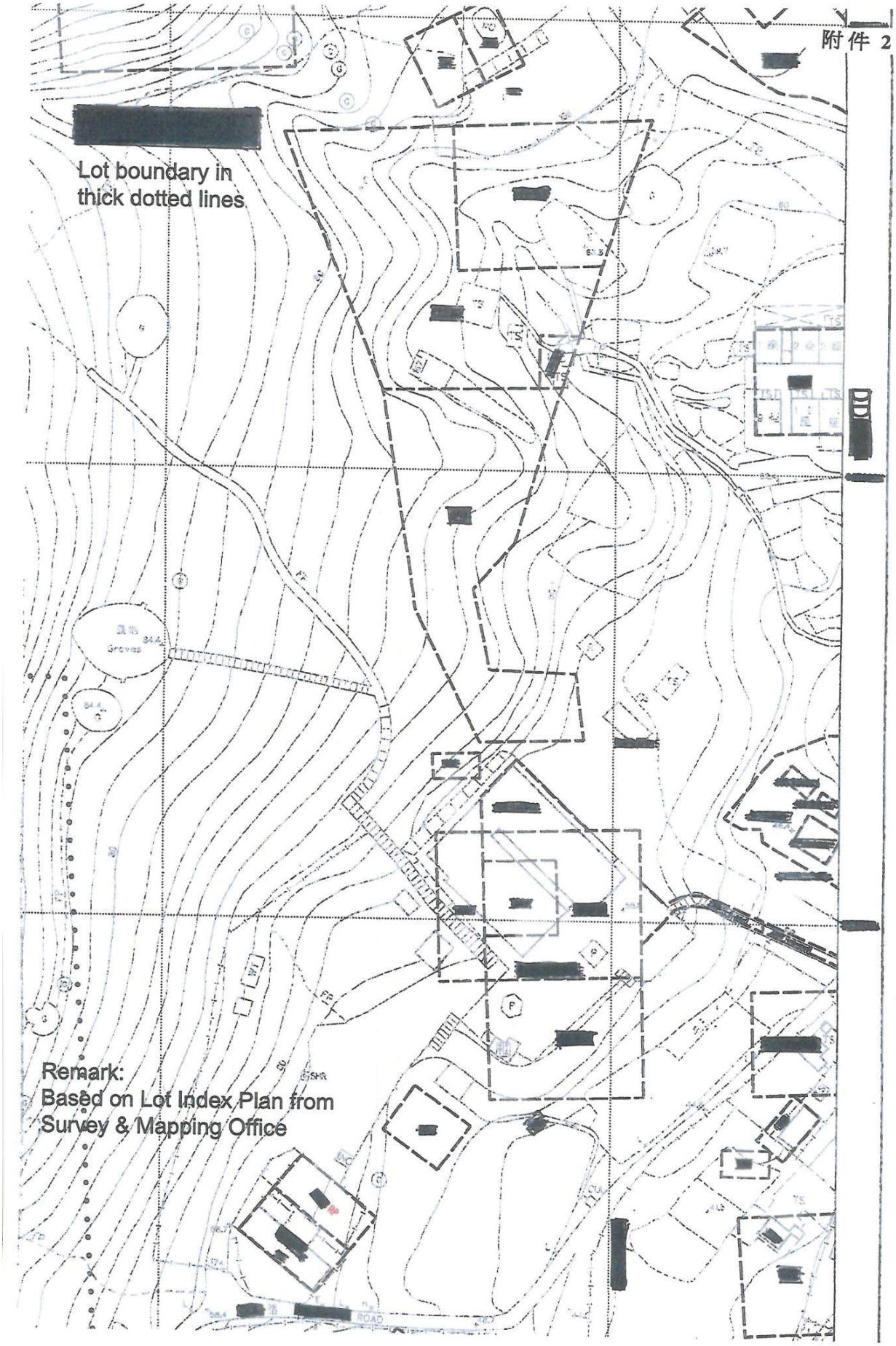
<u>建議 8</u>：　逆權管有對祖地的影響（第 7.43 – 7.44 段）

我們知道在實際的情況下不能在祖地確立逆權管有。然而，我們看不出有需要改變關於這個問題的法律。

附件 1



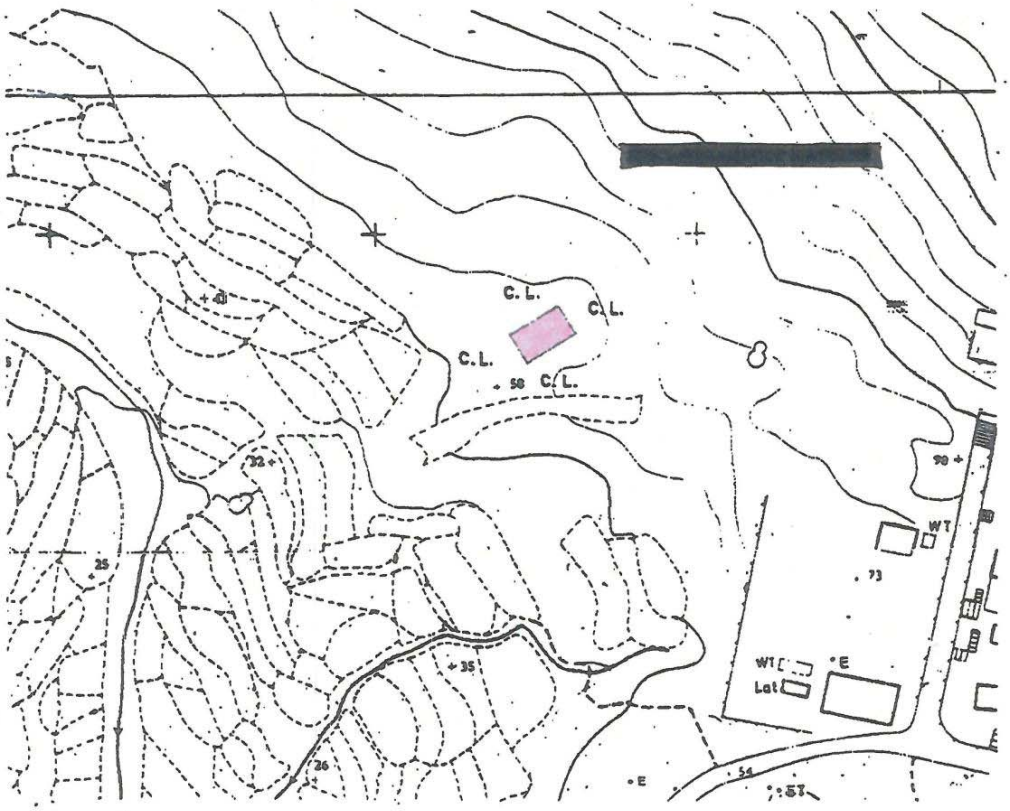
Remark:
Based on Lot Index Plan from
Survey & Mapping Office


Lot boundary in
thick dotted lines
Remark:
Based on Lot Index Plan from
Survey & Mapping Office

附件 3a

PROPOSED LEASE

LOT No. [redacted] IN D.D. [redacted]

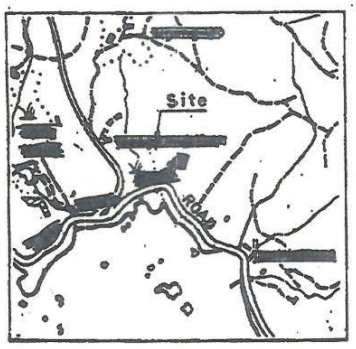


Coloured pink area 65.04 m^2 or 700 sq. ft. (about)

(Subject to survey) SCALE 1 : 1 200 (Heights in feet)

Metres 20 10 0 20 40 60 80 100 120 140 Metres

LOCATION



Scale 1:25 000

Grantee's signature_____

( )

Date_____

_____

District Officer, [redacted]

[redacted] District Office
New Territories

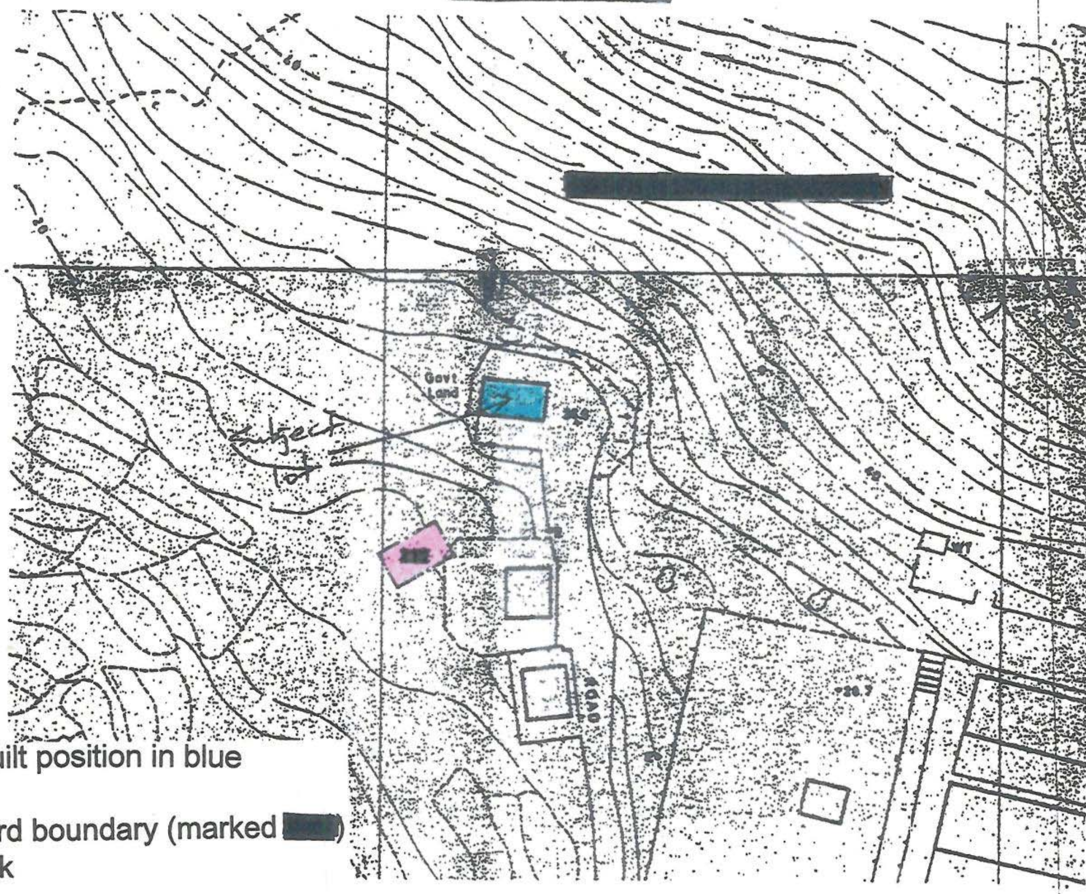
Drawing No. [redacted]

File No. [redacted] Survey Sheet No. [redacted]

附件 3b

PROPOSED EXCHANGE

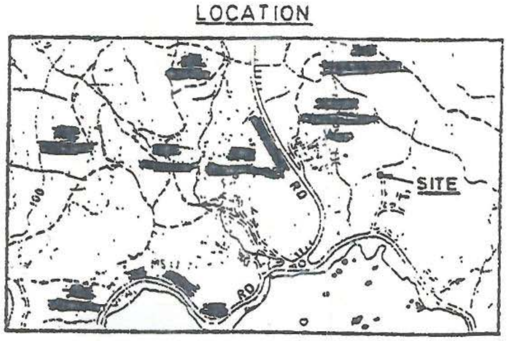
D. D. [redacted]



SCALE 1:1 000

METRES 20 0 20 40 60 80 100 METRES

LOCATION



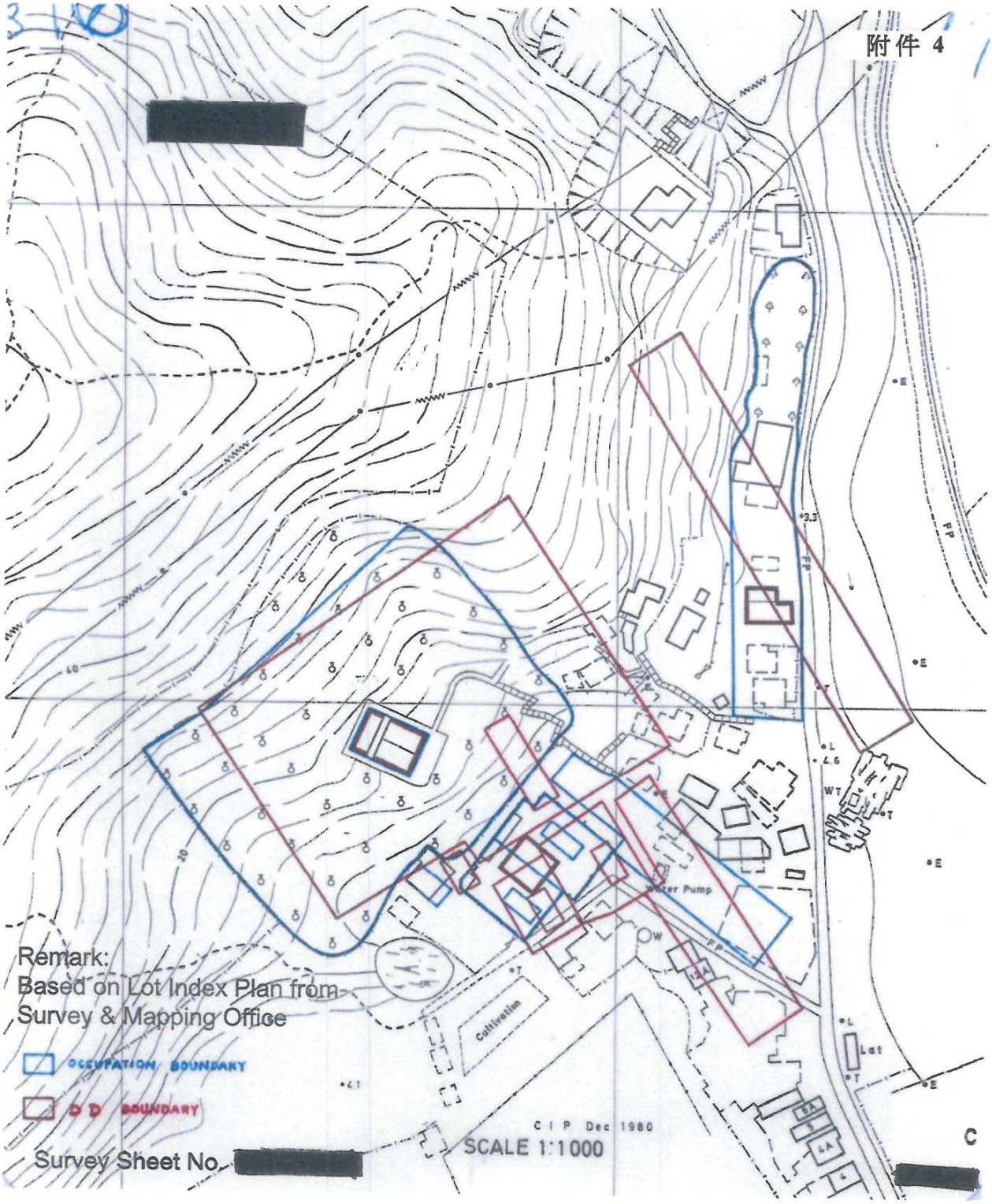
SCALE 1:20 000

Area to be surrendered
Lot No. [redacted] 65.04 m^2 (about)
Non-industrial (in pink)

Area to be regranted
65.04 m^2 (about) (in blue)

PROVISIONAL PLAN - SUBJECT TO SURVEY District Lands Office, [redacted] Lands Department Plan prepared by District Survey Office	File Ref. No. DLO/[redacted] Survey Sheet No. [redacted] Layout Plan No. — Engineering Drg. No. — PLAN No. [redacted]

附件 4


[redacted]
Water Pump
Cultivation
WT
Remark:
Based on Lot Index Plan from
Survey & Mapping Office
OCCUPATION BOUNDARY
D D BOUNDARY
Survey Sheet No. [redacted]
C I P Dec 1980
SCALE 1:1000
C
[redacted]

本條例旨在綜合及修訂有關訴訟時效的法律。

(由2010年第17號第112條修訂)

[1965年6月11日]

第I部

導言

1. 簡稱

本條例可引稱為《時效條例》。

2. 釋義

(1) 在本條例中，除文意另有所指外 ——

"人身傷害" (personal injuries)包括任何疾病及對個人的身體及精神狀態的損傷，而"傷害" (injury)亦須據此解釋； *(由1976年第67號第2條代替)*

"土地" (land)包括有體可繼承產及租費，以及其中的任何法定或衡平法產業權或權益(包括售賣以售產信託方式所持有的土地的所得收益中的權益)，但除以上所述者外，並不包括任何無體可繼承產；

"非土地遺產" (personal estate)及"非土地財產" (personal property)不包括土地實產；

"法院" (the court)就訴訟而言，指該訴訟已經或擬向其提出的法院；

"信託" (trust)、"受託人" (trustee)及"售產信託" (trust for sale)的涵義，與《受託人條例》(第29章)中各詞的涵義相同；

"租金" (rent)包括租費及地租；

"租費" (rentcharge)指就土地而支取或繳付的任何年金或定期款項，但地租或土地按揭的利息除外；

"船舶" (ship)包括各類非單靠槳力推進而用於航行的船隻；

"訴訟" (action)包括在法院進行的任何法律程序。

(2) 任何人如經由、透過或藉着另一人或經由另一人的作為而有權享有所申索的權利，則須當作透過該另一人而申索：但如某人是憑藉一項特別指定受益的權力而有權享有任何產業權或權益，則該人並不當作透過指定人而申索。

(3) 在本條例中，凡提述收回土地的訴訟權，即包括提述行使有關土地的管有權的權利，如屬租費的情況，則包括提述為追討欠繳租金而扣押的權利，而凡提述提出上述訴訟，即包括提述上述的行使管有權或作出上述的扣押。

(4) 如屬租費的情況，在本條例中凡提述土地的管有，須解釋為提述有關租金的收取，而凡提述剝奪或中止管有土地的日期，須解釋為提述最後收取租金的日期。

(5) 在本條例第III部中，凡提述訴訟權，即包括提述訴訟因由，以及收取藉任何財產的按揭或押記而獲得保證的款項的權利或追討售賣土地所得收益的權利，亦包括提述於某死者的非土地遺產中收取任何份額或權益的權利；又凡提述訴訟權的產生日期 ——

(a) 如屬清算帳項的訴訟，須解釋為提述所申索的清算帳項所涉的事項的發生日期；

(b) 如屬基於某項判決的訴訟，須解釋為提述該項判決成為可予強制執行的日期；

(c) 如屬追討欠繳租金或利息的訴訟，或追討就欠繳租金或利息所引致的損害賠償的訴訟，須解釋為提述該項租金或利息到期應繳的日期。

(由1991年第31號第2條修訂)

[比照 1939 c. 21 s. 31 U.K.；比照 1954 c. 36 s. 2(3) U.K.]

To consolidate and amend the law relating to the limitation of actions.

(17 of 2010 s. 112)

[11 June 1965]

PART I

PRELIMINARY

1. Short title

This Ordinance may be cited as the Limitation Ordinance.

2. Interpretation

(1) In this Ordinance, unless the context otherwise requires—

"action" (訴訟) includes any proceeding in a court of law;

"the court" (法院), in relation to an action, means the court in which the action has been, or is intended to be, brought;

"land" (土地) includes corporeal hereditaments and rentcharges, and any legal or equitable estate or interest therein, including an interest in the proceeds of the sale of land held upon trust for sale, but save as aforesaid does not include any incorporeal hereditament;

"personal estate" (非土地遺產) and "personal property" (非土地財產) do not include chattels real;

"personal injuries" (人身傷害) includes any disease and any impairment of a person's physical or mental condition, and "injury" (傷害) shall be construed accordingly; *(Replaced 67 of 1976 s. 2)*

"rent" (租金) includes a rentcharge and a rent service;

"rentcharge" (租費) means any annuity or periodical sum of money charged upon or payable out of land, except a rent service or interest on a mortgage on land;

"ship" (船舶) includes every description of vessel used in navigation not propelled solely by oars;

"trust" (信託), "trustee" (受託人) and "trust for sale" (售產信託) have the same meanings respectively as in the Trustee Ordinance (Cap. 29).

(2) A person shall be deemed to claim through another person, if he became entitled by, through, under, or by the act of that other person to the right claimed:
Provided that a person becoming entitled to any estate or interest by virtue of a special power of appointment shall not be deemed to claim through the appointer.

(3) References in this Ordinance to a right of action to recover land shall include references to a right to enter into possession of the land or, in the case of rentcharges, to distrain for arrears of rent, and references to the bringing of such an action shall include references to the making of such an entry or distress.

(4) In the case of rentcharges, references in this Ordinance to the possession of land shall be construed as references to the receipt of the rent, and references to the date of dispossession or discontinuance of possession of land shall be construed as references to the date of the last receipt of rent.

(5) In Part III of this Ordinance, references to a right of action shall include references to a cause of action and to a right to receive money secured by a mortgage or charge on any property or to recover proceeds of the sale of land, and to a right to receive a share or interest in the personal estate of a deceased person; and references to the date of the accrual of a right of action shall—

(a) in the case of an action for an account, be construed as references to the date on which the matter arose in respect of which an account is claimed;

(b) in the case of an action upon a judgment, be construed as references to the date on which the judgment became enforceable;

(c) in the case of an action to recover arrears of rent or interest, or damages in respect thereof, be construed as references to the date on which the rent or interest became due.

(Amended 31 of 1991 s. 2)

[cf. 1939 c. 21 s. 31 U.K.; 1954 c. 36 s. 2(3) U.K.]

第II部

PART II

不同類別訴訟的時效期

3. 第II部須受第III部規限

(1) 本部訂明提出本部所述各類別訴訟的一般時效期。

(2) 一般時效期可按照第III部而予以延長或豁除。

(由1991年第31號第3條代替)

[比照 1980 c. 58 s. 1 U.K.]

關乎合約及侵權行為的訴訟以及某些其他訴訟

4. 有關合約及侵權行為的訴訟以及某些其他訴訟的時效

(1) 以下訴訟，於訴訟因由產生的日期起計滿6年後，不得提出——

(a) 基於簡單合約或侵權行為的訴訟；

(b) 強制執行擔保的訴訟；

(c) 強制執行某項裁決的訴訟(如有關的原受仲裁協議並非藉經蓋印的文書作出者)；

(d) 追討憑藉任何條例或英國成文法則而可予追討的款項的訴訟，但有關款項如屬罰金或沒收款項或屬作為罰金或沒收款項的款項則除外：
但——

(i) *(由1991年第31號第4條廢除)*

(ii) 本款的規定，並不視作提述任何第6條適用的訴訟。

(2) 清算帳項的訴訟，不得就任何於訴訟展開時已發生超過6年的事項而提出。

(3) 基於蓋印文據的訴訟，不得於訴訟因由產生的日期起計滿12年後提出：
但本款並不影響本條例其他條文已訂明較短時效期的訴訟。

(4) 基於任何判決的訴訟，不得於該判決成為可予強制執行的日期起計滿12年後提出；而就任何判定債項的欠繳利息，則不得於利息到期應繳的日期起計滿6年後追討。

(5) 追討憑藉任何條例或英國成文法則可追討的罰金或沒收款額，或作為罰金或沒收款額的款項，有關訴訟不得於訴訟因由產生的日期起計滿2年後提出：
但就本款而言，"罰金"(penalty) 一詞並不包括任何人就某項刑事罪行被定罪後可處的罰款。

(6) 第(1)款適用於追討海員工資的訴訟，但除此之外，本條並不適用於在高等法院海事司法管轄權範圍以內，並可對物強制執行的訴訟因由。

(7) 本條並不適用於強制履行合約、強制令或其他衡平法濟助的申索，但如法院以類推方式引用本條任何條文，方式一如《1980年時效法令》*(1980 c. 58 U.K.)所載的對應成文法則在英國法院被引用者，則屬例外。 *(由1991年第31號第4條修訂)*

(8) *(由1991年第31號第4條廢除)*

[比照 1939 c. 21 s. 2 U.K.；比照 1954 c. 36 s. 2(1) U.K.]

編輯附註：

* "《1980年時效法令》"乃"Limitation Act 1980"之譯名。

5. 連續侵佔情況下的時效以及被侵佔貨品擁有人的所有權的終絕

(1) 凡就實產的侵佔或錯誤扣留而有訴訟因由在任何人方面產生，而在該人收回該實產的管有之前，有進一步的侵佔或錯誤扣留出現，則自關乎原先侵佔或扣留的訴訟因由產生起計滿6年後，不得就該進一步侵佔或扣留而提出訴訟。

(2) 凡上述的訴訟因由在任何人方面產生，而提出該訴訟或就上述進一步的侵佔或錯誤扣留提出訴訟的訂明期限已經屆滿，且該人在該期限前並未收回該實產的管有權，則該人對於該實產的所有權即告終絕。

[比照 1939 c. 21 s. 3 U.K.]

PERIODS OF LIMITATION FOR DIFFERENT CLASSES OF ACTION

3. Part II to be subject to Part III

(1) This Part prescribes the ordinary limitation periods for bringing actions of the various classes mentioned in this Part.

(2) The ordinary limitation periods are subject to extension or exclusion in accordance with Part III.

(Replaced 31 of 1991 s. 3)

[cf. 1980 c. 58 s. 1 U.K.]

Actions of contract and tort and certain other actions

4. Limitation of actions of contract and tort, and certain other actions

(1) The following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued, that is to say—

(a) actions founded on simple contract or on tort;

(b) actions to enforce a recognizance;

(c) actions to enforce an award, where the submission is not by an instrument under seal;

(d) actions to recover any sum recoverable by virtue of any Ordinance or imperial enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture:
Provided that—

(i) *(Repealed 31 of 1991 s. 4)*

(ii) nothing in this subsection shall be taken to refer to any action to which section 6 applies.

(2) An action for an account shall not be brought in respect of any matter which arose more than 6 years before the commencement of the action.

(3) An action upon a specialty shall not be brought after the expiration of 12 years from the date on which the cause of action accrued:
Provided that this subsection shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Ordinance.

(4) An action shall not be brought upon any judgment after the expiration of 12 years from the date on which the judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of 6 years from the date on which the interest became due.

(5) An action to recover any penalty or forfeiture, or sum by way of penalty or forfeiture, recoverable by virtue of any Ordinance or imperial enactment shall not be brought after the expiration of 2 years from the date on which the cause of action accrued:
Provided that for the purposes of this subsection the expression "penalty" (罰金) shall not include a fine to which any person is liable on conviction of a criminal offence.

(6) Subsection (1) shall apply to an action to recover seamen's wages, but save as aforesaid this section shall not apply to any cause of action within the Admiralty jurisdiction of the High Court which is enforceable in rem.

(7) This section shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any provision thereof may be applied by the court by analogy in like manner as the corresponding enactment contained in the Limitation Act 1980 (1980 c. 58 U.K.) is applied in the English Courts. *(Amended 31 of 1991 s. 4)*

(8) *(Repealed 31 of 1991 s. 4)*

[cf. 1939 c. 21 s. 2 U.K.; 1954 c. 36 s. 2(1) U.K.]

5. Limitation in case of successive conversions and extinction of title of owner of converted goods

(1) Where any cause of action in respect of the conversion or wrongful detention of a chattel has accrued to any person and, before he recovers possession of the chattel, a further conversion or wrongful detention takes place, no action shall be brought in respect of the further conversion or detention after the expiration of 6 years from the accrual of the cause of action in respect of the original conversion or detention.

(2) Where any such cause of action has accrued to any person and the period prescribed for bringing that action and for bringing any action in respect of such a further conversion or wrongful detention as aforesaid has expired and he has not during that period recovered possession of the chattel, the title of that person to the chattel shall be extinguished.

[cf. 1939 c. 21 s. 3 U.K.]

6. **申索分擔款項的時限**

(1) 凡根據《民事責任(分擔)條例》(第377章)第3條，任何人有權享有就任何損害向任何其他人追討分擔款項的權利，則在該權利產生的日期起計2年的期間結束後，不得憑藉該權利(除第22及26條另有規定外)而提出追討分擔款項的訴訟。

(2) 就本條而言，就任何損害追討分擔款項的權利在任何人方面產生的日期(在本款內提述為"有關日期")須按以下規定予以確定 ——

(a) 如有關人士是由於在任何民事法律程序中所作的判決或就任何仲裁所作的裁決而須對該項損害負有法律責任，有關日期即為作出判決或裁決的日期，視屬何情況而定；

(b) 如在不屬(a)段範圍的情況下，有關人士向一名或多於一名人士支付或同意支付任何款項作為該項損害的補償(不論他是否承認對該項損害負有法律責任)，有關日期即為他(或其代表)與將獲得付款的人(或將獲得付款的每一人，視屬何情況而定)之間就其須付的款額達成協議的最早日期，

而就本款而言，在上訴時所作的任何判決或裁決對該有關人士被裁決須繳付的損害賠償額的更改，不須予以考慮。

(由1984年第77號第10條代替)

[比照 1978 c. 47 Sch. 1 para. 6 U.K.]

6. **Time limit for claiming contribution**

(1) Where under section 3 of the Civil Liability (Contribution) Ordinance (Cap. 377) any person becomes entitled to a right to recover contribution in respect of any damage from any other person, no action to recover contribution by virtue of that right shall (subject to sections 22 and 26) be brought after the end of the period of 2 years from the date on which that right accrued.

(2) For the purposes of this section the date on which a right to recover contribution in respect of any damage accrues to any person (in this subsection referred to as "the relevant date") shall be ascertained as follows, that is to say—

(a) if the person in question is held liable in respect of that damage by a judgment given in any civil proceedings, or an award made on any arbitration, the relevant date shall be the date on which the judgment is given, or the date of the award, as the case may be;

(b) if, in any case not falling within paragraph (a), the person in question makes or agrees to make any payment to one or more persons in compensation for that damage (whether he admits any liability in respect of the damage or not), the relevant date shall be the earliest date on which the amount to be paid by him is agreed between him (or his representative) and the person (or each of the persons, as the case may be) to whom the payment is to be made,

and for the purposes of this subsection no account shall be taken of any judgment or award given or made on appeal in so far as it varies the amount of damages awarded against the person in question.

(Replaced 77 of 1984 s. 10)

[cf. 1978 c. 47 Sch. 1 para. 6 U.K.]

收回土地及追討租金的訴訟

Actions to recover land and rent

7. **收回土地的訴訟時效**

(1) 自有關訴訟權在官方方面產生的日期起計滿60年後，官方不得提出收回土地的訴訟；如該訴訟權最初在某人方面產生，而官方是透過該某人而申索的，則官方亦不得在該訴訟權在該人方面產生的日期起計滿60年後提出收回土地的訴訟。

(2) 自有關訴訟權在任何其他人方面產生的日期起計滿12年後，他不得提出收回土地的訴訟；如該訴訟權最初在某人方面產生，而他是透過該某人而申索的，則他亦不得在該訴訟權在該某人方面產生的日期起計滿12年後提出收回土地的訴訟：
但如訴訟權最初在官方方面產生，而提出訴訟的人是透過官方而申索的，則該訴訟可在官方本可提出訴訟的期間屆滿前的任何時間提出，或可在該訴訟權在並非官方的其他人方面產生的日期起計12年內提出，以首先屆滿的期間為準。 *(由1991年第31號第5條修訂)*

7. **Limitation of actions to recover land**

(1) No action shall be brought by the Crown to recover any land after the expiration of 60 years from the date on which the right of action accrued to the Crown or, if it first accrued to some person through whom the Crown claims, to that person.

(2) No action shall be brought by any other person to recover any land after the expiration of 12 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person:
Provided that, if the right of action first accrued to the Crown through whom the person bringing the action claims, the action may be brought at any time before the expiration of the period during which the action could have been brought by the Crown, or of 12 years from the date on which the right of action accrued to some person other than the Crown, whichever period first expires. *(Amended 31 of 1991 s. 5)*

8. **土地現有權益訴訟權的產生**

(1) 凡提出收回土地的訴訟的人或任何其他人(而提出訴訟的人是透過該人申索的)，一直管有該土地，而於有權管有的期間，被剝奪或中止其管有，則有關訴訟權須當作在剝奪或中止管有的日期產生。

(2) 凡任何人根據遺囑或在無遺囑的情況下，提出收回死者的任何土地的訴訟，而死者在其去世的日期管有該土地，或如情況屬藉遺囑所設定或在死者去世時生效的租費者，死者在其去世的日期管有繳付租費的土地，並且該死者是最後有權享有該土地而管有該土地的人，則訴訟權須當作在死者去世的日期產生。

(3) 凡任何人提出收回土地的訴訟，而土地乃屬一項管有中的產業權或權益，該產業權或權益藉遺囑以外的方式轉易予該人或任何其他人(而該人是透過該其他人申索的)，且作出轉易的人在轉易生效的日期管有該土地，或如屬藉該項轉易所設定的租費的情況，作出轉易的人在轉易生效的日期管有繳付租費的土地，並且無人曾憑藉該項轉易而管有該土地，則訴訟權須當作在該項轉易生效的日期產生。

[比照 1939 c. 21 s. 5 U.K.]

8. **Accrual of right of action in case of present interests in land**

(1) Where the person bringing an action to recover land, or some person through whom he claims, has been in possession thereof, and has while entitled thereto been dispossessed or discontinued his possession, the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance.

(2) Where any person brings an action to recover any land of a deceased person, whether under a will or on intestacy, and the deceased person was on the date of his death in possession of the land or, in the case of a rentcharge created by will or taking effect upon his death, in possession of the land charged, and was the last person entitled to the land to be in possession thereof, the right of action shall be deemed to have accrued on the date of his death.

(3) Where any person brings an action to recover land, being an estate or interest in possession assured otherwise than by will to him, or to some person through whom he claims by a person who, at the date when the assurance took effect, was in possession of the land or, in the case of a rentcharge created by the assurance, in possession of the land charged, and no person has been in possession of the land by virtue of the assurance, the right of action shall be deemed to have accrued on the date when the assurance took effect.

[cf. 1939 c. 21 s. 5 U.K.]

9. **未來權益訴訟權的產生**

9. **Accrual of right of action in case of future interests**

(1) 除本條另有規定外，凡申索的產業權或權益屬復歸或剩餘產業權或權益、或任何其他未來產業權或權益，而且無人曾憑藉所申索的產業權或權益而管有有關土地，則收回土地的訴訟權，須當作在該產業權或權益藉在先產業權或權益的終結而成為管有中的產業權或權益的日期產生。

(2) 如有權享有該在先產業權或權益(不屬一段絕對年期者)的人，在該產業權或權益終結的日期並非管有該土地，則有權享有後繼產業權或權益的人自訴訟權在有權享有該在先產業權或權益的人方面產生的日期起計滿12年後，或自訴訟權在有權享有該後繼產業權或權益的人方面產生的日期起計滿6年後，不得提出訴訟，以較後屆滿的期限為準：但如有權享有該後繼產業權或權益者為官方，則本款前述條文仍屬有效，但提述12年之處，須以60年取代，而提述6年之處，須以12年取代。 *(由1968年第100號法律公告修訂；1991年第31號第6條修訂)*

(3) 任何人不得根據下述轉易而提出收回土地產業權或權益的訴訟：該項轉易是於收回有關土地的訴訟權在作出轉易的人或任何其他人(而該作出轉易的人是透過該人申索的)或享有在先產業權或權益的人方面產生之後始生效者；但如該訴訟是於作出該項轉易的人本可提出訴訟的期間內提出的，則屬例外。

(4) 凡任何人有權享有管有中的土地產業權或權益，並於如此享有的同時，亦有權享有有關土地的任何未來產業權或權益，而該人收回該管有中的產業權或權益的權利根據本條例已遭禁制，則該人或透過該人而申索的人，不得就該未來產業權或權益而提出訴訟，但如在此期間有權享有中期產業權或權益的人已收回有關土地的管有，則屬例外。

[比照 1939 c. 21 s. 6 U.K.]

(1) Subject as hereafter provided in this section the right of action to recover any land shall, in a case where the estate or interest claimed was an estate or interest in reversion or remainder or any other future estate or interest and no person has taken possession of the land by virtue of the estate or interest claimed, be deemed to have accrued on the date on which the estate or interest fell into possession by the determination of the preceding estate or interest.

(2) If the person entitled to the preceding estate or interest, not being a term of years absolute, was not in possession of the land on the date of the determination thereof, no action shall be brought by the person entitled to the succeeding estate or interest after the expiration of 12 years from the date on which the right of action accrued to the person entitled to the preceding estate or interest, or 6 years from the date on which the right of action accrued to the person entitled to the succeeding estate or interest, whichever period last expires:
Provided that, where the Crown is entitled to the succeeding estate or interest, the foregoing provisions of this subsection shall have effect with the substitution for the reference to 12 years of a reference to 60 years, and for the reference to 6 years of a reference to 12 years. *(Amended L.N. 100 of 1968; 31 of 1991 s. 6)*

(3) No person shall bring an action to recover any estate or interest in land under an assurance taking effect after the right of action to recover the land had accrued to the person by whom the assurance was made or some person through whom he claimed or some person entitled to a preceding estate or interest, unless the action is brought within the period during which the person by whom the assurance was made could have brought such an action.

(4) Where any person is entitled to any estate or interest in land in possession and, while so entitled, is also entitled to any future estate or interest in that land, and his right to recover the estate or interest in possession is barred under this Ordinance, no action shall be brought by that person, or by any person claiming through him, in respect of the future estate or interest, unless in the meantime possession of the land has been recovered by a person entitled to an intermediate estate or interest.

[cf. 1939 c. 21 s. 6 U.K.]

10. 有關以信託方式持有土地的條文

(1) 除第20(1)條另有規定外，本條例的條文適用於土地的衡平法權益，包括在售賣以售產信託方式所持有的土地後的所得收益中的權益，方式一如其適用於法定產業權一樣；據此，就本條例而非其他方面而言，收回土地的訴訟權須當作在有權管有該衡平法權益的人方面產生，其產生的方式、情況及日期如同該人的權益是土地的法定產業權一樣。

(2) 凡土地以信託(包括售產信託)方式持有，而本條例所訂明由受託人提出收回土地的訴訟的期限已屆滿，但只要任何有權享有該土地實益權益或售賣所得收益的人，其收回該土地的訴訟權仍未產生或未為本條例所禁制，則該受託人的產業權並沒有終絕，但如該訴訟權已遭如此禁制，則在其遭如此禁制之時該受託人的產業權即告終絕。

(3) 凡土地以信託(包括售產信託)方式持有，而任何有權享有該土地或售賣所得收益的管有中實益權益的人，如其訴訟權並未為本條例所禁制，則即使受託人的訴訟權若非因本款條文本已為本條例所禁制，受託人仍可代表該人提出收回該土地的訴訟。

[比照 1939 c. 21 s. 7 U.K.]

10. Provisions in case of land held on trust

(1) Subject to the provisions of section 20(1), the provisions of this Ordinance shall apply to equitable interests in land, including interests in the proceeds of the sale of land held upon trust for sale, in like manner as they apply to legal estates, and accordingly a right of action to recover the land shall, for the purposes of this Ordinance but not otherwise, be deemed to accrue to a person entitled in possession to such an equitable interest in the like manner and circumstances and on the same date as it would accrue if his interest were a legal estate in the land.

(2) Where any land is held upon trust, including a trust for sale, and the period prescribed by this Ordinance has expired for the bringing of an action to recover the land by the trustees, the estate of the trustees shall not be extinguished if and so long as the right of action to recover the land of any person entitled to a beneficial interest in the land or in the proceeds of sale either has not accrued or has not been barred by this Ordinance, but if and when every such right of action has been so barred, the estate of the trustee shall be extinguished.

(3) Where land is held upon trust, including a trust for sale, an action to recover the land may be brought by the trustees on behalf of any person entitled to a beneficial interest in possession in the land or in the proceeds of sale whose right of action has not been barred by this Ordinance, notwithstanding that the right of action of the trustees would apart from this provision have been barred by this Ordinance.

[cf. 1939 c. 21 s. 7 U.K.]

11. 在權利的喪失或條件的違反情況下訴訟權的產生

憑藉權利的喪失或條件的違反而收回土地的訴訟權，須當作在招致權利喪失的日期或條件被違反的日期產生：

但如訴訟權在有權享有復歸或剩餘產業權或權益的人方面產生，而有關土地並未藉此項訴訟權而收回，則收回該土地的訴訟權，須在該人管有其產業權或權益時，始當作在該人方面產生，猶如權利的喪失或條件的違反不曾發生一樣。

[比照 1939 c. 21 s. 8 U.K.]

11. Accrual of right of action in case of forfeiture or breach of condition

A right of action to recover land by virtue of a forfeiture or breach of condition shall be deemed to have accrued on the date on which the forfeiture was incurred or the condition broken:

Provided that, if such a right has accrued to a person entitled to an estate or interest in reversion or remainder and the land was not recovered by virtue thereof, the right of action to recover the land shall not be deemed to have accrued to that person until his estate or interest fell into possession, as if no such forfeiture or breach of condition had occurred.

[cf. 1939 c. 21 s. 8 U.K.]

12. 有關某些租賃的訴訟權的產生

12. Accrual of right of action in case of certain tenancies

(具追溯力的適應化修訂——見1998年第29號第105條)

(1) 隨意終止的租賃，就本條例而言，須當作於租賃生效時起計1年的期間屆滿時終結(之前已終結者除外)，而據此，有權享有受該項租賃所規限的土地的人，其訴訟權須當作在上述租賃終結的日期產生。

(2) 按年或按其他期限計算的無書面租約的租賃，就本條例而言，須當作於第一年或第一個其他期限屆滿時終結，而據此，有權享有受該項租賃所規限的土地的人，其訴訟權須當作在上述租賃終結的日期產生：
但如其後曾就該項租賃而有任何租金被收取，則訴訟權須當作在最後一次收取租金的日期產生。

(3) 凡任何人憑藉書面租契管有土地，而有關租契所保留的租金不少於$20，且該租金為錯誤地聲稱有權享有預期於租契終結時立即復歸的土地的人所收取，而其後合法地如此有權享有的人並無收取任何租金，則後述的人收回該土地的訴訟權，須當作於該錯誤地如上述般聲稱的人首次收取租金的日期而並非在該租契終結的日期產生。

(4) 第(1)及(3)款不適用於任何隨意終止的租賃或政府所批出的租契。 *(由1998年第29號第105條修訂)*

[比照 1939 c. 21 s. 9 U.K.]

(Adaptation amendments retroactively made - see 29 of 1998 s. 105)

(1) A tenancy at will shall, for the purposes of this Ordinance, be deemed to be determined at the expiration of a period of 1 year from the commencement thereof, unless it has previously been determined, and accordingly the right of action of the person entitled to the land subject to the tenancy shall be deemed to have accrued on the date of such determination.

(2) A tenancy from year to year or other period, without a lease in writing, shall, for the purposes of this Ordinance, be deemed to be determined at the expiration of the first year or other period, and accordingly the right of action of the person entitled to the land subject to the tenancy shall be deemed to have accrued at the date of such determination:
Provided that, where any rent has subsequently been received in respect of the tenancy, the right of action shall be deemed to have accrued on the date of the last receipt of rent.

(3) Where any person is in possession of land by virtue of a lease in writing by which a rent of not less than $20 is reserved, and the rent is received by some person wrongfully claiming to be entitled to the land in reversion immediately expectant on the determination of the lease, and no rent is subsequently received by the person rightfully so entitled, the right of action of the last-named person to recover the land shall be deemed to have accrued at the date when the rent was first received by the person wrongfully claiming as aforesaid and not at the date of the determination of the lease.

(4) Subsections (1) and (3) shall not apply to any tenancy at will or lease granted by the Government. *(Amended 29 of 1998 s. 105)*

[cf. 1939 c. 21 s. 9 U.K.]

13. 處於逆權管有下訴訟權始產生或繼續

(1) 除非土地是由時效期的計算對其有利的人所管有(在本條中提述為逆權管有)，否則收回土地的訴訟權須當作沒有產生；而凡根據本條例前述條文上述訴訟權被當作在某日期產生，但無人於該日期在逆權管有，則訴訟權不當作產生，除非與直至該土地處於逆權管有下。

(2) 凡收回土地的訴訟權已產生，而其後在該權利受禁制之前，有關土地已停止在逆權管有下，則該訴訟權不再當作已產生，而新的訴訟權亦不當作產生，除非與直至該土地再度處於逆權管有下。

(3) 就本條而言 ——

(a) 任何人(有權享有租費的人除外)如管有受租費所規限的土地，但卻沒有繳付租金，則該項管有須當作逆權管有有關租費；及

(b) 第12(3)條所指錯誤地聲稱有權享有復歸土地的人，如根據一項租契而收取租金，該項收取須當作逆權管有有關土地。

[比照 1939 c. 21 s. 10 U.K.]

13. Right of action not to accrue or continue unless there is adverse possession

(1) No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (hereafter in this section referred to as adverse possession) and where under the foregoing provisions of this Ordinance any such right of action is deemed to accrue on a certain date and no person is in adverse possession on that date, the right of action shall not be deemed to accrue unless and until adverse possession is taken of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action shall no longer be deemed to have accrued and no fresh right of action shall be deemed to accrue unless and until the land is again taken in adverse possession.

(3) For the purposes of this section—

(a) possession of any land subject to a rentcharge by a person (other than the person entitled to the rentcharge) who does not pay the rent shall be deemed to be adverse possession of the rentcharge; and

(b) receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3), the land in reversion shall be deemed to be adverse possession of the land.

[cf. 1939 c. 21 s. 10 U.K.]

14. 贖回的訴訟時效

如土地的承按人管有任何已作按揭的土地已有12年，按揭人或透過按揭人而申索的人以後即不得提出贖回該承按人如此管有的土地的訴訟。

(由1991年第31號第7條修訂)

[比照 1939 c. 21 s. 12 U.K.]

14. Limitation of redemption actions

When a mortgagee of land has been in possession of any of the mortgaged land for a period of 12 years, no action to redeem the land of which the mortgagee has been so in possession shall thereafter be brought by the mortgagor or any person claiming through him.

(Amended 31 of 1991 s. 7)

[cf. 1939 c. 21 s. 12 U.K.]

15. 訴訟權不因形式上進入或持續申索而獲得保留

就本條例而言，任何人不得僅因已在形式上進入某土地而當作已管有該土地，而就任何土地或其附近的持續申索或其他申索則並不令收回該土地的訴訟權獲得保留。

[比照 1939 c. 21 s. 13 U.K.]

15. No right of action to be preserved by formal entry or continual claim

For the purposes of this Ordinance, no person shall be deemed to have been in possession of any land by reason only of having made a formal entry thereon, and no continual or other claim upon or near any land shall preserve any right of action to recover the land.

[cf. 1939 c. 21 s. 13 U.K.]

16. 遺產管理追溯至去世時開始

就本條例有關收回土地的訴訟的條文而言，死者遺產的管理人須當作是在猶如死者去世與遺產管理證明書發出之間並無時間距離的情況下而申索。

[比照 1939 c. 21 s. 15 U.K.]

16. Administration to date back to death

For the purposes of the provisions of this Ordinance relating to actions for the recovery of land, an administrator of the estate of a deceased person shall be deemed to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration.

[cf. 1939 c. 21 s. 15 U.K.]

17. 所有權於期限屆滿後終絕

除第10條的條文另有規定外，在本條例就任何人提出收回土地的訴訟(包括贖回訴訟)所訂明的期限屆滿時，該人對該土地的所有權即告終絕。

[比照 1939 c. 21 s. 16 U.K.]

18. 追討租金的訴訟時效

在欠繳租金到期應繳的日期起計滿6年後，不得提出訴訟或作出扣押，以追討欠繳租金或有關此等欠繳租金的損害賠償。

[比照 1939 c. 21 s. 17 U.K.]

追討藉按揭或押記而獲得保證的款項的訴訟或追討售賣土地所得收益的訴訟

19. 追討藉按揭或押記而獲得保證的款項或追討售賣土地所得收益的訴訟時效

(1) 追討藉按揭財產或其他財產押記而獲得保證的本金的訴訟，或追討售賣土地所得收益的訴訟，不得在收取有關款項的權利產生的日期起計滿12年後提出。 *(由1991年第31號第8條修訂)*

(2) 有關已作按揭的非土地財產的止贖訴訟，不得在止贖的權利產生的日期起計滿12年後提出： *(由1991年第31號第8條修訂)*
但如承按人在該日期之後管有該項已作按揭的財產，則就本款而言，就該項在其管有中的財產的止贖權利並不當作已產生，直至承按人中止管有該項財產的日期為止。

(3) 收取藉按揭或其他押記而獲得保證的本金的權利，以及就受按揭或押記所規限的財產的止贖權利，在該項財產仍包含任何未來權益或尚未到期或終結的人壽保險單時，並不當作產生。

(4) 本條並不適用於已作按揭的土地的止贖訴訟，但本條例有關收回土地的訴訟的條文，則適用於該等訴訟。

(5) 追討就藉按揭或其他押記而獲得保證的款項所應繳而欠繳的利息或就售賣土地所得收益所應繳而欠繳的利息，或追討有關該等欠繳利息的損害賠償，不得在利息到期應繳的日期起計6年屆滿後提出：
但 ——

(a) 凡居先的承按人或其他產權負擔持有人已經管有有關已作押記的財產，而在後的產權負擔持有人在該項管有中止後1年內提出訴訟，則他可藉該訴訟追討該居先的產權負擔持有人在管有期間所有到期應繳而欠繳的利息或有關此等欠繳利息的損害賠償，即使該期間已超過6年亦然；

(b) 凡受按揭或押記所規限的財產包含任何未來權益或人壽保險單，而該項按揭或押記的一項條款，規定欠繳利息須視為藉該項按揭或押記而獲得保證的本金的一部分，則在收取該項本金的權利產生或當作已產生之前，不得將利息當作到期應繳。

(6) 本條不適用於船舶的按揭或押記。

[比照 1939 c. 21 s. 18 U.K.]

有關信託財產或死者非土地遺產的訴訟

20. 信託財產的訴訟時效

(1) 本條例所訂明的時效期，不適用於受益人根據信託而提出的訴訟，如該訴訟為 ——

(a) 關乎任何欺詐或欺詐性違反信託，而受託人乃其中一方或參與者；或

(b) 向受託人追討在他管有中的信託財產或信託財產的所得收益，或之前已由他收取並轉為己用的信託財產或信託財產的所得收益。

17. **Extinction of title after expiration of period**

Subject to the provisions of section 10, at the expiration of the period prescribed by this Ordinance for any person to bring an action to recover land (including a redemption action), the title of that person to the land shall be extinguished.

[cf. 1939 c. 21 s. 16 U.K.]

18. **Limitation of actions to recover rent**

No action shall be brought, or distress made, to recover arrears of rent, or damages in respect thereof, after the expiration of 6 years from the date on which the arrears became due.

[cf. 1939 c. 21 s. 17 U.K.]

Actions to recover money secured by a mortgage or charge or to recover proceeds of the sale of land

19. **Limitation of action to recover money secured by a mortgage or charge or to recover proceeds of the sale of land**

(1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on property, or to recover proceeds of the sale of land, after the expiration of 12 years from the date when the right to receive the money accrued. *(Amended 31 of 1991 s. 8)*

(2) No foreclosure action in respect of mortgaged personal property shall be brought after the expiration of 12 years from the date on which the right to foreclose accrued: *(Amended 31 of 1991 s. 8)*
Provided that if, after that date the mortgagee was in possession of the mortgaged property, the right to foreclose on the property which was in his possession shall not, for the purposes of this subsection, be deemed to have accrued until the date on which his possession discontinued. *(Amended 31 of 1991 s. 8)*

(3) The right to receive any principal sum of money secured by a mortgage or other charge and the right to foreclose on the property subject to the mortgage or charge shall not be deemed to accrue so long as that property comprises any future interest or any life insurance policy which has not matured or been determined.

(4) Nothing in this section shall apply to a foreclosure action in respect of mortgaged land, but the provisions of this Ordinance relating to actions to recover land shall apply to such an action.

(5) No action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or other charge or payable in respect of proceeds of the sale of land, or to recover damages in respect of such arrears, shall be brought after the expiration of 6 years from the date on which the interest became due:
Provided that—

(a) where a prior mortgagee or other incumbrancer has been in possession of the property charged, and an action is brought within 1 year of the discontinuance of such possession by the subsequent incumbrancer, he may recover by that action all the arrears of interest which fell due during the period of possession by the prior incumbrancer or damages in respect thereof, notwithstanding that the period exceeded 6 years;

(b) where the property subject to the mortgage or charge comprises any future interest or life insurance policy and it is a term of the mortgage or charge that arrears of interest shall be treated as part of the principal sum of money secured by the mortgage or charge, interest shall not be deemed to become due before the right to receive the principal sum of money has accrued or is deemed to have accrued.

(6) This section shall not apply to any mortgage or charge on a ship.

[cf. 1939 c. 21 s. 18 U.K.]

Actions in respect of trust property or the personal estate of deceased persons

20. **Limitation of actions in respect of trust property**

(1) No period of limitation prescribed by this Ordinance shall apply to an action by a beneficiary under a trust, being an action—

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

(2) 除上文另有規定外，受益人為追討信託財產或就任何違反信託而提出的訴訟，如本條例的任何其他條文並無訂明其時效期，則該訴訟不得在訴訟權產生的日期起計滿6年後提出：
但有權享有未來權益的受益人，在管有該權益前，其訴訟權仍不當作已產生。

(3) 如在任何受益人提出的訴訟中對方根據本條例具有好的免責辯護，則該受益人從任何其他受益人所取得的判決或命令中獲取的任何利益，不得大於或有別於如其本人提出訴訟而對方以本條例抗辯時所取得的利益。

[比照 1939 c. 21 s. 19 U.K.]

21. 申索死者非土地遺產的訴訟時效

除第20(1)條的條文另有規定外，申索死者非土地遺產或該產業任何份額或權益的任何訴訟，不論是根據遺囑的訴訟或是在無遺囑情況下的訴訟，均不得在收取該份額或權益的權利產生的日期起計滿12年後提出；而追討有關任何遺產的欠繳利息或有關該等欠繳利息的損害賠償的訴訟，則不得在該等利息到期應繳的日期起計滿6年後提出。

[比照 1939 c. 21 s. 20 U.K.]

(2) Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Ordinance, shall not be brought after the expiration of 6 years from the date on which the right of action accrued:
Provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property, until the interest fell into possession.

(3) No beneficiary as against whom there would be a good defence under this Ordinance shall derive any greater or other benefit from a judgment or order obtained by any other beneficiary than he could have obtained if he had brought the action and this Ordinance had been pleaded in defence.

[cf. 1939 c. 21 s. 19 U.K.]

21. Limitation of actions claiming personal estate of a deceased person

Subject to the provisions of section 20(1), no action in respect of any claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a will or on intestacy, shall be brought after the expiration of 12 years from the date when the right to receive the share or interest accrued, and no action to recover arrears of interest in respect of any legacy, or damages in respect of such arrears, shall be brought after the expiration of 6 years from the date on which the interest became due.

[cf. 1939 c. 21 s. 20 U.K.]

第III部

某些情況下時效期的延長或豁除*

編輯附註：

* (由1991年第31號第9條修訂)

PART III

EXTENSION OR EXCLUSION OF LIMITATION PERIODS IN CERTAIN CASES*

Editorial Note:

* (Amended 31 of 1991 s. 9)

無行為能力

22. 在無行為能力的情況下時效期的延長

(1) 本條例訂明時效期的訴訟權，如在該訴訟權產生的日期，在該訴訟權在其方面產生的人並無行為能力，則有關訴訟可在該人停止無行為能力或該人去世(以首先發生者為準)的日期起計6年內的任何時間提出，即使該時效期已屆滿亦然：
但——

(a) 如訴訟權最初在某人(並非無行為能力者)方面產生，而無行為能力的人透過該人而申索，則本條對此情況並無影響；

(b) 如訴訟權已在無行為能力的人方面產生，而該訴訟權於該人在仍屬無行為能力的情況下去世時在另一個無行為能力的人方面產生，則不得由於該另一人的無行為能力而容許將時限再予延長； *(由1968年第100號法律公告修訂)*

(c) 自訴訟權在某人方面產生或在任何其他人(而該人是透過該其他人申索的)方面產生的日期起計滿30年後，該人即不得憑藉本條提出收回土地或追討以土地作押記的款項的訴訟；

(d) 本條不適用於憑藉任何條例或英國成文法則而提出追討罰金或追討沒收款項、或追討屬作為罰金或沒收款項的款項的訴訟，但如訴訟是由感到受屈的一方所提出則除外。

(2) 如訴訟為第27或28(3)條所適用者，則第(1)款的效力猶如"6年"一詞已由"3年"一詞所取代一樣。 *(由1976年第67號第4條代替) [比照 1975 c. 54 s. 2 U.K.]*

(2A) 凡本條憑藉第6條而適用，則第(1)款的效力猶如"6年"一詞已由"2年"一詞所取代一樣。 *(由1976年第67號第4條增補)*

(3) 就本條及第22A條而言，幼年人或精神不健全的人均當作無行為能力；此外，在以不影響本款前述條文的概括性為原則下，任何人當其依據授權拘留精神不健全的人(包括被判罪名成立或聽候審訊的人)的法例或英國成文法則而被拘留時，或當其根據《精神健康條例》(第136章)的條文自願接受治療時，即須不可推翻地推定為精神不健全。
(由1991年第31號第10條修訂)
[比照 1939 c. 21 ss. 22 & 31(2) & (3) U.K.；比照 1954 c. 36 s. 2(2) U.K.]

Disability

22. Extension of limitation period in case of disability

(1) If on the date when any right of action accrued for which a period of limitation is prescribed by this Ordinance, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of 6 years from the date when the person ceased to be under a disability or died, whichever event first occurred, notwithstanding that the period of limitation had expired:
Provided that—

(a) this section shall not affect any case where the right of action first accrued to some person (not under a disability) through whom the person under a disability claims;

(b) when a right of action which has accrued to a person under a disability accrues, on the death of that person while still under a disability, to another person under disability, no further extension of time shall be allowed by reason of the disability of the second person; *(Amended L.N. 100 of 1968)*

(c) no action to recover land or money charged on land shall be brought by virtue of this section by any person after the expiration of 30 years from the date on which the right of action accrued to that person or some person through whom he claims;

(d) this section shall not apply to any action to recover a penalty or forfeiture, or sum by way thereof, by virtue of any Ordinance or imperial enactment, except where the action is brought by an aggrieved party.

(2) If the action is one to which section 27 or 28(3) applies subsection (1) shall have effect as if for the words "6 years" there were substituted the words "3 years". *(Replaced 67 of 1976 s. 4) [cf. 1975 c. 54 s. 2 U.K.]*

(2A) Where this section applies by virtue of section 6, subsection (1) shall have effect as if for the words "6 years" there were substituted the words "2 years". *(Added 67 of 1976 s. 4)*

(3) For the purposes of this section and section 22A, a person shall be deemed to be under a disability while he is an infant or of unsound mind, and, without prejudice to the generality of the foregoing provisions of this subsection, a person shall be conclusively presumed to be of unsound mind while he is detained in pursuance of any Ordinance or imperial enactment authorizing the detention of persons of unsound mind, including persons convicted of offences or awaiting trial, or while he is receiving treatment voluntarily under the provisions of the Mental Health Ordinance (Cap. 136). *(Amended 31 of 1991 s. 10)*

[cf. 1939 c. 21 ss. 22 & 31(2) & (3) U.K.; 1954 c. 36 s. 2(2) U.K.]

22A. 就時效期為第31(4)(b)條所訂的期限的個案而作的延長

(1) 除第(2)款另有規定外，如訴訟的時效期由第31條所訂明，而 ——

(a) 按照第31(4)條適用的期限為第31(4)(b)條中所述的期限；

(b) 在就該條而言是知悉日期的日期，根據第31(1)條決定該日期時須以其所知悉作為參照的人，屬無行為能力；及

(c) 第22條並不適用於該訴訟，

則該訴訟可於該人停止無行為能力或該人去世(以首先發生者為準)的日期起計3年內的任何時間提出，即使上文所述的期限已屆滿亦然。

(2) 第32條所訂明的時效期結束後，不得憑藉第(1)款提出訴訟。

(由1991年第31號第11條增補)

[比照 1980 c. 58 s. 28A U.K.]

22A. Extension for cases where the limitation period is the period under section 31(4)(b)

(1) Subject to subsection (2), if in the case of any action for which a period of limitation is prescribed by section 31—

(a) the period applicable in accordance with section 31(4) is the period mentioned in section 31(4)(b);

(b) on the date which is for the purposes of that section the date of knowledge, the person by reference to whose knowledge that date fell to be determined under section 31(1) was under a disability; and

(c) section 22 does not apply to the action,

the action may be brought at any time before the expiration of 3 years from the date when he ceased to be under a disability or died (whichever first occurred) notwithstanding that the period mentioned above has expired.

(2) An action may not be brought by virtue of subsection (1) after the end of the period of limitation prescribed by section 32.

(Added 31 of 1991 s. 11)

[cf. 1980 c. 58 s. 28A U.K.]

承認及部分繳款

Acknowledgment and part payment

23. 於承認或部分繳款後重新產生訴訟

(1) 凡有收回土地的訴訟權(包括止贖訴訟權)產生，或有非土地財產承按人就該等財產提出止贖訴訟的權利產生，而 ——

(a) 管有有關土地或非土地財產的人承認訴訟權在其方面產生的人的所有權；或

(b) 如屬承按人提出止贖或其他訴訟的情況，如上所述般管有的人或負有法律責任繳付按揭債項的人就該債項繳付任何款項，不論屬本金或利息，

則該權利須當作在承認或繳款的日期而非在該日期之前產生。 *(由1968年第100號法律公告修訂)*

(2) 凡承按人憑藉按揭而管有任何已作按揭的土地，並且就按揭債項的本金或利息收取任何款項，或承認按揭人的所有權或其衡平法贖回權，則贖回在承按人管有中的土地的訴訟可在繳付款項或承認的日期起計12年屆滿前的任何時候提出。

(3) 凡有訴訟權就追討任何債項或其他算定金額的申索而產生，或就追討死者非土地遺產或其中份額或權益的申索而產生，而對此負有法律責任或須負責的人承認該項申索或就此繳付任何款項，則訴訟權須當作在承認申索或最後一次繳款的日期而非在該日期之前產生：
但繳付於任何時候到期應繳的租金或利息的一部分，並不會延長到期應繳餘數的申索期，但繳付利息則須視作就本金債項而繳款。 *(由1982年第346號法律公告修訂)*

[比照 1939 c. 21 s. 23 U.K.]

23. Fresh accrual of action on acknowledgment or part payment

(1) Where there has accrued any right of action (including a foreclosure action) to recover land or any right of a mortgagee of personal property to bring a foreclosure action in respect of the property, and—

(a) the person in possession of the land or personal property acknowledges the title of the person to whom the right of action has accrued; or

(b) in the case of a foreclosure or other action by a mortgagee, the person in possession as aforesaid or the person liable for the mortgage debt makes any payment in respect thereof, whether of principal or interest,

the right shall be deemed to have accrued on and not before the date of the acknowledgment or payment. *(Amended L.N. 100 of 1968)*

(2) Where a mortgagee is by virtue of the mortgage in possession of any mortgaged land and either receives any sum in respect of the principal or interest of the mortgage debt or acknowledges the title of the mortgagor, or his equity of redemption, an action to redeem the land in his possession may be brought at any time before the expiration of 12 years from the date of the payment or acknowledgment.

(3) Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment:
Provided that a payment of a part of the rent or interest due at any time shall not extend the period for claiming the remainder then due, but any payment of interest shall be treated as a payment in respect of the principal debt. *(Amended L.N. 346 of 1982)*

[cf. 1939 c. 21 s. 23 U.K.]

24. 關於承認及部分繳款的形式的條文

(1) 上述的每項承認均須以書面作出，並由作出該項承認的人簽署。

(2) 任何上述的承認或繳款，可由根據第23條須作出承認或繳款的人的代理人，向其所有權或申索獲承認或就其申索獲繳款(視屬何情況而定)的人或其代理人作出。

[比照 1939 c. 21 s. 24 U.K.]

24. Formal provisions as to acknowledgments and part payments

(1) Every such acknowledgment as aforesaid shall be in writing and signed by the person making the acknowledgment.

(2) Any such acknowledgment or payment as aforesaid may be made by the agent of the person by whom it is required to be made under section 23, and shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made.

[cf. 1939 c. 21 s. 24 U.K.]

25. 承認或部分繳款對作出者或獲得者以外人士的影響

(1) 由管有土地或管有已作按揭的動產的人作出有關該土地或已作按揭動產的所有權的承認，對隨後的時效期內所有其他管有人均具約束力。

(2) 由按揭人或管有已作按揭的財產的人就按揭債項作出的繳款，就承按人將有關財產止贖或以其他方式收回財產的任何權利而言，對隨後的時效期內所有其他管有該項已作按揭的財產的人均具約束力。

(3) 凡有2名或多於2名的承按人憑藉按揭而管有已作按揭的土地，則其中1名承按人就按揭人的所有權或衡平法贖回權所作出的承認，只對其本人或其繼承人有約束力，而對於其他承按人或其繼承人則無約束力；又凡給予該項承認的承按人有權享有已作按揭的土地的一部分但無權享有按揭債項的任何已確定部分，則按揭人有權按照該部分土地在整項已作按揭的土地的價值中所佔的比例，繳付該整項按揭債項中佔相同比例的款項，再加上利息，以贖回該部分土地。

(4) 凡有2名或多於2名的按揭人，而其中1名按揭人的所有權或贖回權如上述般獲承認，則該項承認須當作向所有按揭人作出。

(5) 任何就債項或其他經算定金額的申索所作的承認，均對承認人及其繼承人有約束力，但對任何其他人則無約束力：
但如作出承認時，就提出追討該債項的訴訟或其他申索而訂明的時效期已屆滿，則該項承認對根據一項在承認日期前生效的授產安排而於財產的居先產業權或權益終結時獲轉予該項法律責任的繼承人，並無約束力。

(6) 就任何債項或其他經算定金額的申索所繳付的款項，對須為該債項或申索負法律責任的人具有約束力：
但如繳付款項時，就提出追討該債項的訴訟或其他申索而訂明的時效期已屆滿，則該項繳款對繳款人或其繼承人以外的人並無約束力，且對根據一項在繳款日期前生效的授產安排而於財產的居先產業權或權益終結時獲轉予法律責任的繼承人，亦無約束力。

(7) 如數名遺產代理人中，有一人就對死者的非土地遺產或其中份額或權益提出的申索作出承認，或就該申索而繳付款項，則該項承認或繳款對死者的遺產具有約束力。

(8) 在本條中，就任何承按人或須對債項或申索負法律責任的人而言，"繼承人" (successor)指其遺產代理人及任何其他獲轉予有關按揭下的權利或(視屬何情況而定)有關債項或申索的法律責任的人，不論該項轉予是因去世或破產或產權處置或已授財產的有限制產業權或權益的終結或其他原因所致。

[比照 1939 c. 21 s. 25 U.K.]

25. **Effect of acknowledgment or part payment on persons other than the maker or recipient**

(1) An acknowledgment of the title to any land or mortgaged personalty by any person in possession thereof shall bind all other persons in possession during the ensuing period of limitation.

(2) A payment in respect of a mortgage debt by the mortgagor or any person in possession of the mortgaged property shall, so far as any right of the mortgagee to foreclose or otherwise to recover the property is concerned, bind all other persons in possession of the mortgaged property during the ensuing period of limitation.

(3) Where 2 or more mortgagees are by virtue of the mortgage in possession of the mortgaged land, an acknowledgment of the mortgagor's title or of his equity of redemption by one of the mortgagees shall bind only him and his successors and shall not bind any other mortgagee or his successors, and where the mortgagee by whom the acknowledgment is given is entitled to a part of the mortgaged land and not to any ascertained part of the mortgage debt, the mortgagor shall be entitled to redeem that part of the land on payment, with interest, of the part of the mortgage debt which bears the same proportion to the whole of the debt as the value of the part of the land bears to the whole of the mortgaged land.

(4) Where there are 2 or more mortgagors, and the title or right to redemption of one of the mortgagors is acknowledged as aforesaid, the acknowledgment shall be deemed to have been made to all the mortgagors.

(5) An acknowledgment of any debt or other liquidated pecuniary claim shall bind the acknowledgor and his successors but not any other person:
Provided that an acknowledgment made after the expiration of the period of limitation prescribed for the bringing of an action to recover the debt or other claim shall not bind any successor on whom the liability devolves on the determination of a preceding estate or interest in property under a settlement taking effect before the date of the acknowledgment.

(6) A payment made in respect of any debt or other liquidated pecuniary claim shall bind all persons liable in respect thereof:
Provided that a payment made after the expiration of the period of limitation prescribed for the bringing of an action to recover the debt or other claim shall not bind any person other than the person making the payment and his successors, and shall not bind any successor on whom the liability devolves on the determination of a preceding estate or interest in property under a settlement taking effect before the date of the payment.

(7) An acknowledgment by one of several personal representatives of any claim to the personal estate of a deceased person, or to any share or interest therein, or a payment by one of several personal representatives in respect of any such claim shall bind the estate of the deceased person.

(8) In this section the expression "successor" (繼承人), in relation to any mortgagee or person liable in respect of any debt or claim, means his personal representatives and any other person on whom the rights under the mortgage or, as the case may be, the liability in respect of the debt or claim devolve, whether on death or bankruptcy or the disposition of property or the determination of a limited estate or interest in settled property or otherwise.

[cf. 1939 c. 21 s. 25 U.K.]

欺詐、隱瞞及錯誤

Fraud, concealment and mistake

26. 在欺詐、隱瞞及錯誤的情況下時效期的延後

(1) 在不抵觸第(4)款的條文下，凡訴訟的時效期由本條例訂明，而 ——

(a) 有關訴訟是基於被告人的欺詐行為；

(b) 被告人蓄意對原告人隱瞞任何有關原告人的訴訟權的事實；或

(c) 該訴訟是為解除某項錯誤所致的結果而尋求濟助，

則時效期在原告人發覺、或經合理努力而應可發覺該欺詐行為、隱瞞或錯誤(視屬何情況而定)之前，並不開始計算。

(2) 第(1)款內對被告人的提述，包括提述被告人的代理人，及被告人透過他而申索的人及該人的代理人。

(3) 就第(1)款而言，在若干時間內相當可能不被發覺的情況下蓄意地違反責任，即構成蓄意隱瞞涉及該宗違反責任的事實。

26. **Postponement of limitation period in case of fraud, concealment or mistake**

(1) Subject to subsection (4), where in the case of any action for which a period of limitation is prescribed by this Ordinance, either—

(a) the action is based upon the fraud of the defendant;

(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or

(c) the action is for relief from the consequences of a mistake,

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

(2) References in subsection (1) to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.

(4) 凡在欺詐行為或隱瞞或(視屬何情況而定)有錯誤的交易進行後，有關財產已由不知情的第三者以有值代價購買，則本條的規定，並不使任何人得以針對該財產的承購人或任何透過該承購人而申索的人提出以下訴訟 ——

(a) 收回該財產的訴訟或追討財產價值的訴訟；或

(b) 強制執行在該財產上的任何押記的訴訟或將任何影響該財產的交易撤銷的訴訟。

(5) 就本條而言，如有以下情況，承購人即屬不知情的第三者 ——

(a) 如屬欺詐或隱瞞有關原告人的訴訟權的事實，承購人並非該項欺詐或(視屬何情況而定)隱瞞該項事實的一方，而於購買時並不知悉、亦無理由相信該項欺詐或隱瞞已經發生；及

(b) 如屬有錯誤，承購人於購買時並不知悉、亦無理由相信已有該項錯誤。

(6) 第31及32條不適用於第(1)(b)款所適用的訴訟(據此，該款所提述的時效期，在上述任何一條若非因本款即予適用的情況中，即為根據第4(1)條適用的時效期)。

(由1991年第31號第12條代替)

[比照 1980 c. 58 s. 32 U.K.]

(3) For the purposes of subsection (1), deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.

(4) Nothing in this section shall enable any action—

(a) to recover, or recover the value of, any property; or

(b) to enforce any charge against, or set aside any transaction affecting, any property,

to be brought against the purchaser of the property or any person claiming through him in any case where the property has been purchased for valuable consideration by an innocent third party since the fraud or concealment or (as the case may be) the transaction in which the mistake was made took place.

(5) A purchaser is an innocent third party for the purposes of this section—

(a) in the case of fraud or concealment of any fact relevant to the plaintiff's right of action, if he was not a party to the fraud or (as the case may be) to the concealment of that fact and did not at the time of the purchase know or have reason to believe that the fraud or concealment had taken place; and

(b) in the case of mistake, if he did not at the time of the purchase know or have reason to believe that the mistake had been made.

(6) Sections 31 and 32 shall not apply to any action to which subsection (1)(b) applies (and accordingly the period of limitation referred to in that subsection, in any case to which either of those sections would otherwise apply, is the period applicable under section 4(1)).

(Replaced 31 of 1991 s. 12)

[cf. 1980 c. 58 s. 32 U.K.]

適用於某些人身傷害訴訟的特別條文

27. 人身傷害的時限

(1) 本條適用於任何因疏忽、妨擾或違反責任(不論有關責任是憑藉某合約或是憑藉經由或根據任何條例或英國成文法則所訂立的條文而存在，或是獨立於任何合約或上述任何條文而存在)而要求損害賠償的訴訟，而原告人就該項疏忽、妨擾或違反責任所申索的損害賠償乃屬或包括與原告人或任何其他人所遭受的人身傷害有關者。

(2) 第4條不適用於本條所適用的訴訟。

(3) 除第30條另有規定外，本條所適用的訴訟，不得在第(4)及(5)款所指明的期限屆滿後提出。

(4) 除第(5)款適用的情況外，上述期限為以下日期起計3年 ——

(a) 訴訟因由產生的日期；或

(b) 原告人的知悉日期(如屬較後者)。

(5) 如受傷害的人在第(4)款所指期限屆滿前去世，則憑藉《法律修訂及改革(綜合)條例》(第23章)第20條，為死者遺產的利益而尚存的訴訟因由的期限，由以下日期起計3年 ——

(a) 去世日期；或

(b) 遺產代理人的知悉日期，

兩日期中以較後者為準。

(6) 在本條及第28條內，凡提述某人的知悉日期，即提述該人最初知悉以下事實的日期 ——

(a) 有關的傷害乃屬重大；及

(b) 該項傷害完全或部分是歸因於指稱構成疏忽、妨擾或違反責任的作為或不作為；及

(c) 被告人的身分；及

(d) 如指稱上述作為或不作為乃被告人以外的人的作為或不作為時，該人的身分以及其他支持針對被告人提出訴訟的事實，

而對任何作為或不作為在法律上是否涉及疏忽、妨擾或違反責任知悉與否，並不相關。

(7) 就本條而言，如原告人本會合理地認為某項傷害的嚴重程度，足以令原告人有充分理由，針對一名並不就法律責任提出爭議、且有能力履行判決的被告人而提起要求損害賠償的法律程序，該項傷害即屬重大。

(8) 就本條及第28條而言，某人所知悉者包括可合理地預期該人從以下事實所獲知者 ——

(a) 該人可觀察或確定的事實；或

(b) 該人透過其合理地應尋求的醫學或其他適當專家意見的協助而可確定的事實，

但任何人如已採取一切合理步驟以取得專家意見(及如屬適當時依循該意見行事)，則不得根據本款而斷定他已知悉只有在專家意見的協助下始可確定的事實。

Special provisions applicable to certain actions in respect of personal injuries

27. Time limit for personal injuries

(1) This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under an Ordinance or imperial enactment or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.

(2) Section 4 shall not apply to an action to which this section applies.

(3) Subject to section 30, an action to which this section applies shall not be brought after the expiration of the period specified in subsections (4) and (5).

(4) Except where subsection (5) applies, the said period is 3 years from—

(a) the date on which the cause of action accrued; or

(b) the date (if later) of the plaintiff's knowledge.

(5) If the person injured dies before the expiration of the period in subsection (4), the period as respects the cause of action surviving for the benefit of the estate of the deceased by virtue of section 20 of the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23) shall be 3 years from—

(a) the date of death; or

(b) the date of the personal representative's knowledge,

whichever is the later.

(6) In this section, and in section 28, references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts—

(a) that the injury in question was significant; and

(b) that that injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and

(c) the identity of the defendant; and

(d) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant,

and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.

(9) 就本條而言，"遺產代理人" (personal representative)包括現時是或曾經是死者遺產代理人的人，亦包括未申領遺囑認證的遺囑執行人(不論他是否已放棄遺囑認證)，而任何上述的人在擔任遺產代理人時或之前所知悉之事，均須予以顧及。

(10) 如有多於1名遺產代理人，而其知悉的日期並不相同，則第(5)(b)款須解釋為提述此等日期中之最早者。

(由1976年第67號第5條代替)
[比照 1975 c. 54 s. 1 U.K.]

(7) For the purposes of this section an injury is significant if the plaintiff would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(8) For the purposes of this section and section 28 a person's knowledge includes knowledge which he might reasonably have been expected to acquire—

(a) from facts observable or ascertainable by him; or

(b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek,

but a person shall not be fixed under this subsection with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

(9) For the purposes of this section "personal representative" (遺產代理人) includes any person who is or has been a personal representative of the deceased, including an executor who has not proved the will (whether or not he has renounced probate); and regard shall be had to any knowledge acquired by any such person while a personal representative or previously.

(10) If there is more than one personal representative, and their dates of knowledge are different, subsection (5)(b) shall be read as referring to the earliest of those dates.

(Replaced 67 of 1976 s. 5)
[cf. 1975 c. 54 s. 1 U.K.]

28. 根據《致命意外條例》提出訴訟的時限

(1) 本條的效力，須受第30條所規限。

(2) 如受傷害的人在已不再能夠就有關傷害繼續進行訴訟及追討損害賠償(不論是因本條例或任何其他條例所訂的時限或因其他理由)之時去世，則任何人不得根據《致命意外條例》(第22章)提出訴訟；如受傷害的人所提出的任何上述訴訟受第27條所訂的時限所禁制，即不得考慮是否可能根據第30條凌駕該時限。

(3) 由以下日期起計滿3年後，不得根據《致命意外條例》(第22章)提出任何訴訟 ——

(a) 去世日期；或

(b) 該訴訟為其利益而提出的人的知悉日期，

兩日期中以較後者為準。

(4) 第(3)款不適用於經由或根據本條例以外的任何條例訂明時效期的訴訟，而第27條則不適用於根據《致命意外條例》(第22章)提出的訴訟。

(5) 第22條適用於根據《致命意外條例》(第22章)提出的訴訟，但除此之外，第22至26條以及第IV部均不適用於該等訴訟。

(由1976年第67號第5條代替)
[比照 1975 c. 54 s. 1 U.K.]

28. Time limit for actions under Fatal Accidents Ordinance (Cap. 22)

(1) This section has effect subject to section 30.

(2) An action under the Fatal Accidents Ordinance (Cap. 22) shall not be brought if the death occurred when the person injured could no longer maintain an action and recover damages in respect of the injury (whether because of a time limit in this Ordinance or in any other Ordinance, or any other reason); and where any such action by the injured person would have been barred by the time limit in section 27, no account shall be taken of the possibility of that time limit being overridden under section 30.

(3) An action under the Fatal Accidents Ordinance (Cap. 22) shall not be brought after the expiration of 3 years from—

(a) the date of death; or

(b) the date of knowledge of the person for whose benefit the action is brought,

whichever is the later.

(4) Subsection (3) shall not apply to an action for which a period of limitation is prescribed by or under any Ordinance other than this Ordinance, and section 27 shall not apply to an action under the Fatal Accidents Ordinance (Cap. 22).

(5) An action under the Fatal Accidents Ordinance (Cap. 22) shall be one to which section 22 applies, but otherwise sections 22 to 26, inclusive, and Part IV shall not apply to the action.

(Replaced 67 of 1976 s. 5)
[cf. 1975 c. 54 s. 1 U.K.]

29. 受養人受不同時限所規限

(1) 凡根據《致命意外條例》(第22章)提出的訴訟是為多於一人的利益而提出的，本條即適用。

(2) 第28(3)(b)條分別適用於上述的每一人；如其中1人或多於1人而非全部人會因而受到禁制，法院即須指示任何會受如此禁制的人，須豁除於該訴訟乃為其而提出的人之外，但如能顯示該訴訟假若只為該被豁除的人的利益而提出，該訴訟亦不會因時效的免責辯護而失敗(不論是由於第22條的規定或有關各方議定不提出該項免責辯護或其他情況所致)，則屬例外。

(由1976年第67號第5條代替)
[比照 1975 c. 54 s. 1 U.K.]

29. Dependants subject to different time limits

(1) This section applies where there is more than one person for whose benefit an action under the Fatal Accidents Ordinance (Cap. 22) is brought.

(2) Section 28(3)(b) shall be applied separately to each of them, and if that would debar one or more of them, but not all, the court shall direct that any person who would be so debarred shall be excluded from those for whom the action is brought unless it is shown that if the action were brought exclusively for the benefit of that person it would not be defeated by a defence of limitation (whether in consequence of section 22, or an agreement between the parties not to raise the defence, or otherwise).

(Replaced 67 of 1976 s. 5)
[cf. 1975 c. 54 s. 1 U.K.]

30. 法院凌駕時限的權力

(1) 如法院經顧及以下事項後，覺得容許某宗訴訟進行是公平的 ——

(a) 第27或28條的條文損害原告人或由原告人代表的人的程度；及

(b) 法院根據本款所作的決定會損害被告人或由被告人代表的人的程度，

30. Court's power to override time limits

(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which — *(Amended L.N. 307 of 1998)*

(a) the provisions of section 27 or 28 prejudice the plaintiff or any person whom he represents; and

則法院可指示該等條文不適用於該訴訟或任何與該訴訟有關的指明訴訟因由。

(2) 除非受傷害的人不再能夠繼續進行訴訟是因第27條所訂時限所致，否則法院不得根據本條而使第28(2)條不適用；因此，舉例而言，如受傷害的人去世時因《航空運輸條例》(第500章)所訂的時限而不再能夠根據《致命意外條例》(第22章)繼續進行訴訟，則法院無權指示第28(2)條不予適用。 *(由1997年第13號第20條修訂)*

(3) 法院根據本條行事時，須顧及個案的所有情況，尤其是以下各項 ——

(a) 原告人方面延誤的時間長短及延誤的理由；

(b) 經顧及有關延誤後，原告人或被告人所提出或相當可能會提出的證據，與有關訴訟如已在第27或28條(視屬何情況而定)所容許的時間內提出時相比，會或相當可能會具有較低的說服力的程度；

(c) 被告人在訴訟因由產生後的行為，包括原告人為確定與其針對被告人的訴訟因由有關或可能有關的事實，而合理地要求有關資料或要求查看時，被告人就該項要求作出回應的程度(如有的話)；

(d) 在訴訟因由產生的日期後，原告人無行為能力的持續期；

(e) 原告人知悉被告人的作為或不作為(有關傷害所歸因者)在當時可能足以引致損害賠償訴訟後，迅速及合理地行事的程度；

(f) 原告人為取得醫學、法律或其他專家意見而採取的步驟(如有的話)，以及他取得的該等意見的性質。

(4) 凡屬受傷害的人在去世時因第27條的規定而不再能夠就有關傷害繼續進行訴訟及追討損害賠償的情況，法院尤須顧及在死者方面延誤時間的長短及理由。

(5) 如屬第(4)款所訂情況，或屬時限或其中一個時限乃取決於原告人以外的人的知悉日期的其他情況，則第(3)款的效力須猶如該款已作適當變通，尤其是對原告人的提述包括提述其知悉日期是或曾經是與決定某一時限有關的人一樣。

(6) 法院作出使第28(2)條的條文不適用的指示，具有使《致命意外條例》(第22章)第3條的條文不適用的相同效用。

(7) 在本條中，"法院" (the court)指有關訴訟已經向其提出的法院。

(8) 本條內對第27條的提述，包括提述經本部及第IV部的條文擴闊的該條規定。

(由1976年第67號第5條代替)
[比照 1975 c. 54 s. 1 U.K.]

(b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents,

the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.

(2) The court shall not under this section disapply section 28(2) except where the reason why the person injured could no longer maintain an action was because of the time limit in section 27; so that if, for example, the person injured could at his death no longer maintain an action under the Fatal Accidents Ordinance (Cap. 22) because of the time limit under the Carriage by Air Ordinance (Cap. 500), the court has no power to direct that section 28(2) shall not apply. *(Amended 13 of 1997 s. 20)*

(3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to—

(a) the length of, and the reasons for, the delay on the part of the plaintiff;

(b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 27 or 28, as the case may be;

(c) the conduct of the defendant after the cause of action arose, including the extent, if any, to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

(d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;

(e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;

(f) the steps, if any taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

(4) In a case where the person injured died when, because of section 27, he could no longer maintain an action and recover damages in respect of the injury, the court shall have regard in particular to the length of, and the reasons for, the delay on the part of the deceased.

(5) In a case under subsection (4), or any other case where the time limit, or one of the time limits, depends on the date of knowledge of a person other than the plaintiff, subsection (3) shall have effect with appropriate modifications, and shall have effect in particular as if references to the plaintiff included references to any person whose date of knowledge is or was relevant in determining a time limit.

(6) A direction by the court disapplying the provisions of section 28(2) shall operate to disapply the provisions to the same effect in section 3 of the Fatal Accidents Ordinance (Cap. 22).

(7) In this section "the court" (法院) means the court in which the action has been brought.

(8) References in this section to section 27 include references to that section as extended by any provision of this Part and Part IV.

(Replaced 67 of 1976 s. 5)
[cf. 1975 c. 54 s. 1 U.K.]

不涉人身傷害的潛在損害所關乎的訴訟

31. **在訴訟因由產生的日期不知悉有關訴訟因由的事實時疏忽訴訟的特別時限**

(1) 本條適用於因疏忽而要求損害賠償的訴訟(第27條所適用者除外)，而原告人或先於原告人而獲歸屬訴訟因由的人最先兼有以下兩者的最早日期(本條內提述為"知悉日期")是遲於該訴訟因由產生的日期者 ——

(a) 就有關損害而提出損害賠償訴訟所需的知悉；及

(b) 提出該訴訟的權利。

(2) 第4(1)條就基於侵權行為的訴訟所訂明的時效期，不適用於本條所適用的訴訟。

(3) 按照第(4)款而適用的期限屆滿後，不得提出本條所適用的訴訟。

(4) 上述期限為 ——

(a) 由訴訟因由產生的日期起計6年；或

Actions in respect of latent damage not involving personal injuries

31. **Special time limit for negligence actions where facts relevant to cause of action are not known at date of accrual**

(1) This section applies to any action for damages for negligence, other than one to which section 27 applies, where the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both—

(a) the knowledge required for bringing an action for damages in respect of the relevant damage; and

(b) a right to bring such an action,

(referred to in this section as the "date of knowledge") falls after the date on which the cause of action accrued.

(2) The period of limitation prescribed by section 4(1) in respect of actions founded on tort shall not apply to an action to which this section applies.

(b) 由知悉日期起計3年，如該期限是於(a)段所述的期限之後屆滿者。

(5) 在第(1)款中，"就有關損害而提出損害賠償訴訟所需的知悉" (the knowledge required for bringing an action for damages in respect of the relevant damage)指對以下事項的知悉 ——

(a) 與申索損害賠償所關乎的損害有關的事實，該等事實會令一個蒙受該項損害的合理的人，認為損害的嚴重程度足以令其有充分理由，針對一名並不就法律責任提出爭議、且有能力履行判決的被告人而提起要求損害賠償的法律程序；

(b) 該項損害完全或部分是歸因於指稱構成疏忽的作為或不作為；

(c) 被告人的身分；及

(d) 如指稱上述作為或不作為乃被告人以外的人的作為或不作為時，該人的身分以及其他支持針對被告人提出訴訟的事實。

(6) 就第(1)款而言，對任何作為或不作為在法律上是否涉及疏忽知悉與否，並不相關。

(7) 就本條或第33條而言，某人所知悉者包括可合理地預期該人從以下事實所獲知者 ——

(a) 該人可觀察或確定的事實；或

(b) 該人透過其合理地應尋求的適當專家意見的協助而可確定的事實，

但任何人如已採取一切合理步驟以取得專家意見(及如屬適當時依循該意見行事)，則不得憑藉本款或第33條而被視為已知悉只有在專家意見的協助下始可確定的事實。

(由1991年第31號第13條增補)

[比照 1980 c. 58 s. 14A U.K.]

(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4).

(4) That period is either—

(a) 6 years from the date on which the cause of action accrued; or

(b) 3 years from the date of knowledge, if that period expires later than the period mentioned in paragraph (a).

(5) In subsection (1) "the knowledge required for bringing an action for damages in respect of the relevant damage" (就有關損害而提出損害賠償訴訟所需的知悉) means knowledge—

(a) of such facts about the damage in respect of which damages are claimed as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment;

(b) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence;

(c) of the identity of the defendant; and

(d) if it is alleged that the act or omission was that of a person other than the defendant, of the identity of that person and the additional facts supporting the bringing of an action against the defendant.

(6) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (1).

(7) For the purposes of this section or section 33 a person's knowledge includes knowledge which he might reasonably have been expected to acquire—

(a) from facts observable or ascertainable by him; or

(b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek,

but a person shall not be taken by virtue of this subsection or section 33 to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

(Added 31 of 1991 s. 13)

[cf. 1980 c. 58 s. 14A U.K.]

32. **不涉人身傷害的疏忽訴訟的凌駕性時限**

(1) 屬以下情況的作為或不作為發生的日期(如有多於一個日期，以最後者為準)起計15年屆滿後，不得提出因疏忽而要求損害賠償的訴訟(第27條所適用者除外) ——

(a) 該作為或不作為被指稱構成疏忽；及

(b) 申索損害賠償所關乎的損害完全或部分是歸因於該作為或不作為。

(2) 如屬第(1)款所適用的情況，本條禁制有關訴訟權，即使在本條所訂明的時效期結束前 ——

(a) 訴訟因由仍未產生；或

(b) 如第31條適用於有關訴訟，就該條而言屬知悉日期的日期仍未出現。

(由1991年第31號第13條增補)

[比照 1980 c. 58 s. 14B U.K.]

32. **Overriding time limit for negligence actions not involving personal injuries**

(1) An action for damages for negligence, other than one to which section 27 applies, shall not be brought after the expiration of 15 years from the date (or, if more than one, from the last of the dates) on which there occurred any act or omission—

(a) which is alleged to constitute negligence; and

(b) to which the damage in respect of which damages are claimed is alleged to be attributable (in whole or in part).

(2) This section bars the right of action in a case to which subsection (1) applies notwithstanding that—

(a) the cause of action has not yet accrued; or

(b) where section 31 applies to the action, the date which is for the purposes of that section the date of knowledge has not yet occurred,

before the end of the period of limitation prescribed by this section.

(Added 31 of 1991 s. 13)

[cf. 1980 c. 58 s. 14B U.K.]

33. *(由1976年第67號第5條廢除)*

33. *(Repealed 67 of 1976 s. 5)*

第IV部

一般規定

PART IV

GENERAL

34. *(由2010年第17號第112條廢除)*

34. *(Repealed 17 of 2010 s. 112)*

35. **待決訴訟中的新申索：法院規則**

(1) 就本條例而言，凡於任何訴訟過程中作出的新申索，須當作為一宗獨立的，並於以下日期展開的訴訟 ——

(a) 如屬在第三方法律程序中作出的或以第三方法律程序方式作出的新申索，則在該等法律程序展開的日期；及

35. **New claims in pending actions: rules of court**

(1) For the purposes of this Ordinance, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced—

(b) 如屬任何其他新申索，則在原訴訟展開的日期。

(2) 在本條中，新申索指任何以抵銷或反申索方式作出的任何申索，以及涉及以下其中一項的任何申索 ——

(a) 加入或代入新的訴訟因由；或

(b) 加入或代入新的一方，

而"第三方法律程序" (third party proceedings)則指在訴訟過程中訴訟任何一方針對之前不屬該訴訟其中一方的人而提出的任何法律程序，但藉着將該人加入為提出該法律程序的一方於原訴訟中已作出的申索的被告人而提出的法律程序，則不包括在內。

(3) 除第30條或法院規則另有規定外，法院不得容許第(1)(b)款所指的新申索，在本條例所訂的時限(對強制執行該申索的新訴訟有影響者)屆滿後於任何訴訟的過程中作出，但原訴抵銷或原訴反申索則除外。

(4) 就第(3)款而言，如某宗申索是由之前在訴訟中不曾作出任何申索的一方作出，並且以抵銷或(視屬何情況而定)反申索方式作出者，即為原訴抵銷或原訴反申索。

(5) 如第(3)款所述，法院規則可訂定條文，容許作出第(3)款適用的新申索，但只可在符合第(6)款內指明的條件，並受該等規則所施加的任何進一步限制的規限下作出。

(6) 第(5)款所提述的條件如下 ——

(a) 在申索涉及新的訴訟因由時，如該新的訴訟因由，與申請許可作出修訂的一方在訴訟中已就其申索濟助的訴訟因由，是源於相同事實或實質上相同的事實者；及

(b) 在申索涉及新的一方時，如該新的一方的加入或代入對原訴訟的裁定是必需者。

(7) 就第(6)(b)款而言，新的一方的加入或代入，並不視為對原訴訟的裁定是必需者，除非 ——

(a) 某一方因其姓名或名稱在原訴訟中作出的申索中錯誤地作為新的一方的姓名或名稱，因而代入新的一方；或

(b) 在原訴訟中作出的申索，如新的一方不加入亦不代入為該訴訟的原告人或被告人，則現有的一方不能繼續進行該申索或該申索不能針對現有的一方進行。

(8) 在符合第(5)款的規定下，法院規則可訂定條文，容許任何訴訟的一方就新的訴訟因由以新的身分申索濟助，即使他在訴訟展開的日期並無作出該項申索的資格亦然。

(9) 第(8)款不得視為損害法院規則訂定條文，容許某方在不加入或不代入新的訴訟因由的情況下以新的身分申索濟助的權力。

(10) 就於第三方法律程序的過程中作出的新申索而言，第(3)至(9)款均予適用，猶如該等法律程序是原訴訟一樣，但須作出法院規則對任何案件或任何類別案件所訂明的其他變通。

(11) 根據《最高法院條例》(第4章)第54條訂立法院規則的權力，包括為施行本條而訂立法院規則的權力。

(12) 《1984年時效(修訂)條例》*(1984年第58號)生效日期前訂立的法院規則，在其訂立之時假若本條已予實施則會有效地訂立者，自《1984年時效(修訂)條例》*(1984年第58號)生效日期起有效，猶如憑藉本條而訂立一樣。

(由1984年第58號第2條代替)

[比照 1980 c. 58 s. 35 U.K.]

編輯附註：

* "《1984年時效(修訂)條例》"乃"Limitation (Amendment) Ordinance 1984"之譯名。

(a) in the case of a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and

(b) in the case of any other new claim, on the same date as the original action.

(2) In this section a new claim means any claim by way of set-off or counterclaim, and any claim involving either—

(a) the addition or substitution of a new cause of action; or

(b) the addition or substitution of a new party,

and "third party proceedings" (第三方法律程序) means any proceedings brought in the course of any action by any party to the action against a person not previously a party to the action, other than proceedings brought by joining any such person as defendant to any claim already made in the original action by the party bringing the proceedings.

(3) Except as provided by section 30 or by rules of court, the court shall not allow a new claim within subsection (1)(b), other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Ordinance which would affect a new action to enforce that claim.

(4) For the purposes of subsection (3), a claim is an original set-off or an original counterclaim if it is a claim made by way of set-off or (as the case may be) by way of counterclaim by a party who has not previously made any claim in the action.

(5) Rules of court may provide for allowing a new claim to which subsection (3) applies to be made as there mentioned, but only if the conditions specified in subsection (6) are satisfied, and subject to any further restrictions the rules may impose.

(6) The conditions referred to in subsection (5) are—

(a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment; and

(b) in the case of a claim involving a new party, if the addition or substitution of the new party is necessary for the determination of the original action.

(7) The addition or substitution of a new party shall not be regarded for the purposes of subsection (6)(b) as necessary for the determination of the original action unless either—

(a) the new party is substituted for a party whose name was given in any claim made in the original action in mistake for the new party's name; or

(b) any claim already made in the original action cannot be maintained by or against an existing party unless the new party is joined or substituted as plaintiff or defendant in that action.

(8) Subject to subsection (5), rules of court may provide for allowing a party to any action to claim relief in a new capacity in respect of a new cause of action notwithstanding that he had no title to make that claim at the date of the commencement of the action.

(9) Subsection (8) shall not be taken as prejudicing the power of rules of court to provide for allowing a party to claim relief in a new capacity without adding or substituting a new cause of action.

(10) Subsections (3) to (9) shall apply in relation to a new claim made in the course of third party proceedings as if those proceedings were the original action, and subject to such other modifications as may be prescribed by rules of court in any case or class of case.

(11) The power to make rules of court under section 54 of the Supreme Court Ordinance (Cap. 4) shall include power to make rules of court for the purposes of this section.

(12) Rules of court made before the commencement of the Limitation (Amendment) Ordinance 1984 (58 of 1984) which would have been validly made had this section been in operation when they were made shall have effect as from the commencement of the Limitation (Amendment) Ordinance 1984 (58 of 1984) as if made by virtue of this section.

(Replaced 58 of 1984 s. 2)

[cf. 1980 c. 58 s. 35 U.K.]

36. 默許

本條例並不影響法院基於默許或其他理由拒絕濟助的衡平法司法管轄權。

[比照 1939 c. 21 s. 29 U.K.]

36. Acquiescence

Nothing in this Ordinance shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise.

[cf. 1939 c. 21 s. 29 U.K.]

37. 對官方適用

除本條例另有明文規定及在以不損害第40條條文為原則下，本條例適用於由官方或針對官方進行的法律程序，方式如同本條例適用於公民與公民之間的法律程序：

但本條例不適用於以下的法律程序：官方為追討任何稅款或稅款利息而進行的法律程序、根據《應課稅品條例》(第109章)或任何與貨物稅有關的條例而進行的沒收法律程序、以及任何就沒收船舶而進行的法律程序。

[比照 1939 c. 21 s. 30(1) U.K.]

38. 過渡性條文及關於已被禁制的訴訟的條文

(1) 就於1977年2月1日之前、當日及之後產生的訴訟因由而言，第22(2)及(2A)、27、28、29及30條均屬有效，而就於1977年2月1日之前產生的訴訟因由而言，即使有關訴訟已就該訴訟因由而展開，而該訴訟在1977年2月1日當日仍屬待決，上述各條仍屬有效。 *(由1976年第67號第6條代替)*

(2) 就本條而言，在任何時候如已就某宗訴訟作出或發出最終命令或判決，則即使有關上訴仍屬待決或提出上訴的時限仍未屆滿，該宗訴訟仍不得視為屬待決。 *(由1976年第67號第6條代替)*

(3) 法院在任何時候根據先前的第27至33條(就關乎許可而言，已被《1976年時效(修訂)條例》+(1976年第67號)所廢除)所作給予或不給予許可的決定，對根據《1976年時效(修訂)條例》+(1976年第67號)進行的法律程序中任何問題的裁定，均無影響；但在該等法律程序中，根據已被《1976年時效(修訂)條例》+(1976年第67號)廢除的上述各條而進行的法律程序中獲接納的證據，均可予以考慮。 *(由1976年第67號第6條代替)*

(3A) 在本條中，"訴訟" (action)包括在法院進行的任何法律程序、仲裁、以及以抵銷或反申索方式作出的申索。 *(由1976年第67號第6條增補)*

(4) 除以上所述外，本條例並不 ——

(a) 影響在本條例生效日期前已展開的任何訴訟或仲裁、或影響屬該訴訟或仲裁標的之財產的所有權；或

(b) 使在緊接本條例生效日期前當時被任何英國成文法則或條例的條文所禁制的任何訴訟(該等成文法則或條例憑藉第39條停止在香港適用或(視屬何情況而定)被第39條所廢除)得以提出；但如有關訴訟因由或訴訟權藉按照本條例的條文作出的承認或部分繳款而恢復生效者，則不在此限。 *[比照 1939 c. 21 s. 33 U.K.]*

(5) 除第6條及本條第(4)款的條文另有規定外，如就本條例生效日期前已產生的訴訟因由而提出的法律程序，其時限於該生效日期仍未屆滿，則該時限須在若非因本條例條文即本會屆滿之時屆滿，或於本條例如在所有關鍵時候均生效的情況下本會屆滿的任何時候屆滿，兩者中以較後者為準：

但如本條例為其訂明時效期的訴訟因由已於本條例生效日期前產生，而就該訴訟因由提出法律程序的時間，若非因本條例的條文則屬無限制者，則被本條例條文限制的提出該等法律程序的時限須由本條例開始實施的日期起計算。 *[比照 1954 c. 36 s. 7(1) U.K.]*

[比照 1975 c. 54 s. 3 U.K.]

編輯附註：

+ "《1976年時效(修訂)條例》"乃"Limitation (Amendment) Ordinance 1976"之譯名。

38A. 有關1991年各項修訂的過渡性條文

(1) 凡在1991年7月1日前產生的以下各項訴訟因由，如就其提出法律程序的時限於該日期仍未屆滿，則該時限須在若非因《1991年時效(修訂)條例》*(1991年第31號)即本會屆滿之時屆滿 ——

(a) 收回土地；

(b) 贖回已作按揭的土地；

(c) 追討藉按揭財產或其他財產押記而獲得保證的本金、或追討售賣土地所得收益；或

(d) 就已作按揭的非土地財產止贖。

(2) 第22A、31或32條的規定，並不 ——

37. **Application to the Crown**

Save as in this Ordinance otherwise expressly provided and without prejudice to the provisions of section 40, this Ordinance shall apply to proceedings by or against the Crown in like manner as it applies to proceedings between subjects:

Provided that this Ordinance shall not apply to any proceedings by the Crown for the recovery of any tax or duty or interest thereon or to any forfeiture proceedings under the Dutiable Commodities Ordinance (Cap. 109) or any Ordinance relating to duties of excise or to any proceedings in respect of the forfeiture of a ship.

[cf. 1939 c. 21 s. 30(1) U.K.]

38. **Transitional provisions and provisions as to actions already barred**

(1) Sections 22(2) and (2A), 27, 28, 29 and 30 shall have effect in relation to causes of action which accrued before, as well as causes of action which accrue on or after, 1 February 1977 and shall have effect in relation to any cause of action which accrued before 1 February 1977 notwithstanding that an action in respect thereof has been commenced and is pending on 1 February 1977. *(Replaced 67 of 1976 s. 6)*

(2) For the purposes of this section an action shall not be taken to be pending at any time if a final order or judgment has been made or given therein, notwithstanding that an appeal is pending or that the time for appealing has not expired. *(Replaced 67 of 1976 s. 6)*

(3) A decision taken at any time by a court to grant, or not to grant, leave under the former sections 27 to 33 inclusive (which, so far as they relate to leave, are repealed by the Limitation (Amendment) Ordinance 1976 (67 of 1976)) does not affect the determination of any question in proceedings under the Limitation (Amendment) Ordinance 1976 (67 of 1976), but in such proceedings account may be taken of evidence admitted in proceedings under the said sections repealed by the Limitation (Amendment) Ordinance 1976 (67 of 1976). *(Replaced 67 of 1976 s. 6)*

(3A) In this section "action" (訴訟) includes any proceedings in a court of law, an arbitration and a claim by way of set-off or counterclaim. *(Added 67 of 1976 s. 6)*

(4) Save as aforesaid, nothing in this Ordinance shall—

(a) affect any action or arbitration commenced before the commencement of this Ordinance or the title to any property which is the subject of any such action or arbitration; or

(b) enable any action to be brought which, immediately before the commencement of this Ordinance, was then barred by the provision of any imperial enactment or Ordinance which ceases to apply in the Colony by virtue of or, as the case may be, is repealed by section 39, except in so far as the cause of action or right of action may be revived by an acknowledgment or part payment made in accordance with the provisions of this Ordinance. *[cf. 1939 c. 21 s. 33 U.K.]*

(5) Subject to the provisions of section 6 and subsection (4) of this section, the time for bringing proceedings in respect of a cause of action which accrued before the commencement of this Ordinance shall, if it has not then already expired, expire at a time when it would have expired apart from the provisions of this Ordinance or at any time when it would have expired if the provisions of this Ordinance had at all material times been in force, whichever is the later:

Provided that where a cause of action, for which a period of limitation is prescribed by this Ordinance, has accrued before the commencement of this Ordinance in any case in which, but for the provisions of this Ordinance, no time for bringing proceedings in respect thereof is limited, the time for bringing such proceedings, as limited by the provisions of this Ordinance, shall commence to run from the date of the coming into operation of this Ordinance. *[cf. 1954 c. 36 s. 7(1) U.K.]*

[cf. 1975 c. 54 s. 3 U.K.]

38A. **Transitional provisions relating to 1991 amendments**

(1) The time for bringing proceedings in respect of a cause of action—

(a) to recover any land;

(b) to redeem mortgaged land;

(c) to recover any principal sum of money secured by a mortgage or other charge on property, or to recover proceeds of the sale of land; or

(d) to foreclose on mortgaged personal property,

which accrued before 1 July 1991 shall, if it has not then already expired, expire at the time when it would have expired

(a) 使任何在1991年7月1日前被本條例禁制的訴訟得以提出；或

(b) 影響任何在1991年7月1日前展開的訴訟。

(3) 除第(2)款另有規定外，就1991年7月1日之前、當日及以後產生的訴訟因由而言，第22A、31及32條乃屬有效。

(由1991年第31號第14條增補)

[比照 1980 c. 58 s. 4 U.K.]

編輯附註：

* “《1991年時效(修訂)條例》”乃“Limitation (Amendment) Ordinance 1991”之譯名。

39. 停止適用

附表第1欄所列的英國成文法則，按附表第2欄所指明的範圍，停止在香港適用。

40. 保留條文

本條例並不適用於經由或根據任何其他條例或英國成文法則訂明時效期的訴訟或仲裁，亦不適用於官方乃其中一方，但如各方均為公民時則會經由或根據任何其他成文法則訂明時效期的訴訟或仲裁。

(由1976年第67號第8條修訂)

apart from the provisions of the Limitation (Amendment) Ordinance 1991 (31 of 1991).

(2) Nothing in section 22A, 31 or 32 shall—

(a) enable any action to be brought which was barred by this Ordinance before 1 July 1991; or

(b) affect any action commenced before 1 July 1991.

(3) Subject to subsection (2), sections 22A, 31 and 32 shall have effect in relation to causes of action accruing before, as well as in relation to causes of action accruing on or after, 1 July 1991.

(Added 31 of 1991 s. 14)

[cf. 1980 c. 58 s. 4 U.K.]

39. Cessations of application

The imperial enactments set out in the first column of the Schedule shall, to the extent specified in the second column thereof, cease to apply in the Colony.

40. Saving

This Ordinance shall not apply to any action or arbitration for which a period of limitation is prescribed by or under any other Ordinance or any imperial enactment, or to any action or arbitration to which the Crown is a party and for which, if it were between subjects, a period of limitation would be prescribed by or under any other enactment.

(Amended 67 of 1976 s. 8)

附表

[第39條]

停止適用的成文法則

英國成文法則	停止適用的範圍
《關乎告發者的法令》* (1588 c. 5 U.K.)	第5條
《1623年時效法令》# (1623 c. 16 U.K.)	第3、4及7條
《法律修訂及公義促進法令》+ (1705 c. 3 U.K.)	第17至19條
《1769年官方訴訟法令》@ (1769 c. 16 U.K.)	全部
《1828年欺詐法規修訂法令》** (1828 c. 14 U.K.)	第1、3、4及8條
《1833年土地財產時效法令》## (1833 c. 27 U.K.)	全部
《1833年民事訴訟程序法令》§ (1833 c. 42 U.K.)	第3至7條
《1837年土地財產時效法令》※ (1837 c. 28 U.K.)	全部
《1842年訴訟及訟費限制法令》ʃ (1842 c. 97 U.K.)	第5條

編輯附註：

* “《關乎告發者的法令》”乃“Act concerning Informers”之譯名。

“《1623年時效法令》”乃“Limitaton Act 1623”之譯名。

+ “《法律修訂及公義促進法令》”乃“Act for the amendment of the Law and the better Advancement of Justice”之譯名。

@ “《1769年官方訴訟法令》”乃“Crown Suits Act 1769”之譯名。

** “《1828年欺詐法規修訂法令》”乃“Statute of Frauds Amendment Act 1828”之譯名。

“《1833年土地財產時效法令》”乃“Real Property Limitation Act 1833”之譯名。

§ “《1833年民事訴訟程序法令》”乃“Civil Procedure Act 1833”之譯名。

※ “《1837年土地財產時效法令》”乃“Real Property Limitation Act 1837”之譯名。

ʃ “《1842年訴訟及訟費限制法令》”乃“Limitations of Actions and Costs Act 1842”之譯名。

SCHEDULE

[s. 39]

CESSATION OF APPLICATION OF ENACTMENTS

Imperial enactments	Extent of cessation of application
An Act concerning Informers (1588 c. 5 U.K.)	Section 5
The Limitation Act 1623 (1623 c. 16 U.K.)	Sections 3, 4 and 7
An Act for the amendment of the Law and the better Advancement of Justice (1705 c. 3 U.K.)	Sections 17 to 19
The Crown Suits Act 1769 (1769 c. 16 U.K.)	The whole Act
The Statute of Frauds Amendment Act 1828 (1828 c. 14 U.K.)	Sections 1, 3, 4 and 8
The Real Property Limitation Act 1833 (1833 c. 27 U.K.)	The whole Act
The Civil Procedure Act 1833 (1833 c. 42 U.K.)	Sections 3 to 7
The Real Property Limitation Act 1837 (1837 c. 28 U.K.)	The whole Act
The Limitations of Actions and Costs Act 1842 (1842 c. 97 U.K.)	Section 5

本條例旨在就某些新界土地契約的續期事宜訂定條文。

[1988年2月26日]

弁言
弁言

鑑於1984年12月19日在北京簽訂的"聯合王國政府和中華人民共和國政府關於香港問題的聯合聲明"訂定，在1997年6月30日前屆滿的某些土地契約可續期至不超過2047年6月30日：

To provide for the extension of certain leases of land in the New Territories.

[26 February 1988]

Preamble

WHEREAS the Joint Declaration of the Government of the United Kingdom and the Government of the People's Republic of China on the Question of Hong Kong signed in Beijing on 19 December 1984 provides that certain leases of land expiring before 30 June 1997 may be extended until not later than 30 June 2047:

第I部

導言

1. 簡稱

(1) 本條例可引稱為《新界土地契約(續期)條例》。

(2) *(已失時效而略去)*

2. 適用範圍

本條例適用於在本條生效日期時存在而若非因本條例便會在1997年6月30日前屆滿的每份新界契約，但以下契約除外 ——

(a) 短期租約；

(b) 特殊用途契約；或

(c) 承租人根據第5條以備忘錄形式註冊的契約。

3. 釋義

(1) 在本條例中 ——

"土地註冊處註冊紀錄冊" (Land Registry register)指根據《土地註冊條例》(第128章)備存於土地註冊處的註冊紀錄冊，而該註冊紀錄冊是關於作為新界契約標的之土地者； *(由1993年第8號第2條修訂)*

"指定日期" (appointed day)指(有關文字因已失時效而略去)指定開始實施第6條的日期*；

"特殊用途契約" (lease for special purposes)指 ——

(a) 符合第(2)款的描述的契約，但其本身並非 ——

(i) 短期租約；

(ii) 附表第II部所指明的地段中任何地段的契約；或

(iii) 批給香港房屋委員會、香港鐵路有限公司、九廣鐵路公司或香港房屋協會的契約； *(由2000年第13號第65條修訂；由2007年第11號第36條修訂)*

(b) 附表第I部所指明的地段中任何地段的契約；

"短期租約" (short term tenancy)指批給年期示明不超過7年的契約；而就本定義而言，在計算該段期間時，不得包括憑藉任何權利的行使而已獲得或可能獲得的該契約的續期或續訂在內；

"新界契約" (New Territories lease)及"契約" (lease)指由總督批出或代表總督批出的新界土地契約，並包括批給該契約的協議。

(2) 第(1)款"特殊用途契約"定義中所提述的租約描述，即以下描述 ——

(a) 契約載有一項有關各方所示明或擬使其在整段契約年期內有效的禁止條款，禁止將作為契約標的之土地或其任何權益轉讓；及

(b) 契約所載條款，並無一條是令承租人在任何事件或任何或有事件發生時或在任何條件獲得遵守時，可將作為契約標的之土地及其每項權益轉讓，

不論契約的明訂條文是否准許將作為契約標的之土地或其任何權益押記、按揭或分租，或在取得出租人或政府主管當局的同意後將其轉讓。

編輯附註:

* 指定日期為1988年4月25日——見1988年第48號法律公告。

PART I

PRELIMINARY

1. **Short title**

(1) This Ordinance may be cited as the New Territories Leases (Extension) Ordinance.

(2) *(Omitted as spent)*

2. **Application**

This Ordinance applies to every New Territories lease that exists at the commencement of this section and that, but for this Ordinance, would expire before 30 June 1997, not being—

(a) a short term tenancy;

(b) a lease for special purposes; or

(c) a lease in respect of which the lessee registers a memorandum under section 5.

3. **Interpretation**

(1) In this Ordinance—

"appointed day" (指定日期) means the day appointed *(Words Omitted as Spent) for section 6 to come into operation;

"Land Registry register" (土地註冊處註冊紀錄冊) means the register that is kept in the Land Registry, under the Land Registration Ordinance (Cap. 128), in respect of land that is the subject of a New Territories lease; *(Amended 8 of 1993 s. 2)*

"lease for special purposes" (特殊用途契約) means—

(a) a lease that satisfies the description in subsection (2) but is not—

(i) a short term tenancy;

(ii) a lease of any of the lots specified in Part II of the Schedule; or

(iii) a lease granted to the Hong Kong Housing Authority, the MTR Corporation Limited, the Kowloon-Canton Railway Corporation or the Hong Kong Housing Society; *(Amended 13 of 2000 s. 65)*

(b) a lease of any of the lots specified in Part I of the Schedule;

"New Territories lease" (新界契約) and "lease" (契約) mean a lease of land in the New Territories granted by or on behalf of the Governor and include an agreement to grant such a lease;

"short term tenancy" (短期租約) means a lease expressed to be granted for a term of not more than 7 years; and in calculating that period for the purpose of this definition there shall be excluded any extension or renewal of the lease that has occurred, or may occur, by virtue of the exercise of any right.

(2) The lease description referred to in the definition of "lease for special purposes" in subsection (1) is that the lease—

(a) contains a prohibition, expressed or intended by the parties to enure for the full term of the lease, against the assignment of the land that is the subject of the lease or of any interest therein; and

(b) contains no provision whereby the land that is the subject of the lease, and every interest therein, could be assigned by the lessee upon the occurrence of any event or contingency, or upon compliance with any condition,

whether or not the express provisions of the lease permit the land that is the subject of the lease, or any interest therein, to be assigned with the consent of the lessor or any Government authority, or to be charged, mortgaged or sublet.

Editorial Note:
* The appointed day is 25 April 1988-see L.N. 48 of 1988.

4. 所有特殊用途契約均須在田土註冊處註冊紀錄冊上予以註明

(1) 凡契約是特殊用途契約，田土註冊處處長須於指定日期前，在田土註冊處註冊紀錄冊上作具此意思的註明。

(2) 為施行本條例，契約 ——

(a) 如在指定日期前已由田土註冊處處長在田土註冊處註冊紀錄冊上註明為特殊用途契約，則須確切地當作為特殊用途契約；

(b) 如在指定日期前並未由田土註冊處處長在田土註冊處註冊紀錄冊上註明為特殊用途契約，則須確切地當作為非特殊用途契約。

4. **Note to be made in Land Office register of all special purpose leases**

(1) Where a lease is a lease for special purposes, the Land Officer shall make a note to that effect in the Land Office register before the appointed day.

(2) A lease shall for the purposes of this Ordinance be conclusively deemed—

(a) to be a lease for special purposes if, before the appointed day, a note has been made by the Land Officer in the Land Office register to the effect that it is such a lease;

(b) not to be a lease for special purposes if no such note has been made by the Land Officer in the Land Office register by the appointed day.

5. 承租人的選擇權

(1) 承租人可藉於指定日期前在田土註冊處註冊紀錄冊上將一份以田土註冊處處長所指明的格式而作出的備忘錄註冊，將他根據任何契約而享有的權益(與該契約有關的土地的不分割份數除外)摒除於本條例適用範圍之外。

(2) 在本條中，"承租人" (lessee) ——

(a) 指其名字在田土註冊處註冊為擁有人、契約持有人或持有人的人；及

(b) 凡就相同權益而如此註冊的人多於一名，或除如此註冊的人外，尚有其他人根據在田土註冊處註冊的 ——

(i) 買賣協議；或

(ii) 按揭，

而享有權益者，指所有該等共同行事的人。

5. **Option by the lessee**

(1) A lessee may exclude from the application of this Ordinance his interest under a lease, other than an undivided share in the land to which the lease relates, by registering in the Land Office register, before the appointed day, a memorandum in a form specified by the Land Officer.

(2) In this section "lessee" (承租人)—

(a) means a person whose name is registered in the Land Office as owner, leaseholder or holder; and

(b) where more than one person is so registered in respect of the same interest or, in addition to any person so registered, any other person has an interest under—

(i) an agreement for sale; or

(ii) a mortgage,

registered in the Land Office, means all of them acting jointly.

第II部

新界契約的續期

PART II

EXTENSION OF NEW TERRITORIES LEASES

6. 契約的續期

本條例所適用契約的年期現予續期，由契約若非因本條例便會屆滿的日期起，續期至2047年6月30日完結時止，無須補繳地價。

6. **Extension of leases**

The term of a lease to which this Ordinance applies is extended, from the date on which it would, apart from this Ordinance, expire, until the expiry of 30 June 2047, without payment of any additional premium.

7. 負擔及契諾

(1) 在任何契約根據第6條獲得續期的期間內，該契約及藉或根據在土地註冊處註冊的文書而設定的任何該契約內的權益，除非據該文書顯示有相反意向，否則須受以下各項規限 —— *(由1993年第8號第2條修訂)*

(a) 在緊接續期期間前適用的相同產權負擔及權益，包括 ——

(i) 任何法律上的按揭或押記或衡平法按揭或押記；

(ii) 任何公眾權利；

(iii) 任何相互契諾、權利、地役權、租約或任何種類或性質的其他負擔；

(b) 在緊接續期期間前適用的相同契諾、原權益保留條款、新權益保留條款、約定條件、但書及聲明(包括重收權)，但繳付租金的新權益保留條款及契諾除外；

(c) 關於以下各項的新權益保留條款 ——

(i) 除第(ii)節另有規定外，指根據《地租(評估及徵收)條例》(第515章)所須繳交的地租；

(ii) 在根據《地租(評估及徵收)條例》(第515章)獲得繳交地租的法律責任的豁免的情況下，則指在緊接續期期間前所須繳交的每年租金；及 *(由1997年第53號第56條代替)*

(d) 承租人 ——

(i) (如屬繳交(c)(i)段指明的地租的情況)按照《地租(評估及徵收)條例》(第515章)承諾繳交該地租的契諾；

(ii) (如屬繳交(c)(ii)段指明的每年租金的情況)承諾按照在緊接續期期間前適用的相同方式及日期繳交該每年租金的契諾。 *(由1997年第53號第56條代替)*

7. **Burdens and covenants**

(1) During the period of the extension of a lease under section 6, the lease and any interest therein created by or under an instrument registered in the Land Registry shall, unless the contrary intention appears from the instrument, be subject to — *(Amended 8 of 1993 s. 2)*

(a) the same encumbrances and interests as applied immediately before the period of extension, including—

(i) any mortgage or charge, whether legal or equitable;

(ii) any public rights;

(iii) any mutual covenants, rights, easements, tenancies or other burdens of whatsoever kind or nature;

(b) the same covenants, exceptions, reservations, stipulations, provisos and declarations (including the right of re-entry) as applied immediately before the period of extension, except the reservation of and covenant to pay rent;

(c) a reservation of—

(i) subject to subparagraph (ii), the Government rent payable under the Government Rent (Assessment and Collection) Ordinance (Cap. 515);

(ii) in the case of an exemption from liability to pay Government rent under the Government Rent (Assessment and Collection) Ordinance (Cap. 515), the annual rent payable immediately before the period of extension; and *(Replaced 53 of 1997 s. 56)*

(d) a convenant by the lessee to pay the Government rent specified in paragraph (c)(i) or the annual rent specified in paragraph (c)(ii), as the case may be—

(i) in the case of such Government rent, in accordance with the Government Rent (Assessment and Collection) Ordinance (Cap. 515);

(2) 任何人根據第(1)款(a)、(b)、(c)及(d)段所述的產權負擔、權益、契諾、原權益保留條款、新權益保留條款、約定條件、但書或聲明而享有的權利及承擔的義務，須於有關契約根據第6條獲得續期期間內繼續存在，猶如該續期期間已在有關文書內述明一樣，但如據設定該產權負擔、權益、契諾、原權益保留條款、新權益保留條款、約定條件、但書或聲明的文書顯示有相反意向，則屬例外。

(3) 凡任何根據第6條獲得續期的契約的條文 ——

(a) 賦權出租人在付給承租人補償金後收回作為契約標的之土地；及

(b) 訂明計算補償金的方法，而該方法包括提述 ——

(i) 某一款額的分數，而其分子為一者；及

(ii) 在收回的日期當日年期尚未屆滿的部分，

則所採用的計算方法，須猶如該分數的分母比該契約所指明的分母加大50，以及猶如該契約原已示明批給的年期包括該契約藉第6條獲得續期的期間在內一樣。

(ii) in the case of such annual rent, in the same manner and on the same days as applied immediately before the period of extension. *(Replaced 53 of 1997 s. 56)*

(2) The rights and obligations of any person under any encumbrance, interest, covenant, exception, reservation, stipulation, proviso or declaration mentioned in paragraphs (a), (b), (c) and (d) of subsection (1) shall, unless the contrary intention appears from the instrument creating that encumbrance, interest, covenant, exception, reservation, stipulation, proviso or declaration, continue during the period of the extension of a lease under section 6 as if that period of extension were expressly mentioned in the instrument.

(3) Where the provisions of a lease whose term has been extended by section 6—

(a) empower the lessor, subject to the payment of compensation to the lessee, to resume the land that is the subject of the lease; and

(b) prescribe a method of calculating the compensation that includes references to—
(i) a fraction, whose numerator is the figure one, of any sum; and
(ii) the portion of the term that is unexpired at the date of resumption,

the method of calculation shall be applied as if the denominator in the fraction were greater by 50 than that specified in the lease and as if the lease had originally been expressed to be granted for a term that included the period for which the lease is extended by section 6.

第III部

(由1997年第53號第57條廢除)

8. *(由1997年第53號第57條廢除)*

9. *(由1997年第53號第57條廢除)*

Part III

(Repealed 53 of 1997 s. 57)

8. *(Repealed 53 of 1997 s. 57)*

9. *(Repealed 53 of 1997 s. 57)*

第IV部

雜項

10. 違反契諾

本條例對任何因在指定日期前作出的違反契諾而產生的權利，並不構成放棄。

11. 訂立規例的權力

(具追溯力的適應化修訂——見1999年第40號第3條)

行政長官會同行政會議可藉規例 —— *(由1999年第40號第3條修訂)*

(a)-(h) *(由1997年第53號第58條廢除)*

(i) 訂定須在土地註冊處註冊紀錄冊內作出的記項； *(由1993年第8號第2條修訂)*

(j) *(由1997年第53號第58條廢除)*

(k) 訂明各式表格；及

(l) 概括地訂定條文，以更有效施行本條例的條文及實現本條例的目的。

PART IV

MISCELLANEOUS

10. **Breaches of covenants**

Nothing in this Ordinance shall constitute a waiver of any right arising out of a breach of a covenant committed before the appointed day.

11. **Power to make regulations**

(Adaptation amendments retroactively made - see 40 of 1999 s. 3)

The Chief Executive in Council may by regulation— *(Amended 40 of 1999 s. 3)*

(a)-(h) *(Repealed 53 of 1997 s. 58)*

(i) provide for entries to be made in the Land Registry register; *(Amended 8 of 1993 s. 2)*

(j) *(Repealed 53 of 1997 s. 58)*

(k) prescribe forms; and

(l) generally, provide for the better carrying out of the provisions and purposes of this Ordinance.

附表

〔第3條〕

第I部

特殊用途契約定義內所特別包括的地段

1. 葵涌地段第4號

2. 葵涌地段第5號

3. 新九龍內地段第5611號

SCHEDULE

[s. 3]

PART I

LOTS SPECIFICALLY INCLUDED IN THE DEFINITION OF LEASE **FOR SPECIAL PURPOSES**

1. Kwai Chung Lot No. 4

2. Kwai Chung Lot No. 5

4. 新九龍內地段第5910號
5. 新九龍永久碼頭第15號
6. 新九龍永久碼頭第17號
7. 新九龍永久碼頭第22號及增批部分
8. 新九龍永久碼頭第23號
9. 新九龍永久碼頭第24號
10. 新九龍永久碼頭第25號
11. 荃灣永久碼頭第17號
12. 荃灣永久碼頭第20號
13. 荃灣永久碼頭第21號
14. 荃灣永久碼頭第23號
15. 荃灣永久碼頭第28號
16. 荃灣永久碼頭第29號
17. 荃灣永久碼頭第31號
18. 丈量約份第6約地段第1405號A段
19. 丈量約份第6約地段第1405號B段
20. 丈量約份第6約地段第1405號餘段
21. 丈量約份第51約地段第4925號
22. 丈量約份第83約地段第2140號
23. 丈量約份第102約地段第3329號餘段
24. 丈量約份第335約地段第275號
25. 丈量約份第450約地段第725號
26. 丈量約份第450約地段第726號
27. 丈量約份第450約地段第727號
28. 丈量約份第453約地段第1235號

第II部

特殊用途契約定義內所特別不包括的地段

1. 沙田市地段第143號
2. 屯門市地段第238號
3. 丈量約份第379約地段第758號

3. New Kowloon Inland Lot No. 5611
4. New Kowloon Inland Lot No. 5910
5. New Kowloon Permanent Pier No. 15
6. New Kowloon Permanent Pier No. 17
7. New Kowloon Permanent Pier No. 22 and Extension
8. New Kowloon Permanent Pier No. 23
9. New Kowloon Permanent Pier No. 24
10. New Kowloon Permanent Pier No. 25
11. Tsuen Wan Permanent Pier No. 17
12. Tsuen Wan Permanent Pier No. 20
13. Tsuen Wan Permanent Pier No. 21
14. Tsuen Wan Permanent Pier No. 23
15. Tsuen Wan Permanent Pier No. 28
16. Tsuen Wan Permanent Pier No. 29
17. Tsuen Wan Permanent Pier No. 31
18. Lot No. 1405 Section A in Demarcation District 6
19. Lot No. 1405 Section B in Demarcation District 6
20. Lot No. 1405 Remaining Portion in Demarcation District 6
21. Lot No. 4925 in Demarcation District 51
22. Lot No. 2140 in Demarcation District 83
23. Lot No. 3329 Remaining Portion in Demarcation District 102
24. Lot No. 275 in Demarcation District 335
25. Lot No. 725 in Demarcation District 450
26 Lot No. 726 in Demarcation District 450
27. Lot No. 727 in Demarcation District 450
28. Lot No. 1235 in Demarcation District 453

PART II

LOTS SPECIFICALLY EXCLUDED FROM THE DEFINITION OF LEASE FOR SPECIAL PURPOSES

1. Sha Tin Town Lot No. 143
2. Tuen Mun Town Lot No. 238
3. Lot No. 758 in Demarcation District 379

HCMP 4191/1998

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO. 4191 OF 1998

———————

BETWEEN

CHAN TIN SHI (陳天仕) Plaintiff

and

LI TIN SUNG (李天送)
LI WONG CHOI (李皇財)
LI WONG HING (李皇興)
LI TIN SUNG (李天送)(appointed to represent
the estate of the Deceased LI WING FU (李榮富)
alias LI KOON SHING(李官勝)) Defendants

———————

Coram: Deputy High Court Judge A Cheung in Court

Dates of Hearing: 27-30 May, 19-21 August & 19 December 2002

Date of Judgment: 14 January 2003

———————

J U D G M E N T

———————

Parties

1. In this action, the Plaintiff claims title to a piece of land based on adverse possession. The land is known as Lot No. 525RP in DD No. 26 in Tai Po. It is registered in the name of Li Wing Fu also known as Li Koon Shing, deceased ("Mr Li"), whose estate is sued by the Plaintiff as the 4th named Defendant and is represented by Mr Li's eldest (adopted) son, the 1st named Defendant ("the 1st Defendant") in this action. The other two Defendants ("the 2nd Defendant" and "the 3rd Defendant" respectively) are the other two sons of Mr Li.

Confusion of titles

2. The history of land ownership of the subject lot is rather complicated. The claim of the Plaintiff also concerns several other adjacent pieces of land. Ownership of these pieces of land is to some extent relevant to the issues between the parties. Mr Mak, counsel for the Plaintiff, has in his very detailed written opening set out the devolution in title of the various pieces of land in question by way of an Annex A. For all practical purposes (and save where otherwise indicated), the information set out in Annex A accurately summarises the devolution in title of each of the pieces of land concerned.

3. For the purpose of this judgment, I need only give a brief summary. Five adjacent pieces of land are involved, i.e. Lot No. 520, Lot No. 522, Lot No. 523, Lot No. 524 and Lot No. 525. The first four lots used to be registered in the name of a Li Sam Shing Tong ("the Tong") pursuant to a Block Crown lease. Lot No. 525 used to be registered in the name of a Li Yi Mui Tso ("the Tso") pursuant to the same Block Crown lease. Right from the beginning, there seems to have been some

confusion between the Tso and the Tong regarding the ownership of the five pieces of land. In 1947, the Tong appointed Mr Li as its manager and the appointment was somehow registered against Lot No. 525 thereby treating Lot No. 525 as a piece of property belonging to the Tong. Then came 17 January 1954. By an agreement in Chinese ("the Chinese Agreement"), Mr Li as manager of the Tong agreed to sell to a Mr Chan Mau Wo ("Mr Chan") – the late father of the Plaintiff – the five plots of land in question including Lot No. 525 for a total consideration of $500.00. Pausing here, it should be remembered that Lot No. 525 which is the subject property in dispute, actually belonged to the Tso; but as explained above, it ended up being included in the Chinese Agreement as part of the subject matter of sale between the Tong and Mr Chan.

4. Then in October 1954, to add to the confusion, the Government obtained the surrender of a portion of Lot No. 525 from Mr Li as the manager of the Tong. Mr Li was paid $65.90 as compensation, notwithstanding that Mr Li had in such capacity already agreed with Mr Chan to sell Lot No. 525 to Mr Chan earlier the same year. Moreover, it should be added that notwithstanding the signing of the Chinese Agreement, title to the five plots of land in question including Lot No. 525 was not transferred by the Tong (or for that matter, the Tso – the true owner of Lot No. 525) to Mr Chan.

5. The confusion compounded when in May 1955, there was an appointment of new managers by the Tso. The instrument of appointment was registered against Lot No. 525. That notwithstanding, the Tso apparently either did not notice or chose not to take any action against the earlier inconsistent registration of the appointment of Mr Li as manager of

the Tong against Lot No. 525 or the subsequent surrender of land between the Government and Mr Li representing the Tong.

6. In July 1963, the Government again procured the surrender of a further portion of Lot No. 525 of about 100 sq ft in area, and likewise compensation was paid to Mr Li as manager of the Tong, which was apparently still regarded by the Government as the lawful owner of the remaining portion of Lot No. 525 since the last surrender. After this second surrender, the remaining portion of the former Lot No. 525 was renamed Lot No. 525RP. Again at that stage, neither the Tso – the true owner of Lot No. 525 nor Mr Chan who had contracted to purchase Lot No. 525 from Mr Li under the Chinese Agreement of 1954, featured in the second surrender.

7. In fact, these two surrenders involved not only Lot No. 525 but Lot No. 524 as well which was also included in the Chinese Agreement as part of the subject matter of sale. Unlike Lot No. 525, Lot No. 524 indeed belonged to the Tong, and therefore for that reason, the Government was quite correct in dealing with Mr Li as manager of the Tong on each occasion regarding the surrender of a portion of Lot No. 524 in favour of the Government, to whom the Government paid compensation for the two surrenders. But Mr Chan, the purchaser of Lot 524 under the Chinese Agreement, did not feature in any of the two surrenders.

8. The confusion over the title to Lot No. 525 eventually came to light in early 1968. On 12 March 1968, the Government entered into two new surrenders with the Tso, the rightful owner of Lot No. 525, in relation to the two portions of Lot 525, the surrender of which the Government had previously sought to obtain from Mr Li as the manager of the Tong. The

compensation monies due to the Tso were regarded as having been paid on account of the compensation monies already paid by the Government to Mr Li previously. In effect, the previous surrenders were ratified by the Tso.

9. Moreover, on that day by a conveyance on sale, the Tso sold Lot No. 525RP to Mr Li in his personal capacity for $350.00. In other words, more than 14 years after Mr Li in his capacity as manager of the Tong purported to deal with Lot No. 525 by entering into the Chinese Agreement selling Lot No. 525 to Mr Chan, Mr Li eventually obtained title to the lot in question, albeit in his personal capacity. As I said, Lot No. 525 remains registered in Mr Li's name up to this day. Mr Li passed away intestate on 8 February 1993; the 1st, 2nd and 3rd Defendants are his only surviving sons and but for the claim of a possessary title by the Plaintiff to the subject lot, the three sons would be entitled to succeed to the subject lot in accordance with the provisions in the New Territories Ordinance (Cap. 97). That is why they are joined as defendants in their personal capacity in this action.

10. Returning to 1968, in August of that year, all the beneficiaries of the Tong resolved to dissolve the Tong, and title to Lot No. 522, Lot No. 523 and Lot No. 524RP became vested in Mr Li and another person beneficially. The three lots were then respectively carved up, and to cut a long story short, eventually on 12 December 1968, a Section D of each of the three lots, i.e. Lot No. 522, Lot No. 523 and Lot No. 524 were respectively assigned by Mr Li and his co-owner to Mr Chan for a total sum of $300.00. Unlike the Chinese Agreement made in 1954, this time the assignment was duly registered with the District Land Registry and Mr Chan eventually became the registered owner of Lot No. 522D, Lot No. 523D and Lot No. 524D, more than 14 years after he first contracted to

purchase the three whole lots under the Chinese Agreement. In 1974, Mr Chan, for personal reasons, decided to transfer his title to the three lots to his only son, the Plaintiff who therefore became and is still the registered owner of Lot No. 522D, Lot No. 523D and Lot No. 524D.

11. What about Lot No. 520 which was also included as part of the subject matter of sale under the Chinese Agreement? The confusion is even more amazing. As I said, according to the Block Crown lease, Lot No. 520 belonged to the Tong but since as early as 1911, the Tso seems to have included Lot No. 520 as one of its properties. But in Mr Li's instrument of appointment as manager of the Tong in April 1947, Lot No. 520 was regarded quite correctly by the Tong as one of its properties and the appointment was indeed registered against Lot No. 520. As I said, in 1954 Lot No. 520 was included in the Chinese Agreement for sale in favour of Mr Chan. In the first surrender in October 1954, the whole of Lot No. 520 was surrendered by Mr Li as manager of the Tong in favour of the Government together with portions of Lot No. 524 and Lot No. 525 as mentioned above. But then in May 1955, when the Tso appointed new managers, the instrument of appointment was again registered against Lot No. 520; and in November 1967, when one of the managers of the Tso retired, the instrument was again registered against Lot No. 520. Then came 12 March 1968 on which date a number of instruments were executed as mentioned above. On that day, a conveyance on sale of Lot No. 520 was executed by the Tso in favour of Mr Li for a consideration of $350.00. Thereafter nothing happened in relation to this particular lot, so apparently, the lot is still registered in the name of Mr Li. In other words, despite the inclusion of the lot in the Chinese Agreement, the lot was never assigned to Mr Chan; and despite the 1954 first surrender, it is still registered in the name of Mr Li.

12. So in short, despite the Chinese Agreement made in 1954 in which Mr Li as manager of the Tong purported to sell the five lots to Mr Chan, eventually Mr Chan only obtained title to portions of three lots, namely Lot No. 522D, Lot No. 523D and Lot No. 524D. Mr Chan did not obtain title to Lot No. 520, nor is it claimed by his son, the Plaintiff, that he ever obtained possession of Lot No. 520 after the making of the Chinese Agreement in 1954.

13. As regards Lot No. 525, after the two surrenders in favour of the Government, only Lot No. 525RP is left. Like Lot No. 520, Mr Chan never obtained title to Lot No. 525RP from either the Tso, the Tong or Mr Li personally. However, unlike Lot No. 520, the Plaintiff claims that at all material times since the signing of the Chinese Agreement in 1954, Mr Chan and his family were and still are in continuous and exclusive possession of Lot No. 525 and subsequently Lot No. 525RP. This forms the basis of the Plaintiff's claim for a possessary title to Lot No. 525RP in the present action against the Defendants.

The Plaintiff's evidence

14. The case of the Plaintiff who gave evidence at trial is essentially as follows. Mr Chan, the Plaintiff's father, was a native resident of Chan Uk Village in Tai Po; he used to work as a fisherman and owned several pieces of land in Tai Po. In 1954, when the Plaintiff was only 11 years old, Mr Chan agreed with Mr Li representing the Tong to acquire the five lots in question, i.e. Lot No. 520, Lot No. 522, Lot No. 523, Lot No. 524 and Lot No. 525 for the construction of buildings on the land for residential purpose. The Plaintiff said he was present on the occasion when the written agreement was signed and actually witnessed the making

of the Chinese agreement. He was old enough to realise what was happening and actually witnessed the making of payment by his father of $500.00 to Mr Li in the presence of witnesses and others concerned. His case is that after the acquisition of the lots in question, his father erected two village type town houses on part of the land which subsequently became Lot No. 522D, Lot No. 523D and Lot No. 524D as explained above. Besides, his father also managed to obtain a short-term licence from the Government in respect of a piece of land at the rear of the lots in question, on which his father erected a small house. The short-term licence has since been renewed many times up to the present. All this was accomplished in the year of 1954 and upon the completion of the construction of the twin town houses, the Plaintiff's family, comprising the Plaintiff's parents, the Plaintiff and his sisters, began to reside there as their new home.

15. Mr Chan was a fisherman but subsequently became an employee of China Light & Power. Mrs Chan, the mother of the Plaintiff, was a farmer. She was assisted by her daughters before they got married. She farmed land owned by Mr Chan, and she used the small house for storage purpose in relation to her farming activities. Moreover, according to the Plaintiff's evidence, at the time when the houses were constructed, Lot No. 525 which like the other lots used to be paddy fields was flattened and became an open ground with a slope near its edge facing the main road (Ting Kok Road). Mrs Chan used Lot No. 525RP for rearing poultry, and a septic tank was also constructed in Lot No. 525RP to serve the pig rearing activities carried on by Mrs Chan inside the small house. The pig manure was used by Mrs Chan for farming purpose. A wooden fence was erected to enclose Lot No. 525 by the parents of the Plaintiff. Fruit trees were planted by the family on the land and an ox used by Mrs Chan for farming

was kept there at night. Subsequently, according to the Plaintiff, a small pond was constructed on the land for the purpose of rearing ducks and for that purpose, water pipes were laid across the land. All these activities, according to the Plaintiff, were carried on by the Plaintiff's family in Lot No. 525RP because the same, like the other lots in question, had been purchased by Mr Chan from Mr Li. They regarded the land as belonging to them and used it to the exclusion of all others including Mr Li or the Tong he represented, as well as the Tso – the true owner of the land until 1968.

16. According to the Plaintiff, after the making of the Chinese Agreement in 1954, his father had, on various occasions, asked Mr Li to formally transfer the title to the lots to him, in accordance with the provisions in the Chinese Agreement which provided for the transfer of title after one month's public notification of the sale and purchase, a requisite procedure for the sale of Tong land. However, according to the little information that the Plaintiff had obtained from his father, Mr Li had been refusing to do so on various excuses. Something relating to payment or receipt of compensation was mentioned but no details were known. Apparently since the Plaintiff's family had been using the land so purchased without encountering any particular problem, Mr Chan did not really take any concrete action to follow up the matter. Rather, after the Plaintiff went to the United Kingdom for work in 1963, Mr Chan mailed the Chinese Agreement to his son in the United Kingdom for safekeeping.

17. According to the Plaintiff, since 1963 until 1997 when he retired and returned from the United Kingdom to Hong Kong for good, he visited his family in Tai Po annually; each time he would spend several weeks to a month with his family. According to his observation, his

family continued to occupy and use exclusively Lot No. 525RP as before, and there was never any objection from anybody. According to the Plaintiff, in 1968 his father eventually managed to obtain the transfer of title to land from Mr Li. But he was not involved in the transfer and knew nothing about its details including why title to three lots only was transferred by Mr Li to his father and why only a Section D of each of the three lots were transferred. But it was the Plaintiff's evidence that whether before 1968 or after 1968, his family continued to use Lot No. 525 (or the remainder thereof after the Government resumptions) to the exclusion of everybody including in particular, Mr Li and his family. The Plaintiff was not aware of the change in title to Lot No. 525RP in 1968 as described above.

18. According to the Plaintiff, in 1974 his father transferred to him various plots of land including Lot No. 522D, Lot No. 523D and Lot No. 524D on which the family houses had been erected. At that time he was focusing on his restaurant business in the United Kingdom and thought nothing about the title to Lot No. 525RP which his family had been using since 1954. The Plaintiff said that throughout this period of time, his family's relationship with the Defendants' family was acceptable even though Mr Li had, despite Mr Chan's requests, failed to effect the transfer of title as described before. In 1968, the Defendants' family erected three town houses next to the twin houses of the Plaintiff's; as a matter of fact, the Plaintiff's houses stand between the Defendants' houses built in 1968 and Lot No. 525RP. According to the Plaintiff, so far as he could tell the neighbours were on reasonable or speaking terms. During cross-examination, the Plaintiff said he had no knowledge of his father's alleged objection to Mr Li's intended construction of houses on his land in 1968.

19. The Plaintiff said that his parents throughout lived at the twin houses erected in Lot No. 522D to Lot No. 524D, and moreover, his mother continued to use Lot No. 525RP for various purposes as described above. Her mother only ceased her farming activities in early 1980s when she grew old and developed an eyesight problem. The Plaintiff said that the poultry and pig rearing activities stopped eventually and Lot No. 525RP was subsequently used by his mother and family members for miscellaneous gardening and storage purposes. What is important is that the Plaintiff claimed that the family continued to occupy Lot No. 525RP exclusively as before.

20. The Plaintiff maintained that his mother used to live in the twin houses in question since their construction in 1954 until her death in 1990, whereas he accepted that his father had during different periods of time resided at his ancestral home in Chan Uk Village; but he denied that the relationship of his parents in their later years was less than good.

21. The Plaintiff said his mother passed away in 1990 and his father passed away in 1993. His wife together with his eldest son returned to live in Hong Kong in 1992 when he expended some money in renovating the twin houses. Amongst other things, he filled up the former septic tank for pig rearing purpose constructed in Lot No. 525RP. He repaired the wooden fence erected by his father many years before and built a new septic tank to serve the twin houses which his wife and his eldest son resided in. He said that none of these activities was objected to by the Defendants' family.

22. As mentioned before, the Plaintiff retired in 1997 and returned to live in Hong Kong for good in the same year. He and his family lived

in the twin houses and continued to occupy exclusively Lot No. 525RP which he used as a garden to grow flowers, fruit trees, bamboos and vegetables as well as for storage purposes.

23. Dispute between the two families arose in mid 1998 when the Plaintiff began to construct a new septic tank in Lot No. 525RP. The 1st Defendant and his family members claimed that the land belonged to their family and that the Plaintiff was trespassing on their land. This led to several confrontations between the two families, the calling of the police, the alleged demolition of the wooden fence previously erected by the Plaintiff's family along the boundaries and the erection of a new wire mesh fence along the boundaries of Lot No. 525RP by the Defendants. In the same year, the present action was commenced by the Plaintiff against the Defendants.

Aerial photographs and the surveyor's evidence

24. Apart from the oral evidence of the Plaintiff, many photographs including Government aerial photographs were adduced before me at trial. Whilst I have borne in mind all of these photographs, I need only mention several specifically. In an aerial photograph taken in 1963 of the area in question, besides the twin village houses and the small house erected by the Plaintiff's father, the photograph depicts quite clearly a flattened and more or less vacant piece of land next to the houses where Lot No. 525RP lies. It seems quite clear to me that somebody must have carried out work on the land in question to flatten it and turn it into an open ground. This is quite consistent with the Plaintiff's story that the land in question was converted from sloping paddy fields into a piece of vacant land in 1954 after it was acquired by his father pursuant to the Chinese

Agreement. Another aerial photograph taken ten years later in 1973 still shows the same piece of land, but by then trees had grown and tree tops simply prevented a clear view of the land in question from being photographed from the sky. The Plaintiff was able to pinpoint a particular tree shown in the photograph which he claimed was planted by him on the boundary of the land when it was first acquired by his father. Subsequent aerial photographs are less helpful for our purposes because much of the land in question was covered by tree tops. The Plaintiff accepted that in the 1963 photograph, neither the septic tank for pig rearing purpose nor the small pond for duck rearing could be seen, but he said they were relatively speaking too small to be seen clearly or at all in the aerial photograph.

25. The surveyor who was called by the Plaintiff to give evidence also confirmed in his evidence that the 1963 aerial photograph clearly shows that Lot No. 525RP had by then been flattened substantially and there were activities being carried on there. But understandably the surveyor was unable to tell what these activities were from the aerial photograph. The surveyor said that by the time he conducted his survey on site in 1998, there were no obvious landmarks on the site to indicate the boundaries of the subject lot. He prepared his survey plan based on on-site measurements as well as the available pre-existing plans. According to his measurement, Lot No. 525RP measures 81.8 m_2.

PW3's evidence

26. The Plaintiff's case as described above was substantially corroborated and supplemented by the evidence of other witnesses called by him. Mr Chan Yung Sing ("PW3") was born in 1936. He was 18 when Mr Chan purchased the lots in question from Mr Li under the

Chinese Agreement. He heard about it at the time. Apart from generally corroborating the evidence given by the Plaintiff, PW3 said that after the acquisition by Mr Chan of the lots, he constructed the twin village houses and the small house and flattened the piece of land in front of the small house (i.e. Lot No. 525RP) and turned it into an open ground whereas previously the lots comprised paddy fields. Despite suggestions to the contrary put to him during cross-examination, PW3 maintained that this work was done by Mr Chan after his acquisition of the various pieces of land and thereafter, his wife and his family used the piece of open ground for rearing poultry, keeping an ox, planting fruit trees and general storage purposes. PW3 said he had known Mr Chan and his family since he was 7 years old and he was also well acquainted with Mr Li. PW3 confirmed on oath the existence of the pig septic tank and a small pond constructed by the Plaintiff's family in Lot No. 525RP. He said for poultry rearing purposes, a fence had been erected by the Plaintiff's family within Lot No. 525RP up to the edge of a slope within the land on the side of the bicycle lane and main road (Ting Kok Road). PW3, a fellow villager of Mr Chan until he and his family moved to live in the new village houses he erected in 1954, used to pay frequent visits to Mr Chan's family until 1961 when he went abroad to work in the United Kingdom. He did not return to Hong Kong until 1977, he kept in contact with Mr Chan's family after his return and visited the village houses from time to time. He said in evidence that by that time pig rearing had stopped but Mr Chan's family continued to rear chicken at the open ground, i.e. Lot No. 525RP. PW3 left for the United Kingdom in 1979 again and in the 80s, he returned to Hong Kong from time to time.

27. In 1992, he assisted the Plaintiff in renovating the twin village houses. He said that for that purpose the Plaintiff arranged for the felling

of many fruit trees previously planted in the flattened portion of Lot No. 525RP in order that building and construction materials could be temporarily stored at Lot No. 525RP. He said that on that occasion, the Defendants' family which lived at the town houses nearby did not raise any objection at all. He denied the suggestion that originally the Plaintiff had planned to construct a septic tank in Lot No. 525RP to serve his twin village houses but the plan was aborted because of objection from the Defendants' family. PW3 said that that never happened. As I said, by and large the evidence of PW3 supported and supplemented the case and evidence of the Plaintiff and I need not repeat further his evidence here.

PW4's evidence

28. As mentioned above, both the Plaintiff and PW3 left for the United Kingdom in the early 1960s. PW3 did not return to Hong Kong until 1977 whereas the Plaintiff managed to visit Hong Kong annually. The evidential gap since 1963 relating to what happened to Mr Chan's family's alleged use and occupation of Lot No. 525RP was filled by the evidence of Mr Ng Sing Ming ("PW4"). PW4 was able to give very useful evidence on the user of the land in question during the "missing years".

29. PW4 is the son of the eldest daughter of Mr Chan and the nephew of the Plaintiff, he was born in 1958 and was brought up by his grandparents at the twin houses since the age of one. PW4 was able to recollect at trial the user of the subject lot in question since the early 1960s. His evidence substantially supported the evidence given by his uncle, the Plaintiff, as well as that given by PW3 whom he did not know well. PW4 confirmed in evidence about the rearing of chicken and ducks by his

grandmother and aunts (i.e. Mrs Chan and her unmarried daughters) on the open ground outside the small house, i.e. Lot No. 525RP. A fence of 3-4 feet in height had been erected there on the ground enclosing the area where the poultry was reared since his earliest recollection. Within that enclosed area was a septic tank constructed for rearing pigs inside the small house. Further, there was a small and shallow pond constructed next to the septic tank for the purpose of rearing ducks. A fruit tree had been planted by his uncle, i.e. the Plaintiff, so he was told by his grandmother, in the flattened portion of Lot No. 525RP (which was substantially enclosed by the fence for poultry rearing), and there were other trees planted by Mr Chan's family on the slope facing Ting Kok Road also within the boundary of Lot No. 525RP. PW4 was able to clarify that, in fact, the ox used by Mrs Chan for farming purpose was not kept within Lot No. 525RP but kept at an area on the other side of the twin village houses. According to PW4, the farming activities stopped before 1970 and the ox was no more kept by the family. The pig rearing activities had stopped earlier in 1967 and thereafter the small house was used mainly for storage purposes. The pig septic tank was continued to be used as the small house also served as a toilet for those living in the twin village houses. There was apparently a problem with the water supply in 1977 and at around that time, duck rearing stopped; but the elderly Mrs Chan and her daughters continued to rear chicken on the open ground within the enclosed portion of Lot No. 525RP for self-consumption, and that continued until around 1988 as Mrs Chan grew older. According to PW4, the fence enclosing the poultry rearing area was still there in the 1980s and lasted until early 1990s. He moved out of the premises in early 1992 after his uncle, i.e. the Plaintiff, had indicated to him his intention to renovate the twin village houses.

30. According to PW4, there was another fence erected at the slope facing Ting Kok Road, it had fallen into disrepair in the 1970s and little if any traces could be found of the former fence in the subsequent years. He also said that in the later years, the open ground was used mainly for storage purposes. He confirmed that the ground in question had always been used by his grandparents' family as its own and he had never seen anybody objecting to their use of the land. He also said firmly despite suggestions to the contrary that were put to him during cross-examination that apart from his grandparents' family, nobody had used Lot No. 525RP during his time there. In particular, he denied that the Defendants' family had ever used the land for any purpose at any time.

31. Like the other factual witnesses of the Plaintiff, PW4 was cross-examined at great length relating to his years spent at the premises in question. I need not repeat the details of his evidence here; suffice it to say that he maintained that the land in question had been used exclusively by his grandparents' family as its own at all material times.

The 1st Defendant's evidence

32. The 1st Defendant who has also been appointed to represent the estate of the late Mr Li gave evidence at trial. The 1st Defendant was born in November 1958. Although he was only formally adopted by Mr Li and his wife in 1977, he was actually raised by the couple since birth, and was throughout regarded by the couple as their own son. In fact, the 1st Defendant's natural father was one of the managers of the Tso. Mr Li and his wife had four daughters but no son and that was why the 1st Defendant was adopted. After his adoption (which was subsequently formalised in

1977), two sons were born to the couple and they are respectively the 2nd and 3rd Defendants in this action.

33. According to the 1st Defendant, even prior to 1968 when his family moved to live next door to Mr Chan's family, his parents had made use of Lot No. 525 RP by keeping an ox and farming equipment there at night. This was because his parents owned and farmed various pieces of land at the opposite side of Ting Kok Road roughly facing Lot No. 525 RP. It was therefore convenient to keep the ox as well as the farming tools at the subject lot. He said in 1968, his parents erected three adjourning houses on land owned by Mr Li and moved to live there from Lee Uk Village where they used to reside. The houses were just next door to the twin houses of the Chan family. As mentioned above, the twin houses of the Chan family situate, roughly speaking, in between the houses of the Li family and the suit property, i.e. Lot No. 525RP.

34. According to the 1st Defendant, he learned from Mr Li that by then the relationship between the two families had turned sour because Mr Chan had objected to Mr Li's intended erection of the houses on the ground of "fung shui". Indeed, according to the 1st Defendant, his father was angry with Mr Chan and had quarrelled with him after they had moved to live in the new houses in the summer of 1968. By that time, Mr Li had formally acquired the title to Lot No. 525RP from the Tso; and according to the 1st Defendant, on one occasion, his father went over to Lot No. 525RP to clear the weeds and bushes that had overgrown on the land, in order to "demonstrate his ownership" of the land to Mr Chan. His father also told Mr Chan on that occasion that the lot (i.e. Lot No. 525RP) belonged to him and warned Mr Chan and his family not to trespass on it. It was also on that occasion, according to the 1st Defendant, that Mr Li

quarrelled with Mr Chan about the latter's objection to his erection of the houses. According to the 1st Defendant, since that occasion, the two families were on poor terms and apparently had little contact with each other.

35. According to the 1st Defendant, he could tell from his own observation that since then (as before) nobody ever (and in particular the Chan family never) made use of Lot No. 525RP for any purpose. Instead it was his family which had from time to time gone over to Lot No. 525RP to cut and collect the weeds and bushes as miscellaneous burning fuel. The 1st Defendant said that from his first floor room in the houses, he could see 80% of the subject lot and he confirmed in evidence that none of the activities alleged to have been carried on in the subject lot by the Chan family was in fact carried on at any material time. Moreover, he said that in fact since 1968, at most of the time the twin houses of the adjacent family were occupied by Mrs Chan and a young kid (i.e. PW4 – the nephew of the Plaintiff) only. Mr Chan was seldom seen there and the 1st Defendant had never met or seen the daughters of Mr Chan or indeed the Plaintiff until the late 1990s when dispute arose relating to the ownership of the subject lot.

36. According to the 1st Defendant, in 1977, the source of water supply to the twin houses of the Chan family had been contaminated and his mother (Mrs Li) agreed to let the elderly Mrs Chan obtain water supply from her houses instead and that situation continued until the death of Mrs Chan in 1990.

37. The 1st Defendant started working for the Government in 1978, and his job related to land resumption and compensation in the New

Territories. In 1979, he advised his father to plant some fruit trees in the subject lot so that in case the lot was resumed by the Government, higher compensation could be claimed from the Government. His father followed his advice and planted two fruit trees in the subject lot which, according to the evidence, were depicted in some of the photographs taken after the dispute between the parties arose.

38. According to the 1st Defendant, the Plaintiff or his family had trespassed or attempted to trespass on Lot No. 525RP by trying to lay water pipes on the ground as well as by attempting to construct a septic tank in the lot in 1991 and 1993 respectively. On each occasion, after his intervention, the trespass or attempted trespass came to a halt.

39. In 1998, there was yet again an attempt by the Plaintiff to build a septic tank in Lot No. 525RP. This time it led to several confrontations between the two sides, police was summoned and surveyors were engaged. Eventually, the 1st Defendant managed to erect a wire mesh fence to enclose the subject lot, and the present action was commenced by the Plaintiff in 1998.

40. The 1st Defendant also gave evidence (by adoption of one of his two witness statements) on the confusion relating to the title of the various lots of land in question. He said he had heard from his father that there was confusion of titles between the Tso and the Tong chiefly because of the Japanese occupation during the Second World War and the consequential loss of title documents, and the matter was eventually rectified in 1968. The 1st Defendant claimed no knowledge of the Chinese Agreement which he said he had never seen prior to the present litigation. As regards the flattening of the subject lot, he said this was done by his

father on behalf of the Tong in 1954 in order to obtain a general building licence covering the five lots in question. There can be no denial that all this was based on hearsay.

41. As regards the 1968 transfer of Lot No. 522D, Lot No. 523D and Lot No. 524D by Mr Li (and his co-owner) to Mr Chan, whilst the 1st Defendant did not claim any specific knowledge or information (from his father or otherwise) relating to the deal, he emphasized in evidence that according to the conveyance, his father only sold the three lots to Mr Chan for the total sum of $300.00, and there was a plan annexed to the conveyance which was signed by Mr Chan, demarcating the boundaries of the three lots which, of course, did not cover the subject lot in dispute. The 1st Defendant also said that after 1968 when his father formally became the registered owner of the subject lot, his father and subsequently he himself have been paying continuously the Crown/Government rent.

42. The 1st Defendant emphasized in his evidence that since the two families lived next door to each other at all material times and the subject lot is no more than a minute's walk from his own houses, there was no way the Chan family could have trespassed into the subject lot without his and his family's knowledge. According to the 1st Defendant, apart from the incidents in the 1990s, the last of which led to the present litigation, and apart from a track which Mr Chan used to use to reach the small house erected at the rear of the twin houses, a corner of which might have cut into the boundary of the subject lot, the Chan family had never carried on any activities of any sort in the subject lot; and in relation to the track, it in fact led to the warning given by Mr Li on the occasion in 1968 when he went over to clear the overgrowth in the subject lot mentioned

above. The Plaintiff's claim of a possessary title to the subject lot was therefore strongly denied by the 1st Defendant.

DW2's evidence

43. The Defendants called a Mr Cheung Kam Moon (DW2), a salesman, to give evidence. DW2 was born and raised in a nearby village in October 1965, he had his primary school education at a village primary school situated (uphill) at the back of the twin houses of the Plaintiff and the subject lot since the age of 6. There were two routes to the primary school, both used by DW2, one of which would lead him past the twin houses of the Plaintiff and the subject lot. According to DW2, he was rather familiar with the subject area in question and on many occasions, he played with his friends and schoolmates at the hillside at the rear of the subject lot. Moreover, he was acquainted with the Plaintiff's mother due to his frequent presence in the area. The 3rd Defendant, on the other hand, was his primary school classmate whom he came to know in around 1975 to 1976.

44. In 1977, DW2 started studying in a secondary school in Yuen Long. On a daily basis he had to take a bus to Yung Long at a bus stop in Ting Kok Road immediately outside the twin houses of the Plaintiff and the town houses of the Defendants. Whilst waiting at the bus stop, he continued to have the occasions to chat with the Plaintiff's mother. After Form 5 education, DW2 started working and he continued to use the bus stop as before until 1988 when he moved to live elsewhere. Thereafter he used to visit his home village once a week.

45. According to the evidence of DW2, there were never any activities being carried on in the area outside the small house of the Plaintiff (i.e. the subject lot and its immediate surrounding area). Throughout these various periods of time, the area was simply a piece of abandoned land overgrown with weeds. From time to time somebody would cut the weeds for burning but he did not know who did it. He saw no poultry rearing, pig rearing or septic tank, there was no fruit tree and there was no fence of whatever sort (until late 1990s when the dispute between the parties to this action arose and he was requested by the 3rd Defendant to act as a witness in the present case).

46. According to DW2, only the Plaintiff's mother and a youth (i.e. PW4) used to reside in the Plaintiff's twin houses and apparently his other family members did not reside there. Occasionally, he would see the Plaintiff's father but he had never seen the Plaintiff. He was not acquainted with the youth residing together with the Plaintiff's mother who was apparently not particularly friendly or sociable. From time to time, the Plaintiff's mother would complain to him about her poor eyesight and after her death in 1990, he saw the youth no more. According to DW2, the Plaintiff's father moved to reside at Chan Uk Village in about 1977, and he resided there until he passed away in about 1993. DW2 did not know who owned the subject land and he was not aware of any dispute over the ownership of the same until dispute arose in late 1990s as described above.

47. DW2 said that of the 1st to 3rd Defendants, he knew the 3rd Defendant best, and they would chat with each other every time they met. He was not related to the Defendants.

DW3's evidence

48. The Defendants also called a former neighbour of the Plaintiff's father in Chan Uk Village since 1981 (DW3). DW3 moved to live in Chan Uk Village in 1981 and the Plaintiff's father lived next door to him. All that he was able to say was that the Plaintiff's father had another house (i.e. the twin village houses), but according to what he had learned from the Plaintiff's father, the Plaintiff's father was not on good terms with his wife and therefore he alone moved to reside at Chan Uk Village.

Findings of fact

49. The Plaintiff obviously bears the burden of proof in relation to the alleged adverse possession of the subject lot. In deciding the factual disputes, particularly that in relation to the user of the subject lot, I have borne in mind not only the burden and standard of proof, but also the content of the evidence of the various factual witnesses who have given evidence at trial, their demeanour in court, the documentary evidence, the undisputed objective facts and the general circumstances surrounding the case. Where relevant, I have also borne in mind the evidence of the surveyor (PW2).

50. At the end of the day, I have come to the conclusion and I make as a finding of fact that the dispossession of Mr Li, as well as the exclusive user of the land by the Plaintiff's family have been established together with the necessary intention to possess. In general, I prefer the evidence of the Plaintiff and his witnesses to that of the 1st Defendant. In particular, I prefer the evidence of PW4 to the evidence of the 1st Defendant relating to the user of the land.

51. I have no doubt that the Chinese Agreement was signed in 1954, it was a genuine document and it represented a genuine attempt by Mr Chan to purchase the five lots from the Tong as represented by Mr Li, its registered manager. I have no doubt that the consideration was duly paid pursuant to the Chinese Agreement. About the execution of the Chinese Agreement, I have the evidence of the Plaintiff. In 1954, the Plaintiff was only 11 years old but I take the view that he was old enough to have some recollection of this event which cannot be described as an ordinary or everyday occurrence and which must have been rather exciting to him as a boy. After all, his father was buying land for the erection of a new family residence.

52. That this was not a paper transaction which was never carried through or performed (at least substantially) is clearly evidenced by the fact that the twin houses were soon afterwards erected in portions of Lot No. 522, Lot No. 523 and Lot No. 524 by Mr Chan who has since made the twin houses his new residence, quite obviously without any objection from anybody. Moreover, a short-term licence was obtained from the Government to erect the small house immediately next to the new twin houses and the subject lot, for use in conjunction with the twin houses, and so I find, the subject lot.

53. It is true that title to the five lots of land covered by the Chinese Agreement was never transferred to Mr Chan pursuant to the Chinese Agreement, and apparently the same never received the blessing of the District Land Officer whose consent must be obtained to comply with section 15 of the New Territories Ordinance. It is also true that the Chinese Agreement was never registered against any of the five lots of land in question. All this, in my judgment, would only suggest that after the

signing of the Chinese Agreement, some problems arose in relation to the proper and formal implementation of the same and in this regard, as I mentioned earlier on, there were Government resumptions of some of the land in question to complicate matters. In particular in 1954, apparently the whole of Lot No. 520 was resumed by the Government. All these complications could well explain the absence of any formal implementation of the Chinese Agreement after it was signed. But looking at the case as a whole, I have no doubt that pursuant to the Chinese Agreement, the twin houses were erected and the Chan family occupied and used the subject lot in question in conjunction with the adjourning twin houses and small house erected on Government land, after the same was flattened by Mr Chan. I accept the Plaintiff's evidence that he learned from his father that Mr Li had since the making of the Chinese Agreement refused or failed to formalise the transaction on various excuses.

54. As for Lot No. 520, it was never used by the Plaintiff's family. One possible and indeed likely explanation for this is that as explained above, in October 1954, i.e. soon after the making of the Chinese Agreement, the whole lot was surrendered to the Government. Very likely because of this, Mr Chan never really enjoyed any real use or occupation of Lot No. 520. It is also likely that some agreement was reached between Mr Li and Mr Chan relating to this lot; but unfortunately, there is no direct evidence on this. Be that as it may, whilst I have borne in mind the fact that Lot No. 520 which was included in the Chinese Agreement was never made use of by the Plaintiff family in evaluating the inherent possibilities and probabilities of the competing stories, as I said, on the evidence as a whole, I am satisfied that pursuant to the Chinese Agreement, the Plaintiff family did occupy and make use of the subject lot in question in conjunction with the twin houses (and the small house).

55. The Plaintiff's family's use of the land since 1954 is to some extent corroborated by the aerial photographs. Particularly, the photographs taken in the earlier years quite clearly suggest that some human activities must have been carried on in the subject lot. This is much more consistent with the story of the Plaintiff and his witnesses than the story of the 1st Defendant. Two aerial photographs taken in 1977 also tend to corroborate the Plaintiff's case in that they suggest that the subject lot was still a piece of vacant and open ground (instead of an abandoned lot) very much like before. This is more consistent with the Plaintiff's case than the story of the 1st Defendant.

56. As regards what took place in 1968, whilst I tend to accept that the two families were not on very good terms, I am not sure about the reason why. The 1st Defendant said it was because of Mr Chan's objection to Mr Li's building houses on the adjacent land based on "fung shui". The relevant District Land Office file has not been obtained or disclosed. Whilst there might have been an objection, I am not satisfied about the alleged reason. But in any event, this does not necessarily support the Defendants' argument that because of the bad relationship between the two and because of the fact that since the two sides had become neighbours in that year, any trespassing by the Plaintiff's family must have been vigorously objected to by the Defendants' side.

57. I do not accept the 1st Defendant's evidence. Apart from my general rejection of his evidence where it conflicted with the evidence given by the Plaintiff and his witnesses, what he said does not quite accord with what I have found to have been the situation. According to my finding as mentioned above, pursuant to the Chinese Agreement, the Chan family had erected the twin houses and had been making good use of the

subject lot which was after all just next to the twin houses and in front of the small house erected on Government land obtained by Mr Chan under a short-term licence. The occupation and use of the subject lot was obviously based on everybody's then assumption that in 1954 when the same was "sold" by the Tong through Mr Li to Mr Chan, Mr Chan had thereby acquired a good title to the subject lot. From the subsequent history relating to the subject lot, it would appear that until 1968, not even Mr Li himself realised that the Tong did not own the subject lot and there was no reason why Mr Chan would have known better in this regard.

58. This being the background as I find it, when the mistake or confusion was apparently discovered in 1968 and the situation changed by the transfer of title to the subject lot by the Tso to Mr Li personally (who could, if he had so wished, have "rectified" the matter by transferring the same to Mr Chan), this would not, in my judgment, as a matter of fairness and common-sense, give Mr Li a good reason to evict Mr Chan and his family from the subject lot. Nor would it give Mr Li a good argument to assert his newly acquired title to the subject lot against Mr Chan and his family, who until 1968 had occupied and used the subject lot as their own, under the belief that Mr Li had, on behalf of the Tong, lawfully sold the subject lot to Mr Chan back in 1954.

59. Put simply, *vis-à-vis* Mr Chan, Mr Li had no good reason to assert his newly acquired title to the subject lot in 1968; it would have been a very odd if not outrageous thing for him to do. Indeed it would have been an even odder thing for Mr Chan to remain silent if he was in fact faced with an assertion of title to the subject lot by its new registered owner, namely Mr Li. As a matter of common-sense, I would have thought that his immediate reaction would have been to cry foul and demand Mr Li to

immediately transfer to him the title to the subject lot and make good the situation pursuant to the Chinese Agreement.

60. In my judgment, none of this happened because Mr Li, after personally obtaining the title to the subject lot from the Tso, never asserted his title against Mr Chan. I accept the Plaintiff's evidence that on their side they never knew that there was this transfer of title between the Tso and Mr Li personally in relation to the subject lot in 1968. So far as their side was concerned, life carried on as before with the exception that in 1968 they had a new neighbour. As I said, I reject specifically the evidence of the 1st Defendant in this regard.

61. Question marks still hang in relation to what actually happened between the Tso and Mr Li relating to the subject lot in 1968. It is possible and likely that in that year the two sides reached some sort of an agreement to resolve all confusion of titles relating to land (not restricted to the subject lot). As to whether the stated consideration of $350.00 for the transfer of the subject lot by the Tso to Mr Li personally was actually paid, there is no reliable evidence (apart from the memorial and the one page assignment itself). But none of this is crucial to the Plaintiff's case although the Plaintiff bears the burden of proof in relation to adverse possession. The more important thing is that in my judgment, and so I find as a fact that, in 1968 and thereafter, Mr Chan and his family continued to regard and use the subject lot as their own land as before.

62. In this regard, I have the very useful and helpful evidence of PW4 relating to the user of the lot. I accept his evidence and in fact, in so far as his evidence differed from that given by the Plaintiff and PW3, I prefer his evidence to that of the Plaintiff and PW3, basically for the reason

that whereas PW4 called the twin houses his home since birth until early 1990s, the Plaintiff and PW3 had spent much of their time during the relevant period in the UK. The differences in their evidence were, in my judgment, due to innocent lapses in memory. As regards the differences in evidence between that given by PW4 and the 1st Defendant, both of whom are of the same age and were neighbours with little contact at the material time, bearing everything in mind including the content of their evidence and their demeanour in Court, I have little difficulty in preferring, as I said, the evidence of PW4 to the evidence of the 1st Defendant, particularly relating to the user of the subject lot from 1968 onwards. I totally disagree with counsel's submission that the 1st Defendant was a straightforward witness. In fact, I find him to have been most argumentative and defensive in the box. In any event, in view of his age and where he used to live, I find that he could say very little that was useful about the user of the land prior to 1968.

63. In this regard, I should say that I have fully borne in mind the evidence of DW2 who was apparently more independent as a witness than the Plaintiff, PW3, PW4 and for that matter, the 1st Defendant. However, given his age, his knowledge of the user of the subject lot related more to the 1970s and thereafter. Of course by then, even on the Plaintiff's case and particularly based on the evidence of PW4 which I accept, the activities being carried on in the subject lot had greatly diminished as compared with the earlier years. Several factors contributed to this, such as the ageing of Mrs Chan, the marriage of the daughters, the cessation of farming due to changes in economic conditions in Hong Kong, and perhaps the less than prefect marital relationship between Mr Chan and his wife resulting in the former spending more and more time in Chan Uk Village. Moreover, it must be remembered that the boundaries of the subject lot were not

apparent on the ground and the user of the subject lot by then (as per the Plaintiff's case) only covered part of the subject lot. To an uninformed outsider like DW2, he might well have got the impression that the area in question was an abandoned area with no human activities. In any event, bearing in mind the respective *qualities* of their knowledge about the user of the land, I prefer the evidence of PW4 to the evidence of DW2 where there was any conflict.

64. As to why in 1968 only title to Lot No. 522D, Lot No. 523D and Lot No. 524D was transferred to Mr Chan but not also title to Lot No. 525RP, there is no direct evidence. I accept, particularly bearing in mind the burden of proof, that this is an objective fact *against* the case of the Plaintiff. This fact would seem to suggest that the subject lot was either by agreement between Mr Chan and Mr Li or otherwise not intended to be given to Mr Chan for his use and all that he was entitled to was the three partial lots. I wish to say specifically that I have fully borne this fact and its possible implications in mind, and given the same their due weight in my deliberation process, in coming to my factual findings.

65. Likewise, I wish to say that I have not overlooked the fact that throughout the years, it was Mr Li and his son who have been paying the Crown/Government rent in relation to the subject lot. This would tend to suggest that at least on their side, they did not treat the land as belonging to Mr Chan and his family. But in this regard, I must note that Mr Li did have a history of dealing with land as its owner even though he had sold or agreed to sell it to someone else. His behaviour between 1954 and 1968 relating to the surrenders of land and the receipt of compensation monies, which land was covered by the Chinese Agreement, would tend to support my comment. It is possible that he held out the hope that by holding onto

the title to the subject lot and making payment of the Crown rent notwithstanding the loss of possession of the same to Mr Chan and his family pursuant to the earlier Chinese Agreement, one day when the Government again resumed the land (or a portion thereof), he could once again had a share in it. This is of course speculation but is indeed a possible explanation for what happened. I have borne in mind the burden of proof as well as the standard of proof, and I have fully kept this fact and its possible implications in mind in my deliberation process.

66. In final submission, both counsel urged upon me a number of factual matters, possibilities, discrepancies and arguments relating to whose version was more credible and so forth. I wish to say that I have taken into account all these points and accorded them their due weight in my deliberation process. I have no intention to lengthen this judgment by referring to these matters one by one, apart from those that I have already mentioned or discussed in the previous paragraphs.

Law

67. In short, I have reached the conclusion that the Plaintiff has made out a case on adverse possession, bearing in mind the law's requirement in this area of dispossession of the true owner, and both factual possession and the requisite intention to possess by the squatter. For authorities, see *Wong Tak Yue v. Kung Kwok Wai David* [1998] 1 HKLRD 241; and *Powell v. McFarlane* (1979) 38 P & CR 452, 470-472. For the requisite intention to possess in the case of a trespasser who (mistakenly) believed himself to be the owner of land, see *Tsun Wai Man v. Cheung Yung* HCA 14202/1999, Cheung J (9 August 2001), paras. 36 to 39;

Hughes v. Cork [1994] EGCS 25; *Viva Steamship Co. Ltd v. Chow Lim Choy* HCA 1722/2001, Kwan J (7 May 2002), paras. 23 and 24.

68. On the evidence before me, I have no doubt that Mr Chan and his family genuinely thought that they had purchased and become the owner of the subject lot in question pursuant to the 1954 Agreement and in that (mistaken) belief they had been in possession and making use of the subject lot since 1954 with the intention to exclude the whole world generally from the land. Of course, Mr Chan and his family would not have realised (and did not realise) that the Tso (prior to 1968) and Mr Li (as from 1968) were respectively the true owners of the land, but the intention to exclude them from the land must have been there given their mistaken belief that Mr Chan was the owner of the land. Such an intention is, according to the above authorities, sufficient to constitute the necessary intention to possess.

69. I have borne in mind the point urged forcefully upon me by counsel for the Defendants during submission that compelling evidence is required to prove the necessary intention to possess and that the burden on the trespasser to establish a case of adverse possession is heavy. I accept all that and in fact I have borne all that in mind in my evaluation of the evidence before me. But at the end of day, I have come to the conclusion that a case of adverse possession comprising the necessary factual possession as well as the requisite intention to possess has been made out.

When did time begin to run?

70. Given my findings, i.e. since 1954, Mr Chan and his family have been in continuous adverse possession of the subject lot with the

requisite intention to possess, I need not deal with the rather interesting question of when time should begin to run in this case. Both sides are in agreement that the requisite period is 20 years whether under the relevant provisions of the Limitation Ordinance (Cap. 347) at the material times or under the Real Property Limitation Act 1833 which applied to Hong Kong prior to the enactment of the Limitation Ordinance in 1965: See the recent judgment of Deputy High Court Judge Lam in *Leung Kuen Fai v. Tang Kwong Yu (or U) Tong* [2002] 2 HKLRD 705. Of course, if one simply counts 20 years from 1954, the relevant period would expire in 1974. But the possible complication is this: Between 1954 and 1968, the Tso was the true owner of the land in question. According to Lam DJ's recent judgment, given the peculiar nature of a tso or tong as a trust, one cannot simply focus on the limitation period applicable to the registered manager of the tso or tong; one must take into account all its living members (if not those yet unborn) and see whether *their* causes of action against the trespasser have also become time-barred, before one can say whether a case of adverse possession has been made out against a tso or tong and its title to the land in question has become time-barred and extinguished.

71. Since the Tso was the owner of the subject lot in the present case between 1954 and 1968, the question that arises in the present case is this: In seeking to make out a case of adverse possession not as against the Tso but as against Mr Li (the true owner since 1968), whether the Plaintiff can resort to the period of adverse possession prior to 1968 (i.e. starting from 1954) in counting the 20 years period or whether he must only start counting his years from 1968. Even based on Lam DJ's judgment, the answer must to some extent depend on the membership of the Tso between 1954 and 1968, as to which there is not much evidence.

72. But I need not express any definite view on the matter, nor need I go any further into this very interesting question. This is because on the facts as found by me, there has been continuous adverse possession since 1954 right up to the time in mid 1990s when the two families started having serious confrontations, resulting eventually in the commencement of the present litigation. In other words, whether one starts counting the 20 years from 1954 or from 1968, it does not really matter. In my judgment, subject to one important matter which I will shortly deal with, whether by 1974 or by 1988, Mr Li's cause of action to recover possession of the subject lot has become time-barred and his title to the same extinguished.

Alternative argument based on the Chinese Agreement

73. I should mention, for the sake of completeness, that on the pleading, the Plaintiff also runs an alternative case of an equitable or beneficial interest in the subject lot arising from the Chinese Agreement itself. But Mr Mak, counsel for the Plaintiff, told the Court in no uncertain terms, both during his opening and during his final submission, that the Plaintiff is not pursuing this argument. In any event, it is difficult to see how this argument could lead the Plaintiff anywhere. The 1954 Chinese Agreement dealt or purported to deal with land owned by the Tong (or, in truth, so far as the subject lot was concerned, the Tso), the consent of the District Land Officer to which was required as mentioned above. Moreover, there was a mutual mistake amongst the vendor and the purchaser in that both apparently thought that the subject lot belonged to the Tong. This was a most fundamental mistake and rendered the Chinese Agreement void in relation to the subject lot. The acquisition of the title to the subject lot by Mr Li in his personal capacity, 14 years after the

signing of the Chinese Agreement, would not help to feed the title. So in my judgment, this alternative argument based on the Chinese Agreement itself is a dead end.

Result but…

74. But for one matter, the upshot of all this is that I would be prepared to make a declaration that by 12 March 1988 (the 20th anniversary of Mr Li's acquisition of title to the subject lot) at the latest, Mr Chan has acquired a possessary title to the subject lot and Mr Li's title to the same has been extinguished, by reason of Mr Chan's adverse possession of the same for a continuous period of no less than 20 years. I would *not* be minded to make any declaration in relation to the *Plaintiff's* title to the land. For this would depend on his succession to his late father's intestate estate, and the claim, if any, of any other possible beneficiaries (like his sisters).

The New Territories Leases (Extension) Ordinance (Cap. 150) ("The Extension Ordinance")

75. The one very important matter that I referred to above is this: It is common ground that the Block Crown lease in question was for a term of 75 years from 1 July 1898 with an option to renew for a further term of 24 years less 3 days. Pursuant to the New Territories (Renewable Government Leases) Ordinance (Cap. 152) ("the Renewal Ordinance"), the option was deemed to have been exercised and a new Government lease granted immediately upon the expiration of the Block Crown lease on 30 June 1973, for a new term of 24 years less 3 days, expiring on 27 June 1997: sections 3 and 4 of the Renewal Ordinance.

76. According to the Privy Council decision in *Chung Ping Kwan v. Lam Island Development Co. Ltd* [1997] AC 38, the Renewal Ordinance did not have the effect of giving a leaseholder under a Crown lease a fresh cause of action to evict a squatter, who had been in adverse possession for over 20 years prior to 1 July 1973, by virtue of the renewal and grant of a new lease on that day pursuant to the provisions in the Renewal Ordinance. On its true construction, the Renewal Ordinance was essentially administrative machinery designed to facilitate the implementation of existing rights and obligations under Crown leases, with a rent alteration in favour of lessees; the Ordinance should be approached on the footing that, save as otherwise provided, the Ordinance was intended to achieve the same result as would have occurred if a new lease had been granted pursuant to the right of renewal. In those circumstances, the deemed new lease was to be regarded as having the like consequences in law as would have followed from an actual exercise of the renewal option and an actual grant of a new lease: p. 50E-F.

77. According to the Privy Council, if there were an actual exercise of the renewal option and an actual grant of a new lease, the lessee would be obtaining and holding the new lease pursuant to the exercise of an option which was granted by the Government under the original Crown lease. The new lease was not obtained by virtue of any new right unconnected with the lessee's prior interest, but by the maturing of a right which had its inception in the original Crown lease. Prior to the grant of the new lease, the lessee under his current lease (the leasehold estate under which is the subject of extinguishment under the squatter's adverse possession) already got a specifically enforceable right to a new lease against the Government. His new lease stemmed from his original lease. According to the Privy Council,

> "The lessee's claim in right of the new lease is not a claim to an estate or interest in reversion within the meaning of section 9(1) [of the Limitation Ordinance][1], because the lessee's right to the new lease, subject to satisfying any prescribed conditions, was a right he already had as lessee."

78. In other words, the lessee was not in the same position of a person claiming through the reversionary interest of the Government as landlord, which in the absence of an option to renew (or the exercise thereof) would fall into possession upon the expiry of the term of the original Government lease, and thus a person who could exercise the Government's fresh cause of action to evict the trespasser upon the falling into possession of the Government's reversionary interest pursuant to section 9(1). Rather, the lessee was a person obtaining and holding the newly granted lease pursuant to the exercise of an option to renew that was contained in the original Government lease in his favour. As between him and the trespasser, that option had been defeated and indeed extinguished pursuant to section 17 just as much as the lessee's other rights under the original Government lease: pp. 48F-G, and 49G-H. Therefore, there was no accrual of a fresh cause of action to evict the trespasser pursuant to section 9(1) of the Limitation Ordinance.

79. Whereas the Renewal Ordinance did not, in substance, create any new right or obligation as between the Government and the lessee, save that there was a mandatory statutory exercise of the option to renew, the same cannot be said in relation to the Extension Ordinance, which had its origin in the Joint Declaration dated 19 December 1984. Annex III para.

[1] Section 9(1) reads: "Subject as hereafter provided in this section the right of action to recover any land shall, in a case where the estate or interest claimed was an estate or interest in reversion or remainder or any other future estate or interest and no person has taken possession of the land by virtue of the estate or interest claimed, be deemed to have accrued on the date on which the estate or interest fell into possession by the determination of the preceding estate or interest."

2 of the Joint Declaration provided that all leases of land granted by the British Hong Kong Government not containing a right of renewal that expired before 30 June 1997, with some (irrelevant) exceptions, might be extended if the lessee should so wish for a period expiring not later than 30 June 2047 without payment of an additional premium.

80. This part of the Joint Declaration was carried into effect domestically by the enactment of the Extension Ordinance in 1988: see the short title and the preamble of the Ordinance. A Government lessee could opt out of the extension provisions in the Ordinance by a prescribed procedure that had to be completed prior to the coming into effect of Part II of the Ordinance on 25 April 1988 which contained the necessary extension provisions: see section 5 in Part I of the Extension Ordinance which came into operation earlier on 26 February 1988.

81. Section 6 in Part II of the Extension Ordinance reads in English and Chinese as follows:

> "6. The term of a lease to which this Ordinance applies is extended, from the date on which it would, apart from this Ordinance, expire, until the expiry of 30 June 2047, without payment of any additional premium.
>
> 本條例所適用契約的年期現予續期，由契約若非因本條例便會屆滿的日期起，續期至 2047 年 6 月 30 日完結時止，無須補繳地價。"

82. Section 7 contains provisions dealing with the burdens and covenants affecting the land during the period of "extension" under section 6, as well as the preservation of rights and obligations concerning the land during the same period.

83. In short, whereas under the Renewal Ordinance, the renewed Government leases were to expire by effluxion of time on 27 June 1997, by virtue of the Extension Ordinance, the leases have been "extended" for 50 years and 3 days to 30 June 2047.

84. The Extension Ordinance was adopted as the laws of the Hong Kong Special Administrative Region by the Provisional Legislative Council on 1 July 1997 under section 7 of the Hong Kong Reunification Ordinance. Furthermore, articles 120 and 121 of the Basic Law confirm the "extension" of these leases. The relevant provisions in both English and Chinese are as follows:

> "Article 120
>
> All leases of land granted, decided upon or renewed before the establishment of the Hong Kong Special Administrative Region which extend beyond 30 June 1997, and all rights in relation to such leases, shall continue to be recognized and protected under the law of the Region.
>
> Article 121
>
> As regards all leases of land granted or renewed where the original leases contain no right of renewal, during the period from 27 May 1985 to 30 June 1997, which extend beyond 30 June 1997 and expire not later than 30 June 2047, the lessee is not required to pay an additional premium as from 1 July 1997, but an annual rent equivalent to 3 per cent of the rateable value of the property at that date, adjusted in step with any changes in the rateable value thereafter, shall be charged.
>
> 第一百二十條
>
> 香港特別行政區成立以前已批出、決定、或續期的超越一九九七年六月三十日年期的所有土地契約和與土地契約有關的一切權利，均按香港特別行政區的法律繼續予以承認和保護。
>
> 第一百二十一條
>
> 從一九八五年五月二十七日至一九九七年六月三十日期間批出的，或原沒有續期權利而獲得續期的，超出一九九七年六月三十日年期而不超過二零四七年六月三十日的一切土

> 地契約，承租人從一九九七年七月一日起不補地價，但需每年繳納相當於當日該土地應課差餉租值百分之三的租金。此後，隨應課差餉租值的改變而調整租金。”

85. In those circumstances, can a Government lessee who has been dispossessed by a squatter for the requisite period of adverse possession prior to the “extension” of his Government lease (as renewed pursuant to the Renewal Ordinance) claim that he has thereby obtained a fresh cause of action based on the extended lease to evict the squatter, pursuant to section 9(1) of the Ordinance, so that time should begin to run again upon the “extension”? Depending on when the squatter completed his requisite period of adverse possession, and depending on the actual meaning and legal effect of an “extension” of the lease, the above question may have to be further modified or fine-tuned. But for the time being, this sufficiently highlights the question faced by the Plaintiff in the present action.

86. In *Unijet Ltd v. Yiu Kwai Hoi* HCA 13637/1998 (21 June 2002), Sakhrani J held that the Extension Ordinance must be construed according to common law principles. Under common law principles, there can be no “extension” of the term of a lease even by mutual agreement between landlord and tenant. That can only be achieved by a surrender and re-grant, or a “reversionary lease”. In a surrender and re-grant situation, the unexpired term of the original lease is there and then surrendered by the tenant to the landlord in exchange for the re-grant of a new tenancy. In a reversionary lease situation, otherwise known as a “concurrent lease” (see *Halsbury’s Laws of England* (4th ed. reissue) Vol. 27(1) para. 81 and particularly footnote 1 and para. 83), for the type of concurrent leases one is concerned with here, the term of the

concurrent/reversionary lease will begin immediately upon the expiration of the earlier lease and end on a future day.

87. Sakhrani J therefore held that the "extension" in the Extension Ordinance was achieved by means of either an immediate surrender and re-grant which therefore would have taken place on 25 April 1988, or a reversionary lease the term of which would have commenced on 28 June 1997 immediately after the expiry of the renewed term of 24 years and 3 days pursuant to the Renewal Ordinance. His lordship did not find it necessary to decide this point on the facts of that case: see para. 81 of the learned judge's judgment.

88. In those circumstances, the learned judge further concluded that in either case, this was a completely different situation from that obtaining in the Renewal Ordinance and the Privy Council decision in *Chung Ping Kwan*. Neither the surrender and re-grant nor the reversionary interest was premised on a pre-existing option to renew under the original lease, or the new lease renewed pursuant to the Renewal Ordinance. The lessee under the re-grant or under the reversionary lease took the lease in question as the new lessee of the Government landlord. He was someone claiming through the Government's reversionary interest whether under the re-grant or under the reversionary lease. There was therefore an accrual of a fresh cause of action pursuant to section 9(1) of the Limitation Ordinance upon the re-grant or upon the taking effect of the reversionary lease. In those circumstances, notwithstanding the possessary title *vis-à-vis* the original lease (as renewed) obtained by a squatter prior to April 1988 or June 1997 when the re-grant or alternatively the reversionary lease took effect, time began to run again upon the re-grant or the reversionary lease taking effect.

89. If that is correct, and if time really began to run again under such a new cause of action either in April 1988 or in June 1997, given that the present counterclaim by the Defendants for eviction was commenced in September 1998, the result must be that the Plaintiff cannot *now* claim a good possessary title against the Defendants, regardless of what the true position was prior to the "extension".

90. However, in *Mutual Luck Investment Ltd v. Yeung Chi Kuen* HCMP 6047/1998 (25 November 2002), Lam DJ in his judgment (Part II) came to an opposite conclusion relating to the Extension Ordinance. In the learned judge's view, the Extension Ordinance is covered by the true principle behind the Privy Council decision in *Chung Ping Kwan*. According to the learned judge (in paras 48-50), first, the "extension" took place in April 1988, because section 6 of the Extension Ordinance in both English and Chinese refers to a present extension. He also drew support from articles 120 and 121 of the Basic Law which have been extracted above. (But the past tense used in these two articles of the Basic Law would equally support Sakhrani J's construction of the Extension Ordinance because whether by means of a surrender and re-grant or a reversionary lease, the "extension", according to Sakhrani J, was achieved before 1 July 1997 when the Basic Law came into effect.)

91. In any event, Lam DJ was of the view that the material question according to the Privy Council's decision is as follows (at paras. 63 and 64):

> "63. It seems to me on proper reading of the judgment of Lord Nicholls, the material question is not whether the right of the lessee to the new legal estate stemmed from an option to renew or other right inherently built into the old lease or right bestowed on the lessee when the old lease was granted. The material question is whether there was a specifically enforceable right in

> the lessee to call for the new legal estate by reason of his interest under the old lease when he was already lawfully in possession. If he had such a right, Section 9(1) would operate in favour of the lessor and conversely, if such a lessee had slept on his rights, the fact that he acquired a new legal estate could not assist him. That is precisely why Lord Nicholls said that the legal source of the lessee's entitlement to his new legal estate could not be ignored.
>
> 64. Applying such a test, the answer is obvious. The right of the Plaintiff's predecessor in title under Section 6 of the New Territories Leases (Extension) Ordinance Cap. 150 is a specifically enforceable right. Such a right was conferred upon Fung Lok Kung Sze when, as between it as lessee and the Government as lessor, it was lawfully in possession. Hence, at all material time, the Government could rely on Section 9(1) to maintain that time has not started to run against it. As regards the squatter, on the assumption that I were incorrect in all my above findings as to the boundary of the First Tau Shui Mun and the status of Hon Kun and the 39th Defendant, Fund Lok Kung Sze slept on its rights by failing to commence proceedings against the 39th Defendant to recover possession. The right of Fund Lok Kung Sze to obtain the new legal estate pursuant to the extension was not by virtue of any new right unconnected with its prior interest (see paragraph 58 above). Hence, the rationale in *Chung Ping Kwan* applies to the new estate obtained by a Government lessee pursuant to the New Territories Leases (Extension) Ordinance Cap. 150 as much as it applied to the new estate pursuant to the deemed renewal in 1973."

92. In other words, Lam DJ held that since the right to an "extension" had its origin in the lessee's status as a Government lessee in lawful possession under the original Government lease (as renewed by the Renewal Ordinance), he did not derive his new title under the re-granted lease in 1988 from the Government's reversionary interest under the original lease (as renewed), but rather pursuant to his statutory right in section 6 of the Extension Ordinance by virtue of his status as a Government lessee under a Government lease that had been renewed pursuant to the Renewal Ordinance.

93. I have carefully considered the reasonings in both judgments, as well as the very interesting arguments mounted by counsel on both sides. With the greatest respect to the two learned judges (and counsel), I prefer the decision of Lam DJ. I will not further lengthen this judgment by a detailed analysis of the situation. That has been done twice by two learned judges. This point, of potentially great importance, obviously requires appellate clarification, particularly in the light of the conflicting first instance decisions. I hope that whatever that I may try to say on this issue in this judgment will not add to the present confusion on the proper construction of the Extension Ordinance.

94. For what it is worth, I would like to simply add a few observations of my own. First, insofar as *Unijet* decided that the extension was achieved by a surrender and re-grant in April 1988 and the effect of that was that a fresh cause of action accrued in April 1988, I cannot agree with it. This would effectively mean that a squatter who had obtained a good possessary title prior to April 1988 was, by a side-wind under the Extension Ordinance, deprived of his possessary title to the land in question for the remainder of the term of the renewed lease (pursuant to the Renewal Ordinance) of more than 9 years, before it was due to expire on 27 June 1997. An interest in land for 9 years is a very valuable interest indeed. The Extension Ordinance should not be construed, unless for compelling reasons, to have such a draconian effect on a person's accrued interest in land, even though that accrued interest was in the nature of a possessary title, which was good only for the remaining term of the leasehold estate of the dispossessed leaseholder. See *Bennion, Statutory Construction* (4th ed.) sections 269 and 278.

95. Secondly, of course, insofar as *Unijet* decided that the "extension" was only achieved by means of a reversionary lease taking effect in June 1997, the above startling result would not arise. However, this alternative construction does not sit well with the actual wording of section 6 of the Extension Ordinance, whether in English or Chinese, as has been pointed out by Lam DJ in para. 48 of his judgment.

96. Thirdly, one must not only focus on what happened on 25 April 1988 when Part II (and in particular section 6) of the Extension Ordinance came into operation. One should bear in mind and analyse the position between 26 February 1988 when Part I and section 5 came into operation and 25 April 1998. Granted that common law does not allow the extension of the term of a lease by mutual agreement, or, for that matter, the insertion of an option to renew into a lease that did not contain such an option (*Baker v. Merckel* [1960] 1 QB 657), it does not follow that the *legislature* cannot force upon the parties a statutory *option* to "extend" (via a surrender and re-grant), which it obviously did, when Part I of the Extension Ordinance came into operation on 26 February 1988. Part I section 5 contains the opt-out provisions. If the lessee opted out before the deadline (i.e. 25 April 1988 when Part II came into operation), there would be no "extension" and his pre-existing lease would be left to run its course. This was, in substance, an option given to the lessee by legislation. This statutory option therefore did *not*, *unlike* the common law, *by itself* cause a (deemed) surrender and regrant. But if the lessee did *not* opt out before the deadline, when Part II came into operation, an "extension" via a surrender and regrant would *then* take place. To this extent, on this analysis, the common law as represented by *Baker v. Merckel* was departed from by the legislative.

97. I call it an "option" to surrender and re-grant because the lessee was indeed given an option under section 5 of the Extension Ordinance, or more correctly, a "negative" option to opt out of the surrender and re-grant, which option to opt out must be exercised within a period of time, i.e. between 26 February 1988 (when section 5 came into effect) and 25 April 1988 (when section 6 came into effect). This was, like an option to renew, a unilateral option on the part of the lessee. The Government had no choice. The lessee had a specifically enforceable right to surrender and obtain a re-grant, provided that he did not choose to opt out within the short period of time. This right was given to him by legislation.

98. Thus analysed, I can see no material distinction between a lessee who was given this option by section 5 during the period of time between 26 February 1988 and 25 April 1988, and a lessee who had an option to renew the Government lease for another term of 24 years less 3 days prior to the expiration of his lease on 30 June 1973. The latter had a right under the original Government lease. The former had a right pursuant to the Extension Ordinance. They both had their respective rights because they were the lessees of the Government, and their rights were specifically enforceable against the Government in their capacity as lessee. In other words, the reversionary interest of the Government to the land was (made) subject to those rights. Put yet another way, in between the squatter and the Government, there stood the Government lease plus those rights respectively. When the two lessees in my example respectively exercised the options against the Government and respectively obtained a new leasehold interest in the land, they were not obtaining the new leasehold estate pursuant to the reversionary interest that the Government had in the land prior to the exercise of the option, which fell

into possession upon the expiry of the existing lease – it did not; rather they were obtaining the new leasehold interest pursuant to their own respective rights against the Government prior to the exercise of the options. The Government's reversionary interest under the current lease in each case never fell into possession; no fresh cause of action therefore accrued under section 9(1).

99. To be more specific, between 26 February and 25 April 1988, the Government lessee had an option (or negative option). If he opted out, there would be no surrender and re-grant. If he did nothing, then on 25 April 1988, there would be a surrender and re-grant. The Ordinance gave him an option or a right to a re-grant upon surrender on 25 April 1988. That right was specifically enforceable against the Government. That right also stood between the Government and the squatter. Section 9(1) of the Limitation Ordinance therefore did not apply, in the sense that the Government's reversionary interest never fell into possession on 25 April 1988. The situation is therefore indistinguishable from the Privy Council decision in *Chung Ping Kwan*.

100. Fourthly, in fact, the same analysis would mean that even if the "extension" in the Extension Ordinance was achieved not by a surrender and re-grant, but by a reversionary lease, there would be no accrual of a fresh cause of action under section 9(1) when the reversionary lease came into effect on 27 June 1997. Just like the right/option to surrender and re-grant in the previous analysis, the right to the reversionary lease originated from an option conferred under section 5 which lasted for two months in 1988. After the lapse of the two months, the option turned into a right which was specifically enforceable against the Government between April 1988 and 27 June 1997. The reversionary lease only came into

maturity on 27 June 1997. The analysis in *Chung Ping Kwan* therefore applies equally to a reversionary lease situation. No accrual of a fresh cause of action under section 9(1) would be involved. As between the squatter and the Government, there would be this right to a reversionary lease standing between them, preventing the application and operation of section 9(1).

101. Finally, the assumption that the Extension Ordinance should not be construed against established common law principles, particularly in relation to how an "extension" of the term of a lease can be achieved at law, must, where necessary, give way to practical considerations. After all, the legislature is not bound by any common law technicalities or disability. If it so wishes, it can legislate on something new or contrary to common law principles. If on any fine and technical analysis of the law, one is driven to the conclusion that an accrued possessary title acquired by the time the Extension Ordinance was enacted would be disturbed fatally by the Ordinance as from April 1988, in my judgment, the Ordinance should be construed free from the common law restrictions, and if necessary, one could construe the "extension" as meaning simply what it says, i.e. that the renewed term of the Government lease pursuant to the Renewal Ordinance is extended for 50 years and 3 days.

102. Admittedly, the need to adopt such a bold construction of the Ordinance would be lessened if the alternative basis of a reversionary lease in *Unijet* is preferred. But in my judgment, even in that case, looking at the spirit, intention and wording of the Joint Declaration and the Extension Ordinance as a whole, I would still lean in favour of a construction which would preserve the *status quo* for 50 years, and that would include preserving the *status quo* of *squatters* who had acquired a possessary title

for 50 years. After all, it should be remembered that the Extension Ordinance was enacted to give effect to the Joint Declaration, and the Joint Declaration is a treaty between the United Kingdom which of course follows the common law *and* the People's Republic of China which does *not* use common law. One should therefore be slow to assume that in agreeing to the extension of leases in Annex III of the Joint Declaration, the PRC Government did *not* intend the "extension" to mean what it says, i.e. simply an extension, and that rather, the PRC Government intended to follow the technical common law position prevailing in the United Kingdom – its treaty counterpart, in achieving the extension of the lease. Since the Extension Ordinance specifically refers to the Joint Declaration and the expressed object of the Extension Ordinance is to give effect to the Joint Declaration, I see no objection whatsoever in looking at the Joint Declaration for reference in seeking to properly construe the Extension Ordinance: See *Bennion, op. cit.*, section 221.

103. So for all these reasons, I hold that the Extension Ordinance does not stand in the path of the Plaintiff in the present case.

Outcome

104. I make a declaration that by 12 March 1988 at the latest, Mr Chan has acquired a possessary title to Lot No. 525RP and Mr Li's title to the same has been extinguished, by reason of Mr Chan's adverse possession of the same for a continuous period of no less than 20 years; and that since 12 March 1988 at the latest, the aforesaid possessary title was and is good against the Defendants.

105. As regards costs, costs should follow the event. I order that the Defendants pay to the Plaintiff the costs of the action including all costs reserved previously, such costs to be taxed if not agreed.

106. The Plaintiff has indicated to me that he is not pursuing any claim for damages arising from the confrontations between the two families in 1998. I make no order in relation to the claim for damages.

107. It must follow from the above that I dismiss the counterclaim of the 4th Defendant for damages based on trespass. I also order that the 4th Defendant pay to the Plaintiff the costs of the counterclaim, such costs to be taxed if not agreed.

108. I would like to thank counsel for their helpful assistance

(Andrew Cheung)
Deputy Judge of the Court of First Instance
High Court

Mr Andrew Y S Mak, instructed by Messrs Donald Yap, Cheng & Kong, for the Plaintiff

Ms Anita Ma, instructed by Messrs Yeung & Chan, for the Defendants

CACV 71/2003

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 71 OF 2003

(ON APPEAL FROM HCMP NO. 4191 OF 1998)

BETWEEN

CHAN TIN SHI (陳天仕) Plaintiff

and

LI TIN SUNG (李天送) Defendants

LI WONG CHOI (李皇財)

LI WONG HING (李皇興)

LI TIN SUNG (李天送) (appointed to represent the estate of the Deceased LI WING FU (李榮富) alias LI KOON SHING(李官勝))

Before: Hon Rogers VP, Le Pichon and Yuen JJA in Court

Date of Hearing: 13 January 2004

Date of Handing Down Judgment: 19 November 2004

J U D G M E N T

Hon Rogers VP:

1. This is an appeal from a judgment of Deputy High Court Judge A Cheung, as he then was, given on 14 January 2003. At the conclusion of the hearing of this appeal, this court reserved its judgment which we now give.

Background

2. Although the history behind the litigation is somewhat involved and took the judge many pages in his judgment to explain, the essential facts found by the judge are not in dispute. For the purposes of this appeal it is sufficient to state that the plaintiff's claim relates to land known as Lot No. 525RP in DD No. 26 in Tai Po ("the land"). The land is registered in the name of Li Wing Fu, also known as Li Koon Shing, deceased ("Mr Li"). Mr Li's estate is sued by the plaintiff as the 4th named defendant, it is represented by Mr Li's eldest (adopted) son, the 1st named defendant ("the 1st defendant"). The other two defendants ("the 2nd defendant" and "the 3rd defendant" respectively) are the other two sons of Mr Li. The essential claim in the action is for a declaration that the registered owner of the land and the defendants have lost the right to bring any action to recover the land or any part thereof by reason of section 7(2) of the Limitation Ordinance, Cap. 374. An order is also sought to vest all the estate right title benefit and interest in the land in the plaintiff.

3. The judge reached the conclusion that the plaintiff had made out a case of adverse possession of the land, having been in adverse possession since 1954. There was a question which arose as to whether the period of adverse possession as against the defendants could be counted from 1954 or 1968. Again, for the purposes of this appeal, that issue does not need to be addressed. I would mention that the judge approached the matter on the basis that the plaintiff could only rely on adverse possession from the later date and thus, at paragraph 74 of the judgment, he said:

> "74. But for one matter, the upshot of all this is that I would be prepared to make a declaration that by 12 March 1988 (the 20th anniversary of Mr Li's acquisition of title to the subject lot) at the latest, Mr Chan has acquired a possessary title to the subject lot and Mr Li's title to the same has been extinguished, by reason of

> Mr Chan's adverse possession of the same for a continuous period of no less than 20 years."

4. That one matter to which the judge referred was the effect of the New Territories Leases (Extension) Ordinance, Cap. 150 ("the Extension Ordinance"). In particular, the question was whether the effect of the Extension Ordinance was to create a new estate by reason of the extension which had the effect of rendering the prior adverse possession by the plaintiff irrelevant. The judge was faced with conflicting decisions at first instance as to the effect of the Extension Ordinance.

5. In *Unijet Ltd v Yiu Kwai Hoi* HCA 13637/1998 (21 June 2002), Sakhrani J held that the extension under the Ordinance could only be achieved by a surrender and re-grant, or a "reversionary lease". In those circumstances, notwithstanding the possessory title *vis-à-vis* the original lease (as renewed) obtained by a squatter prior to April 1988 [or June 1997] when the re-grant [or alternatively the reversionary lease] took effect, time began to run again upon the re-grant [or the reversionary lease] taking effect.

6. In contrast, Lam DJ, as he then was, in *Mutual Luck Investment Ltd v Yeung Chi Kuen* HCMP 6047/1998 (25 November 2002), had come to the opposite conclusion. He held, in effect, that the source of the government's lessee's right to the extension was his pre-existing lease and, since the title of the government lessee had been extinguished as against the squatter under the pre-existing lease, the fact that he acquired a new legal estate could not assist him. In so holding, Lam DJ considered that he was following the reasoning in the Privy Council decision in *Chung Ping Kwan v Lam Island Development Co. Ltd* [1997] AC 38 ("the Lam Island decision").

7. The judge below preferred the reasoning of Lam DJ and in doing so mentioned three further points. The first was that to hold in favour of the

government lessee would "mean that a squatter who had obtained a good possessory title prior to April 1988 was, by a side-wind under the Extension Ordinance, deprived of his possessory title to the land in question for the remainder of the term of the renewed lease (pursuant to the Renewal Ordinance) of more than 9 years, before it was due to expire on 27 June 1997." Secondly, he felt that it was difficult to construe the Extension Ordinance on the basis that a reversionary lease would take effect in June 1997. Thirdly, he held that the effect of the Extension Ordinance was to give the government lessees a statutory option to extend their leases, thus, in effect, re-writing the original leases.

8. On that basis the judge below gave judgment for the plaintiff and made a declaration that Mr Li's title had been extinguished by reason of the plaintiff's adverse possession of the land and that since 12 March 1988, at the latest, the plaintiff's possessory title was good against the defendants.

The Extension Ordinance

9. Before turning to the arguments on the appeal, it would be convenient to set out some of the provisions of the Extension Ordinance. Under section 5 of the Extension Ordinance a government lessee may exclude the application of the Extension Ordinance. Section 5(1) provides:

> "**Option by the lessee**
>
> (1) A lessee may exclude from the application of this Ordinance his interest under a lease, other than an undivided share in the land to which the lease relates, by registering in the Land Office register, before the appointed day, a memorandum in a form specified by the Land Officer."

10. Part II of the Extension Ordinance deals with the question of extension of New Territories leases. That part commences:

"PART II

EXTENSION OF NEW TERRITORIES LEASES

6. Extension of leases

The term of a lease to which this Ordinance applies is extended, from the date on which it would, apart from this Ordinance, expire, until the expiry of 30 June 2047, without payment of any additional premium."

This appeal

11. On this appeal Mr Chan SC, who appeared on behalf of the defendants, argued quite simply that the only way in which section 6 of the Extension Ordinance could be implemented is by means of a surrender and re-grant or alternatively by the grant of a new lease which would take effect after the expiry of the old lease in June 1997. He said that in either event that would constitute a new estate. In those circumstances, the fact that the plaintiff may have acquired squatter's rights as against the defendants in respect of the old lease did not mean that any rights had been acquired which would affect the new lease which took effect either on the coming into operation of Part II of the Extension Ordinance or else upon the expiry of the old lease in June 1997.

12. In the course of his argument, Mr Chan relied heavily on the decision of the majority of the House of Lords in *Fairweather v St. Marylebone Property Co. Ltd.* [1963] AC 510. Although the decision in that case was heavily criticised by Professor Wade in an article in 1978 LQR 541, those criticisms are not pertinent to the matters which are relevant in this case. In his speech Lord Radcliffe explained, in terms to which Professor Wade did not object, the effect of the limitation provisions. For present purposes the provisions then prevailing in England can be taken as having the same effect as those in Hong Kong. He said that it was a misunderstanding that had been clearly explained by Scrutton, LJ in *Taylor v Twinberrow* [1930] 2 KB 16, to

treat the legal effect of adverse possession under the Limitation Acts as if it gave a title. Its effect was "merely negative". Where the possession had been against a tenant, its only operation was to bar the tenant's right to claim against the man in possession. Although he qualified that by saying at page 535:

> "I think that this statement needs only one qualification: a squatter does in the end get a title by his possession and the indirect operation of the Act and he can convey a fee simple."

He went on to say, at page 536:

> "...but he *(i.e. the squatter)* has not the title or estate of the owner or owners whom he has dispossessed nor has he in any relevant sense an estate 'commensurate with' the estate of the dispossessed. All that this misleading phrase can mean is that, since his possession only defeats the rights of those to whom it has been adverse, there may be rights not prescribed against, such, for instance, as equitable easements, which are no less enforceable against him in respect of the land than they would have been against the owners he has dispossessed."

13. Lord Denning, in agreement with Lord Radcliffe, explained that although the title of the leaseholder may be extinguished as against the squatter, the leaseholder's title remained as against the landlord of the premises.

14. If one applies those principles to the facts of this case, leaving aside the question of any extension in 1988, the defendants would not have been able to assert title as lessee against the plaintiff but, as against the government, the lease remained good. One example of that is that rent would still have had to have been paid. Another example is that the plaintiff would have had no rights against the government under the Limitation Ordinance. Hence it would naturally follow that the plaintiff would have had no rights once the defendants' rights had ceased. Thus although the judge correctly pointed out that the plaintiff could have confidently expected not to have been ousted until the end of the defendants' term of the lease, the plaintiff could have had no expectation

or otherwise that he would have any rights after June 1997, or even earlier, if the lease had terminated for any reason, for example because of government action for non-payment of rent.

15. Mr Chan argued that, in those circumstances, since the government had good title as against the plaintiff, if it granted a new estate, whether it be to the defendants or anybody else, that new estate would be good as against the plaintiff. *Chung Ping Kwan v Lam Island Development Co. Ltd* [1997] AC 38 at 46H-47B. In my view, Mr Chan's argument to this extent cannot be faulted and, indeed, the defendants did not seek to argue otherwise, nor did the judgment below proceed on any other basis.

16. The *Lam Island* decision is not directly relevant to this case. It was a decision as to the effect of the New Territories (Renewable Government Leases) Ordinance, Cap. 152 ("the Renewal Ordinance") in relation to a lease that had contained an option to renew. Quite apart from the fact that the wording of the Renewal Ordinance is different from the Extension Ordinance, the important part of the decision was that the original lease had contained a right of renewal. That, the Privy Council held, gave the lessee a right in respect of the property which he could enforce against the landlord. The Privy Council held that the adverse possession barred the lessee from asserting against the squatter that specifically enforceable right, and the legal estate which flowed from that right, as much as it barred the lessee from asserting against the squatter the other rights granted to him by the lease.

17. The question in this case might be thought to come down to whether the extension granted by section 6 of the Extension Ordinance amounts to a new estate which was created or whether as Lam DJ held, there was for all practical purposes an insertion into the old lease of an option to renew which

would take effect as a surrender and new grant. However, even when that latter proposition is analysed it can be seen that the notional insertion of an option to renew in a lease must constitute giving a new right. Hence, even if it should be assumed that there was a notional insertion of the option, that would, in my view, constitute the creation of a new estate or at the very least a new right which would rise to a term beyond that originally contracted for and time would begin to run again as against the squatter. I consider that on its proper construction section 6 of the Extension Ordinance did create a new estate in the leaseholders who did not opt out of the provisions of the Extension Ordinance under section 5.

18. Thus, although I consider that there is some attraction in the notion that section 6 of the Extension Ordinance means that somehow the original leases were to continue unaltered save for the fact that they would not expire in June 1997, I consider that without very clear wording, which would have in some way either preserved the "squatter's title" or made it clear that no new estate was being created, the effect of what has been done is that a new estate had been created. The legal effect may thus be wider than had at first been envisaged.

19. It may well be that squatters' rights were curtailed in the New Territories in the period after March 1988, after the coming into force of the Extension Ordinance, but, as was pointed out by Lord Denning, squatters' rights are often vulnerable. Whilst that result might have not been at the forefront of the intention of the legislature, it would be equally unimaginable, if not more so, that the legislature would have wished to grant immunity to squatters in the New Territories as against the registered owners who would be liable to pay the rent for the land.

20. The intention of the legislature in passing the Extension Ordinance was to provide legislation in accordance with what had been agreed in the Joint Declaration. That agreement would appear to have had a twofold purpose. In the first place it was to secure the continuity of land tenure, particularly in the New Territories, so that financial confidence could be maintained based upon a certainty that land tenure would continue. By the early 1980's the continued financing of land purchases in the New Territories had become something of blind faith since bankers were in severe quandaries as to whether land tenure which expired in 1997 could be used as security for loans extending beyond that date. In the second place the provisions of the Joint Declaration, in this regard, were there to safeguard the revenue source from land for the future government of Hong Kong. Hence questions of squatters' rights did not come into the policy behind the Extension Ordinance.

21. Insofar as it might be relevant to consider the policy behind the legislation relating to limitation of actions, that has been variously described as being that long dormant claims should not be permitted since they had "more of cruelty than justice in them"; coupled with that, defendants might have lost the evidence to disprove a stale claim and finally that persons with good causes of action should pursue them with reasonable diligence: see Halsbury's Laws of Hong Kong, vol. 17 para. 245.004. Whilst it might be said that statutes relating to limitation are beneficial and should be construed liberally and not strictly, that does not, in my view, predispose that construction of a statute relating to ownership of land, but not in any way concerned with limitation, has to be favourable to squatters, who, after all, commenced their occupation as trespassers and thus were wrongdoers. This would be all the more so since they would be occupying land without paying rent and one of the purposes behind the Extension Ordinance was to enact provisions which had been agreed

on the basis that they would preserve the income of the ultimate landlord i.e. the government.

22. I would therefore allow this appeal, make an order dismissing the plaintiff's claim, make a further order granting an injunction in terms sought in paragraph 2 of the prayer for relief sought in the notice of appeal and make an order for an enquiry as to damages as sought in paragraph 3 of the prayer for relief in the notice of appeal. I would make an order *nisi* that the costs of this appeal and in the Court below be to the defendants.

Hon Le Pichon JA:

23. I have had the advantage of reading in draft the judgments of the Vice President and Yuen JA. I agree with the Vice President that the appeal should be allowed for the reasons he gives in his judgment and the order he proposes. In view of the difference of opinion on the effect of the Extension Ordinance, I would add a few observations of my own.

24. The judge below followed the decision of the Lam DJ (as he then was) in *Mutual Luck Investment Ltd v Yeung Chi Kuen*, HCMP 6047 of 1998 (unreported, 25 November 2002) whose judgment was premised on a surrender and re-grant having taken place on 25 April 1988 which was when section 6 of the Extension Ordinance came into operation. Lam DJ concluded that time did not begin to run again upon the re-grant in April 1988. He reached that conclusion because he did not think that Lord Nicholls intended to confine the rationale of *Chung Ping Kwan v Lam Island Co Ltd* [1997] AC 38 to a new estate obtained pursuant to an option to renew contained in the original lease and that a new interest granted pursuant to statute could come within the scope of such a rationale provided there was sufficient nexus between the old interest and the new one. See paragraph 55 of *Mutual Luck*. In considering the

correctness of this analysis, it is necessary first of all to determine what *Lam Island* did decide.

25. *Lam Island* had nothing to do with the interpretation of the Extension Ordinance. Rather, it concerned the interpretation of the New Territories (Renewable Crown Leases) Ordinance, Cap. 152 ("the Renewal Ordinance") and its effect on squatters who had been in adverse possession of land in the New Territories. Until 1959, crown leases of land in the New Territories were normally for a term of 75 years from 1 July 1898 with an option to renew for a further term of 24 years less three days. Original leases were thus to expire on 30 June 1973 and renewed leases on 27 June 1997. Under the Renewal Ordinance, such leases were deemed to have been renewed for a period of 24 years less three days from 1 July 1973. It was held that an option to renew contained in the original lease was an existing property right vested in the lessee which was specifically enforceable against the lessor and although upon the exercise of the option, the lessee obtained a new legal estate, that was no more than implementation of a pre-existing contract embodied in the original lease. Where a squatter has been in adverse possession for the prescribed period, that barred the lessee from asserting against the squatter all his rights under the original lease and that included the option to renew because the source of that right was the original lease itself.

26. In his speech, Lord Nicholls cited with approval the decision of the Full Court of Victoria in *Bree v Scott* (1904) 29 VLR 692. In that case, the defendant had been in adverse possession of land since 1878 under such circumstances as to acquire title under the Statute of Limitations. A., the plaintiff's predecessor in title had entered into the land in question under the Land Act 1869 sometime prior to 1878 as Crown licensee and subsequently became Crown lessee. A person who had acquired prior rights by licence and

lease under that Act could acquire the fee upon the performance of her obligations under them. In 1885, a grant of the land in question issued to A., "in pursuance of the Land Act 1869". The plaintiff brought an action to recover the land from the defendant and the question for determination was whether that claim was time-barred. The answer depended on whether time ran in favour of the defendant from the time she entered into possession or from the date of the Crown grant. In holding that time ran from the earlier date, A'Beckett J said this (at p. 713):

> "This inactive licensee and lessee afterwards acquired a legal estate in the fee, not by virtue of any new right unconnected with her prior interest, but by the maturing of a right which had its inception in the licence."

It will be seen that the point made here was that ownership of the licence vested in the licensee an inchoate right to call for the Crown grant which right became absolute on the performance of certain obligations. The acquisition of the licence under the Land Act was therefore crucial: without it, A. would not have been in a position to call for a Crown grant at the later date. The right to the Crown grant could thus be said to have had its inception in the licence.

27. In *Mutual Luck*, Lam DJ framed the crucial issue (at para 56) as "whether there was such a continuity of interest that the new legal estate … could not be regarded as a new right unconnected with the prior interest under the old lease, but should be regarded as the maturing of a right having its seed in the old lease" and found (at para 58) "a nexus between the old lease and the new legal estate" in the original grant made in 1918 deemed to be renewed in 1973 without which the plaintiff could not have had the benefit of the extension. Mr Chan SC described paragraph 58 in Lam DJ's judgment as a "quantum leap" because it ignored the source of the rights possessed by the lessee at the time the squatter's rights were acquired. Lam DJ went on to say this (at para 59):

> "59. It is true that the Plaintiff's right under the extension derived from statute rather than an inherent property rights (*sic*) within the original lease. But so was the right of the grantee in **Bree v Scott** (1904) 29 VLR 692. In that case, the statute had been enacted when the grantee became a licensee of the land whilst in the present case, Cap. 150 was only enacted in 1988. Is this a material distinction?"

To that question, after referring to certain passages in the judgment of Lord Nicholls in *Lam Island*, his answer (at para 63) was this:

> "63. It seems to me on proper reading of the judgment of Lord Nicholls, the material question is not whether the right of the lessee to the new legal estate stemmed from an option to renew or other right inherently built into the old lease or right bestowed on the lessee when the old lease was granted. The material question is whether there was a specifically enforceable right in the lessee to call for the new legal estate by reason of his interest under the old lease when he was already lawfully in possession. If he had such a right, Section 9(1) would operate in favour of the lessor and conversely, if such a lessee had slept on his rights, the fact that he acquired a new legal estate could not assist him. That is precisely why Lord Nicholls said that the legal source of the lessee's entitlement to his new legal estate could not be ignored."

28. But the focus of Lord Nicholls' judgment was not the existence or otherwise of a specifically enforceable right; rather it was the existence of a right that was part and parcel of the original lease or embedded in it and one which gave rise to or matured into the new legal estate. That was the crucial feature of both *Lam Island* and *Bree v Scott*. So, had the option to renew in *Lam Island* not formed part of the original lease but had come about, for example, through a subsequent agreement between the parties, the result would have been very different. In that scenario, the right to renew would not have had its source in the original lease but in the subsequent agreement. Adverse possession by a squatter for the prescribed period would bar all rights of the lessee under the original lease but not those arising under the subsequent agreement. The fact that there happened to be in existence a landlord tenant relationship is insufficient to satisfy the "continuity of interest in the land" contemplated by A'Beckett J in *Bree v Scott* (at p. 712) which on proper

analysis required the original lease to have been the seed of the subsequent fruition of title (see Madden CJ at 700). Quite simply, it would not pass the test laid down by Lord Nicholls because, on any footing, the original lease could not be said to be the "legal source of the lessee's entitlement to the new estate".

29. In the present case, whether or not the new estate that came into existence took effect through a surrender and regrant or a reversionary lease of an estate coming into possession on the expiration of the renewed lease on 27 June 1997 or the insertion or the engrafting of an additional term into the lease made mandatory by statute, the crucial fact is that the right to a new term (i.e. the extension) was not part and parcel of the original lease or an inherent property right embedded in the original lease; rather, it was a new right that came into existence in April 1988 and conferred by statute upon a lessee of New Territories land who did not opt out of the Extension Ordinance under section 5. I cannot agree that the original lease under consideration could be said to be the "seed" from which the extension was the "fruition" as appeared to be the view of Lam DJ. The observations of Madden CJ in *Bree v Scott* (at p. 708) viz.:

> "… [the grantee] was a person from the seed of whose license the subsequent Crown grant was the fruition"

when properly understood, do not warrant that conclusion.

30. As noted above, at the date the licence in *Bree v Scott* was acquired, the Land Act 1869 (which conferred on the licensee the right to call for a grant of the fee upon the performance of certain obligations) was already in place. When the licensee acquired the licence, she automatically obtained the right to call for a Crown grant subject to her fulfilling certain conditions. When the lease in the present case was granted, the lessee had no inchoate right to the extension available under the Extension Ordinance for the simple reason that

that Ordinance did not exist until 1988. Put differently, in the present case, the rights of the lessee under his original lease which were extinguished once the prescribed period of adverse possession elapsed did not and could not have encompassed the right to an extension conferred by the Extension Ordinance. It would follow that the term conferred by the Extension Ordinance is a new estate and for the purposes of limitation of action, time would begin to run again from the date of its creation.

Hon Yuen JA:

31. I must respectfully differ from the judgments of the Vice-President and Hon Le Pichon JA in this appeal and that of Hon Sakhrani J in *Unijet Ltd v Yiu Kwai Hoi* [2003] 1 HKC 90.

32. In the present action, Deputy High Court Judge Andrew Cheung (now Hon Andrew Cheung J) found that the 1st-3rd Defendants' father ("the Lessee") had present interests in the land (within the meaning of s.8 Limitation Ordinance Cap. 347) in 1954 or 1968 (for present purposes, it does not matter which year is taken). He found as a fact that the Plaintiff's father ("the Squatter") dispossessed the Lessee in 1954 or 1968 and thereafter remained in continuous possession of the land for 20 years or more.

33. The effect of those findings was that in 1974 or 1988, the Lessee's title in the land was, as between himself and the Squatter, extinguished under s.17 Limitation Ordinance. This did not of course affect the Lessee's interests in the land as between himself and the Government in its capacity as lessor ("the Lessor"). Nor did this have any effect as between the Squatter and the Lessor, because during the Lessee's term of years under the lease, the Lessor's future interests in the land (within the meaning of s.9 Limitation Ordinance) had not yet fallen into possession.

34. So much, I believe, is clear on the general principles of the law of limitation. On what basis, then, could the Lessee recover the land from the Squatter by proceedings commenced in 1998?

35. Mr Edward Chan SC for the Lessee submitted that by the New Territories Leases (Extension) Ordinance Cap. 150 ("the Extension Ordinance") enacted in 1988, there was a surrender of the lease from the Lessee to the Lessor and an immediate regrant of a lease from the Lessor to the Lessee. Alternatively, he submitted, there was a grant of a reversionary lease from the Lessor to the Lessee of an estate to come into possession when the existing lease expired on 27 June 1997. Either way, a new legal estate came into existence under which the Lessor (and so, the Lessee claiming through it) could eject the Squatter.

Surrender and regrant

36. I should first set out my understanding of what is meant by a surrender and regrant. Generally, a lessor and a lessee can agree to alter the term of years under an existing lease by the lessee surrendering to the lessor the interests he (the lessee) has under the existing lease, and the lessor giving him a fresh grant of a single term of years from that date for the period as altered expiring on the newly agreed date (which may be earlier or later than the expiry date under the original lease).

37. For the reasons discussed below, I do not consider that the Extension Ordinance operated as a surrender and regrant.

38. First, a surrender and regrant has not been expressed, or even been impliedly referred to, in the Ordinance. In my view, if the legislature had intended that there should be a surrender and regrant of nearly all government

leases in the New Territories (short term tenancies and special purpose leases excepted), it could easily have said so. A search of the Laws of Hong Kong shows that the terms "surrender" and "regrant" are commonly used in our statutes. They are conspicuously absent from the Extension Ordinance.

39. The Extension Ordinance refers instead to an "extension". Mr Chan on behalf of the Lessee submitted that an "extension" of a term of years is not a concept or mechanism known to the common law (such as surrender and regrant). In my view, this works against the Lessee, not in his favour, as the legislature must be taken to have known that. Yet it chose not to use the language of surrender and regrant with which it was familiar, but chose to use the word "extend".

40. In fact, the preamble to the Extension Ordinance tells us the source of its power to "extend" the term of years - the Joint Declaration of the Government of the United Kingdom and the Government of the People's Republic of China on the Question of Hong Kong, in particular the Annex dealing with leases of land granted by the British Hong Kong Government: Annex III of the Joint Declaration, paragraph 2. The Ordinance was devised in and for unique historical circumstances, deriving its authority from the Joint Declaration of the two governments. It was adopted as part of the laws of the Hong Kong Special Administrative Region on 1 July 1997 under s.7 of the Hong Kong Reunification Ordinance.

41. As I see it, there was an imposition by the legislature of an additional provision in the leases, under which lessees were entitled to extend the term of years as against the lessor for the time being: the British Hong Kong Government and then, upon reunification, the Government of the Hong Kong Special Administrative Region.

42. Given the unique historical circumstances in which this Ordinance was devised and the purpose it served, it is in my view neither necessary nor desirable to seek to justify, or engineer, the extension by reference to the mechanism of surrender and regrant, which the legislature had clearly chosen not to employ.

43. Secondly, even within the common law, "the implication of surrender and regrant is a fiction based on estoppel" which is not to be encouraged or extended (*Baker v Merckel* [1961] 1 QB 657, 667). This must especially be so where the grant of the right to extend the term of years was not a consensual act of individual parties (it being settled law that no difference is to be drawn between a lease granted by the Government and a private lease: *Hang Wah Chong Investment Co Ltd v Attorney General* [1981] 1 HKLR 336, 341), but was a right conferred by statute made applicable to nearly all leases throughout the New Territories. In my view, arguments based on estoppel have no place in such a situation.

44. Last but not least, the analysis of the Extension Ordinance as a surrender and immediate regrant breaks down even if the Ordinance were read merely as a private document agreed between individuals. It is settled law that on surrender, the original lease merges in the lessor's reversion and is extinguished immediately (Megarry & Wade, The Law of Real Property 6th ed §14-172). On regrant, a lease is freshly granted for a single term *commencing from the time of surrender* and expiring at the end of the newly-agreed term of years (see *Jenkin R Lewis Ltd v Kerman* [1971] 1 Ch 477, 496 and the discussion of this case in *Take Harvest Ltd v Liu* [1993] AC 552, where the Privy Council held at 565H-566F that the court could not invoke the fiction of a new tenancy for a term of just 21 days when the parties never contemplated it). On Mr Chan's submission that the Extension Ordinance operated as a surrender

and regrant, the surrender would have occurred on the operative date of s.6 (25 April 1988) and a fresh grant given for a term *commencing from that date* (25 April 1988) to 30 June 2047. However, the Extension Ordinance does not confer a single term of years from 25 April 1988 to 30 June 2047. Instead s.6 provides that the term is "extended *from the date on which it would, apart from this Ordinance, expire...*", thus acknowledging the continuous existence of the original lease.

45. I do not think it is necessary to go further. In my view, the analysis that the Extension Ordinance operated as a surrender and regrant is incorrect for the reasons discussed above. Accordingly, it is not necessary in this appeal to seek an answer to the interesting problem posed regarding the validity of a surrender by and regrant to a lessee (whose title has been extinguished by a squatter's adverse possession) for the purpose of overturning the squatter's right to possession as against the lessee, and how such a device might be invalidated by, amongst other grounds, invoking the tort of conspiracy to injure: see Wade, "Landlord, Tenant and Squatter" (1962) 78 LQR 541 referred to by Lord Nicholls in *Chung Ping Kwan v Lam Island Co Ltd* [1997] AC 38, 47 as a powerful critique of *Fairweather v St Marylebone Property Co Ltd* [1963] AC 510, where Lord Denning (at 547) thought that there was "no way of preventing" the destruction of the squatter's right to possession.

Reversionary Lease

46. I then turn to Mr Chan's submission that the Extension Ordinance operated as the grant of a reversionary lease by the Lessor to the Lessee.

47. Again, I would first set out my understanding of what is meant by a reversionary lease. (As a matter of completeness, I would note, with much respect to the trial judge, that a reversionary lease is not synonymous with a

concurrent lease; a concurrent lease is however synonymous with a lease of the reversion: see the discussion on the alignment of leasehold relationships in Gray and Gray, Elements of Land Law, 3rd ed. 387-391; Megarry & Wade, §14-061 esp fn.31, and §14-103).

48. Say a lease of land for a term of 10 years has been granted by a lessor L to a lessee T. After say, 3 years of this lease have run, L can secure a future letting of the land to R to take effect immediately upon the expiry of T's lease in 7 years time. Such a lease to R is called a reversionary lease.

49. It is no less a reversionary lease if after 3 years of T's lease have run, L agrees to lease the land to T to take effect upon the expiry of his present term (*Jenkin R Lewis v Kerman*, 496). L is free to decide if he wishes to grant a reversionary lease to R or to T (or not at all). By contrast, if L is under a specifically enforceable obligation under the lease to let the land to T upon the expiry of his present term for a further period of time at T's option, what T has is not a reversionary lease but a lease with a right to renew for a further term of years.

50. As discussed above, the Extension Ordinance gave every existing lessee of the relevant leases a right to extend the lease from its expiry date under the existing lease to 30 June 2047: sections 5 and 6. The lessee could opt-out of the extension by registering a memorandum within the 2 month period from 26 February 1988 to 25 April 1988: section 5. However the lessor (and at risk of repeating myself, the Government is to be treated in its lease dealings as a private landlord) could *not* opt-out of the extension. It had no freedom to choose whether to let the land upon the expiry of the present term of years to the existing lessee or to another (perhaps better) lessee. Therefore, in my view,

the analysis that the Extension Ordinance operated as a reversionary lease is also incorrect.

Right of renewal conferred by statute

51. As I see it, by the Extension Ordinance, the legislature wrote into the existing leases an additional right of renewal, under which the existing lessees were given the right to enforce a further term of years against the lessor for the time being, i.e. the British Hong Kong Government and then the Government of the Hong Kong Special Administrative Region. It is interesting to note in this regard that the Chinese term "續期" is used for both "renewal" in the New Territories (Renewable Government Leases) Ordinance Cap.152 and for "extension" in the Extension Ordinance. The fact that the option to renew was deemed by statute to be exercised unless a lessee gave notice to opt-out within the given period makes no difference to the nature of the right.

Effect on squatters' rights against dispossessed lessees

52. On this analysis, does the Extension Ordinance affect a squatter's rights as against a lessee whose title he had extinguished under s.17 Limitation Ordinance? In my view, it does not affect him at all.

53. The decision of the Privy Council in *Chung v Lam Island*, that a squatter's right of possession against a lessee he has dispossessed is not affected when the lessee acquires a new legal estate through a right of renewal in the lease, is well-known and I will not attempt to paraphrase Lord Nicholls' judgment.

54. What I would wish to refer to however is that part of the judgment (at 48) where Lord Nicholls emphasized that "to ignore the legal source of the lessee's entitlement to his new legal estate would be to exalt form (a new legal estate) over substance (a pre-existing right to the estate)".

55. In *Chung v Lam Island*, the source of entitlement to the new legal estate was a right of renewal in the lease. In the present case, the legislature conferred an additional right of renewal in the lease. I do not see anything in the authorities which dictates that the "pre-existing right to the [new] estate" must be one which had been in the lease from Day 1. In my view, the crucial point is that the seed of the new legal estate from 1997 to 2047 was planted *as part of the lessee's interest in the land under the existing lease during its currency*. The question is simply whether the new estate was or was not a "new right unconnected with [the lessee's] prior interest" as lessee under the original lease (*Bree v Scott* (1904) 29 VLR 692, 713). In my view, the new estate from 1997 to 2047 was clearly connected with the lessee's prior interest, because the right to it had been conferred on him as part of his bundle of rights as lessee under the original lease and only by virtue of that interest.

56. On this analysis, the rationale of the Privy Council's decision in *Chung v Lam Island,* regarding a squatter's position where the lessee has a new lease pursuant to a right of renewal, is directly applicable. Lord Nicholls held (48 D-F) that the lessor had no right to eject the squatter even at the expiry of the original term. That was because the lessee had a specifically enforceable right under the original lease (in our case, imposed on the lessor by statute) which he could enforce against the lessor. The lessor was consequently not entitled to enter into possession of the land at the expiry of the original term, because the pre-existing right of the lessee to possession under the renewal

stood in the lessor's way. The lessor therefore had no right to eject the squatter.

57. Further, as Lord Nicholls explained (49G-H), the lessee's claim in right of the new lease was not a claim to an estate or interest in reversion under s.9 (1), because the lessee's right to the new lease was a right he already had as lessee. However, as the lessee had slept on his rights *vis-a-vis* the squatter, the new legal estate does not enable him to eject the squatter, because he acquired that new legal estate by virtue only of a pre-existing right included (in our case, by statute) in the lease, his title to which has been extinguished as against the squatter (48 F-H).

58. In my view, that result accords not only with the recognised policy of the limitation legislation, but also with the intention expressed in the Joint Declaration and the ensuing legislation that all rights in property (albeit the somewhat tenuous rights of squatters as against dispossessed lessees) should continue to be recognised and protected, or at least not abrogated without clear wording, of which there is none in any of the legislation referred to this court. As with the Renewal Ordinance, the Extension Ordinance leaves the squatter in no better and no worse position.

59. For the reasons set out above, I would dismiss the appeal with costs.

Hon Rogers VP:

60. There will therefore be an order as set out in paragraph 22 above.

(Anthony Rogers)	(Doreen Le Pichon)	(Maria Yuen)
Vice-President	Justice of Appeal	Justice of Appeal

Mr Andrew Mak, instructed by Messrs Adrian Yeung & Cheng,
for the Plaintiff/Respondent

Mr Edward Chan SC and Ms Anita Ma, instructed by Messrs Yeung & Chan,
for the Defendants/Appellants

FACV No. 7 of 2005

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 7 OF 2005 (CIVIL)
(ON APPEAL FROM CACV NO. 71 OF 2003)
(Heard together with FACV No. 12 of 2005 and FACV Nos 13 and 21 of 2005 (Consolidated))

Between :

CHAN TIN SHI — **Appellant**

- and -

LI TIN SUNG — **Respondents**
LI WONG CHOI
LI WONG HING
LI TIN SUNG (appointed to represent the estate of the Deceased LI WING FU alias LI KOON SHING)

FACV No. 12 of 2005

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 12 OF 2005 (CIVIL)
(ON APPEAL FROM HCMP NO. 968 OF 1999)
(Heard together with FACV No. 7 of 2005 and FACV Nos 13 and 21 of 2005 (Consolidated))

Between :

MOK YUEN FUN and PERSONS UNKNOWN — **Appellant**

- and -

CHINA OVERSEAS GRAND GAIN PROPERTY DEVELOPMENT LTD — **Respondent**

FACV No. 13 of 2005

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 13 of 2005 (CIVIL)
(ON APPEAL FROM CACV NO. 101 OF 2004)
(Consolidated with FACV No. 21 of 2005 and heard together with FACV No. 7 of 2005 and FACV No. 12 of 2005)

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Between :

CHAN SUK YIN and WONG YAM TAI **Appellant**

- and -

HARVEST GOOD DEVELOPMENT LTD **Respondent**

_____

FACV No. 21 of 2005

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 21 of 2005 (CIVIL)
(ON APPEAL FROM CACV NO. 101 OF 2004)
(Consolidated with FACV No. 13 of 2005 and heard together with FACV No. 7 of 2005 and FACV No. 12 of 2005)

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Between :

HARVEST GOOD DEVELOPMENT LTD **Appellant**

- and -

CHAN SUK YIN and WONG YAM TAI **Respondent**

_____

Court : Mr Justice Bokhary PJ, Mr Justice Chan PJ, Mr Justice Ribeiro PJ, Mr Justice Litton NPJ and Lord Hoffmann NPJ

Dates of Hearing : 29 November and 2 December 2005

Date of Judgment : 5 January 2006

J U D G M E N T

Mr Justice Bokhary PJ :

1. I agree with the judgment of Lord Hoffmann NPJ.

Mr Justice Chan PJ :

2. I agree with the judgment of Lord Hoffmann NPJ.

Mr Justice Ribeiro PJ :

3. I agree with the judgment of Lord Hoffmann NPJ.

Mr Justice Litton NPJ :

4. What falls for consideration ultimately on these appeals are a few lines in a statute: Section 6 of the New Territories Leases (Extension) Ordinance, Cap. 150. It was passed in 1988 when the Block Crown leases granted in the early years of the 20th century had still about 9 years to run.

5. Section 6, on its face, is unambiguous. The words "is extended" (in Chinese "續期") imports, as counsel for the appellants suggest, the continuance of an existing state of affairs, not the creation of a new one: The legislature in 1988 simply extended the then existing leases to 30 June 2047, to give effect to Annex III of the Joint Declaration, signed in Beijing in December 1984: As simple as that. If this interpretation of s.6 is correct, the appellants must succeed on these

appeals: The title by which the registered owners claim possession in these cases is the same title which was extinguished, as against the squatters, by the operation of s.17 of the Limitation Ordinance, Cap. 347 when the 20 years of continuous adverse possession expired.

6. The fact that, as between the sovereign governments, the lease of the New Territories expired on 30 June 1997 is not relevant on these appeals. It has not been suggested by counsel that, as a matter of Hong Kong's domestic law, the legal consequence, as summarized above, is not possible: So the argument must necessarily focus on the meaning and effect of the words "is extended" in s.6.

7. Section 6 cannot be viewed in isolation: It must be construed having regard to the Ordinance as a whole. Hence, counsel for the respondents say as follows: Look at s.7: It says that during the period of extension, the lease shall be subject to the same covenants, exceptions, reservations etc as appear from the instrument; if the lease during the extended period is the same lease, there is no need to make a provision like that. This submission has some weight: But the point does not go very far. Regard must be had also to s.7(1)(c) which provides for a reservation of government rent payable under the Government Rent (Assessment and Collection) Ordinance, Cap. 515: 3% of the rateable value, payable annually for the 50 years expiring on 30 June 2047. Plainly, this is outside the terms of the Block Crown leases and separate provision such as this must be made to give effect to Annex III of the Joint Declaration. Further, s.7 deals with things like mortgages and charges which are not contained in the Block Crown leases: These are covered by s.7(1)(a)(i). Looked at overall, there is, in my view, nothing in s.7 which supports the respondents' case.

8. There are undoubted oddities arising from the construction urged upon us by counsel for the appellants. For example, s.5 which enables a registered lessee to opt out by lodging a memorandum before the appointed date (25 April 1988). So a lessee who had sold his land, say a few months before, could in theory be liable to pay the annual government rent amounting to 3% of the rateable value until 30 June 2047. But the greatest anomaly, in my view, is this: A squatter, confirmed in his possessory title by a court declaration, can greatly enhance the value of the property by improvements on the land, increasing its rateable value. But the burden of paying the annual rent of 3% of the rateable value falls on the dispossessed registered owner, not on the squatter. Take as an example, appeal No. FACV13/2005 which concerns Lots 6A RP, 7 RP, 8, 9 and 10 in D.D.32. They comprise nearly 121,000 square feet of land, on the edge of Tai Po. Although part of the land is left vacant at present, and the rest used for low-grade farming, there is nothing to prevent the appellants from fencing off the whole lot and turning it into a luxurious country residence, free of all obligation to pay government rent.

9. Rogers VP in the Court of Appeal (Appeal No. FACV 7/2005) said that one of the purposes behind the Extension Ordinance was to give effect to the Joint Declaration so as to preserve the income source of the ultimate landlord, the Hong Kong SAR Government; he thought it "unimaginable…that the legislature would have wished to grant immunity to squatters in the New Territories as against the registered owners who would be liable to pay the rent for the land". That, with respect, is to put the matter too high. It is an anomaly: A troubling one. But it does not mean that, in consequence, s.6 must necessarily be construed as if it created a new estate (either by way of a surrender and regrant as at 25 April 1988, or by way of a reversionary lease

commencing on 28 June 1997), rather than to take it upon its plain meaning : That the existing leases are extended to 30 June 2047. Full stop.

10. The starting point in statutory interpretation must always be the ordinary linguistic meaning of the words used: Were it otherwise the relationship between the two branches of government, the legislature and the judiciary, would be a very difficult one. Great mischief could result in the courts reading words into statutes which are not there, simply to achieve a purpose which the courts claim to be desirable: Here it would be to add the words "by the grant of a new lease" after the words "is extended" in s.6. This cannot be done.

11. I have had the advantage of reading in draft Lord Hoffmann NPJ's judgment. For the reasons he gives I too would allow the appeals and make the orders he proposes.

Lord Hoffmann NPJ :

12. These three appeals have been heard together because they raise a common question of construction on s.6 of the New Territories Leases (Extension) Ordinance ("the Ordinance"), Cap. 150:

> "The term of a lease to which this Ordinance applies is extended, from the date on which it would, apart from this Ordinance, expire, until the expiry of 30 June 2047, without payment of any additional premium."

13. The Ordinance, which was passed in 1988, applied to "every New Territories lease that exists at the commencement of this section and that, but for this Ordinance, would expire before 30 June 1997" (s.2) with immaterial exceptions and subject to the right of all persons interested in the lease, acting together, to opt out of the s.6 extension by registering an appropriate memorandum at the Land Office under s.5.

14. The background to the passing of the Ordinance was the 1984 Joint Declaration of the Government of the United Kingdom and the Government of the People's Republic of China concerning the future of Hong Kong. The Colonial government had not granted any leases of land in the New Territories for terms exceeding that of the British Government's own lease from China, which expired on 30 June 1997. In fact the standard form of New Territories lease had been for 75 years from 1 July 1898 with an option to renew for 24 years less three days, but the New Territories (Renewable Government Leases) Ordinance, Cap. 152, passed in 1969, had deemed the right of renewal to have been exercised and a new Government lease to have been granted on 1 July 1973 for a term of 24 years less three days. At the time of the Joint Declaration, therefore, all leases in the New Territories were due to expire within less than 13 years. In order to put an end to the uncertainty over what would happen next, the Chinese Government agreed, by Annex III, paras 2 and 3 of the Joint Declaration, to recognise extensions of New Territories leases until a date not later than 30 June 2047. The Extension Ordinance was passed pursuant to this agreement.

15. These appeals all concern lots of leasehold land in the New Territories which are occupied by squatters. In *Chan Suk Yin and another v. Harvest Good Development Ltd* the plaintiffs are squatters living on some agricultural land in the hills near Tai Po who claimed a declaration that the leasehold owner's title had been barred by upwards of 20 years adverse possession, pursuant to s.7(2) of the Limitation Ordinance, Cap. 347. The judge found that their possession had been sufficient to satisfy the Ordinance and this finding of fact was upheld by the Court of Appeal. Likewise in *Chan Tin Shi v. Li Tin Sung and others* the plaintiffs claimed a declaration that the leaseholder's title to some land in Tai Po was barred under the Limitation Ordinance. The judge

found that the plaintiffs and their predecessors had been in adverse possession since 1954. This finding of fact was also upheld by the Court of Appeal.

16. In *Chan Tin Shi*, however, the claim was dismissed by the Court of Appeal on the ground that the leaseholders were not relying upon the title which had been barred by adverse possession but upon a new title created by the 1988 Ordinance, which I shall call the "Extension Ordinance". The reasoning was as follows. English law, unlike systems based upon Roman law, has no theory of prescription by which title can be obtained by long possession: see *R. v. Oxfordshire County Council, ex parte Sunningwell Parish Council* [2000] 1 AC 335, 349. Instead, adverse possession by a squatter for the period of limitation will bar the right which the person entitled to possession has to recover the land by action. This principle is reflected in s.7(2) of the Limitation Ordinance:

> "No action shall be brought by any…person to recover any land after the expiration of [20] years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person…"

17. As is plain from the language of the Ordinance, adverse possession does not affect the rights of other persons having interests in the land which do not entitle them to possession. In the case of land subject to a lease, the person entitled to possession is the lessee. The freeholder has no right to possession until the lease comes to an end. Adverse possession by a squatter may therefore bar the remedy of the lessee but will not affect the right of the freeholder to claim possession when the lease falls in.

18. The lessee's right to possession derives from the lease being

an estate in the land. The leasehold estate is the lessee's title to possession. Conversely, if the right to possession is barred by s.7(2) of the Limitation Ordinance, then the lessee's estate is destroyed by s.17:

> "at the expiration of the period prescribed by this Ordinance for any person to bring an action to recover land . . . the title of that person to the land shall be extinguished."

19. The lessee's "title" is his estate – the words in this context mean the same thing: see Lord Denning in *Fairweather v. St. Marylebone Property Co. Ltd* [1963] AC 510, 544–545. But the title is extinguished only as against the squatter. As against the landlord it remains in existence, so that the lessee remains liable upon the covenants of the lease.

20. It follows from these well established principles that when the period of limitation expired, the lessee of the land occupied by a squatter was barred by s.7(2) from bringing proceedings for possession and his title was, as against the squatter, extinguished by s.17. This did not however affect the interest of the government, against which time could not commence to run while the leasehold interests subsisted. As between the government and the lessees, the lease continued to subsist, notwithstanding the expiry of the limitation period. It follows that if the Extension Ordinance had not been passed the government would have been able, by virtue of its superior interest, to claim possession from the squatter when the lease expired in 1997. Or it could have granted a new lease, whether to the same or a different tenant, and thereby created a new leasehold estate giving a right to possession which would not have been affected by the Limitation Ordinance. The decision of the House of Lords in *Fairweather v. St. Marylebone Property Co. Ltd* [1963] AC 510 is authority for saying that the same would have happened at an earlier date if the original lease had been surrendered. The government could

immediately have claimed possession itself or regranted the land under a new lease which would have enabled the tenant to obtain possession. It is not necessary in these proceedings to decide whether that is correct because all the proceedings in these appeals were commenced after the old leases would have expired.

21. Apart from this last point, all that I have said so far is, I think, uncontroversial. It is the next step in the reasoning of the Court of Appeal that has been in issue in these appeals. The Court decided, by a majority (Rogers VP and Le Pichon, Yuen JJA dissenting) that the effect of s.6 of the Extension Ordinance was to grant the leaseholders a new lease, either in exchange for a deemed surrender of the old lease when s.6 of the Ordinance came into force on 25 April 1988, or commencing upon the expiry of the old lease on 27 June 1997. In either case, said the majority, the title by which the leaseholders claim possession in these proceedings is not the title which was extinguished by s.17 of the Limitation Ordinance. It is a new title by which they claim under the Government's reversionary interest after the termination of the old leases.

22. This decision was followed by another division of the Court of Appeal in *Chan Suk Yin*. It also encouraged the plaintiffs in *China Overseas Grand Gain Property Development Ltd v. Mok Yuen Fun and others* to apply to strike out a limitation defence in a claim to possession of land in Chiu Keng Village, Sheung Shui, occupied by squatters. Suffiad J struck out the defence, as in the light of *Chan Tin Shi* he was bound to do. Indeed, if the Court of Appeal is right, the Extension Ordinance has destroyed all squatters' titles in the New Territories. But Suffiad J gave leave to appeal directly to this Court. The facts of *Mok Yuen Fun* have not yet been decided. In *Chan Tin Shi* the findings of fact by the judge and the Court of Appeal are no longer disputed. All

that remains is the point of law. In *Chan Suk Yin* the respondent owner challenges by cross-appeal the judge's finding that the squatters had the necessary intention to possess, which it says was not open to him on the evidence. I shall consider this cross-appeal when I have dealt with the question of law which arises on the three appeals.

23. The issue of law is whether s.6 created new leasehold estates, either by way of regrant after surrender or in reversion after expiry by effluxion of time, or whether it merely extended the term of the existing estates. The language of s.6 is in my opinion clear. It says that the term of the existing leases is extended from the date on which they would otherwise have expired, i.e. 27 June 1997, until 30 June 2047. Every existing lease, instead of being for a term expiring on 27 June 1997, is by force of statute to be for a term expiring 30 June 2047. But it continues to be the same lease. If it were a new lease, whether from 28 April 1988 or from 28 June 1997, it could not be said that *its* term had been "extended".

24. That was enough for Yuen JA and I must say at once that I find her reading of the statute entirely convincing. But the majority were persuaded for various reasons that s.6 could not be construed in this straightforward manner. I shall consider the arguments put forward by the Court of Appeal and some additional ones raised by counsel for the respondents.

25. First, reliance was placed upon the rule of common law that a lease is an interest in land, an item of property, originally created by consent but, once launched into the world, incapable of being modified simply by the agreement of the parties or their successors in title. It is therefore not possible for the parties to agree to amend an existing

leasehold interest to extend the term: see *Jenkin R. Lewis Ltd v. Kerman* [1971] Ch. 477. If they enter into such an agreement, it will be interpreted as an agreement to surrender the old lease and for the owner to grant in return a new lease for the extended term from the date when the agreement was to take effect, or alternatively as an agreement for the owner to grant a reversionary lease commencing when the old lease expires. In either case, the transaction is given effect by the creation of a new leasehold interest.

26. It is accepted that the legislature is not restricted by the rules which limit what the parties can do by consent. If it passes a law which says that a lease shall be for a longer term than originally granted or shall include land which was not in the original parcels, it is within its competence to do so. But it is said that the legislature should not, in the absence of very clear language, be assumed to have altered the common law.

27. The difficulty about this argument is that the Ordinance leaves the common law intact. The rule is about what the parties can do by consent. But the extension under s.6 is not by consent. It is a plain legislative intervention to alter the character of every existing New Territories leasehold estate by extending the term. The fact that there is a provision for opting out under s.5 does not make it a consensual transaction.

28. Mr Anthony Neoh, SC on behalf of the respondent in *Chan Suk Yin and another v. Harvest Good Development Ltd*, said that s.6 should be construed as if it had deemed the government and the lessee to have agreed to an extension to the lease. Then it would have taken effect as a surrender and regrant. In support of this submission, he

referred to a statement by the Secretary for Lands and Works when the bill for the Extension Ordinance was introduced into the Legislative Council (Official Report of Proceedings of the Legislative Council, 6 May 1987). The Minister said that the terms of New Territories leases were to be extended by statute because there were so many that it was impracticable to extend them individually. The inference, said Mr Neoh SC, is that if there had not been so many of them, they would have been extended consensually. That having been the government's preferred option, the statute should therefore be construed as having deemed consensual extensions to have taken place.

29. The answer to this bold and ingenious argument is that it is not what the statute says. It could easily have provided that the government should be *deemed* to have given the New Territories leaseholders options to extend their leases and that all leaseholders who did not register objections under s.5 should be deemed to have exercised the options. The precedent of the New Territories (Renewable Government Leases) Ordinance was ready to hand. Section 4(1) of that Ordinance said that the options to renew in the existing leases should be deemed to have been exercised and that "a new Government lease" should be deemed to have been granted. That undoubtedly created a new leasehold interest. Because the lease created by the option was a new estate, the Privy Council in *Chung Ping Kwan v. Lam Island Development Co. Ltd* [1997] AC 38 had to consider whether adverse possession under the Limitation Ordinance barred not only the existing estate of the owner but also a new estate derived from a right which existed in the old lease. But no such question arises in this case. Section 6 of the Extension Ordinance creates no new interest because it simply says that the existing lease shall be extended. Rogers VP did not accept this argument. He said that without "very clear wording" he was

unable to give s.6 its literal meaning. I suppose the draftsman might have added something like "notwithstanding any rule of common law". But for my part, I can detect no ambiguity.

30. Mr Leo Remedios, for the respondent in *China Overseas Grand Gain Property Development Ltd v. Mok Yuen Fun and others*, took a somewhat different tack. He placed great emphasis upon the 1984 Joint Declaration, without which, as he rightly said, there could be no certainty that any legal system adopted after the 1997 would recognise the validity of leases granted by the colonial government. He referred to para.2 of Annex III to the Declaration, which said that:

> "All leases of land granted by the British Hong Kong Government not containing a right of renewal that expire before 30 June 1997…may be extended if the lessee so wishes for a period expiring not later than 30 June 2047 without payment of an additional premium."

31. Section 6, said Mr Remedios, should be construed so as to give effect to the Declaration. I have no difficulty with this proposition but it does not help Mr Remedios. The Declaration does, after all, say that the leases may be extended. It does not say that new ones may be granted in substitution. So the language is entirely consistent with s.6. Mr Remedios says that the Government of the People's Republic of China and the British Government must be taken to have meant that the leases should be *consensually* extended and therefore, assuming that they knew of the doctrine of surrender and regrant, intended that the leases should not be extended but that new ones should be granted instead. For my part, I find this far fetched. The truth is that there were various ways in which, in conveyancing terms, effect could have been given to the Joint Declaration. Consensual extensions were one possibility but the method actually adopted was entirely in accordance with the terms of the Declaration.

32. Mr Edward Chan SC, in a succinct and excellent argument for the respondent in *Chan Suk Yin and another v. Harvest Good Development Ltd*, made the point that an extension of the original leases would mean that, by virtue of the doctrine of privity of contract, the original lessee would become liable for the rent for another 50 years without having any opportunity to object. He pointed out, correctly, that the right to contract out under s.5 is given only to the current lessee and not to the original lessee. So, in the event of default in payment of rent by the tenant after 1997, the original tenant might find himself liable for rent which he never contracted to pay. This unfair result could be avoided if s.6 were to be construed as creating a new lease rather than extending the old one.

33. Mr Chan SC may well be right; at any rate, no one offered an answer to his point. But I think that in the case of the ground rent payable during the extension period (3% of rateable value) the possibility of the government having recourse to the original lessee is not in practice very high. In any case, I do not think that the theoretical injustice is sufficient to overcome the very clear language of the section.

34. Mr Chan SC also offered an alternative argument. Even if the terms of the existing leasehold estates were extended and no new estates created, nevertheless the lessee's rights during the extension period were new rights which had not existed before 1988. These new rights were not derived from anything in the old leases and were therefore not statute barred on the principle applied in *Chung Ping Kwan v. Lam Island Development Co. Ltd* [1997] AC 38.

35. The point is a subtle one but too subtle, in my opinion, to be viable. A lease is a bundle of rights which subsist in a legal estate, a

proprietary interest in land. It is delimited in space by the parcels and in time by the term of years granted. The existence of the estate confers the right to possession. The Limitation Ordinance bars the right to claim possession in right of the lessee's estate or title. If the estate or title is still the same, it remains barred, notwithstanding any variation in the description of the estate or the rights attached to it. In the present case, the legislature has used language which makes it clear that the lease is to continue to exist but that the term is to be extended. It must follow that the lessee's title remains the same and that it continues to be barred.

36. Finally I must say something about the general policy of the Extension Ordinance. Rogers VP said that neither the sovereign parties to the Joint Declaration nor the Legislative Council when it passed the Ordinance gave much thought to the position of squatters. That may well be true. So one has to ask whether the ordinary meaning of the words used in s.6 would produce a result so contrary to anything which the legislature could have intended that some other meaning must be found. Rogers VP said that it was "unimaginable" that the legislature should have wanted to give immunity to squatters against registered owners who were liable to pay the rent.

37. But that was the position before the original expiry date of the leases. The Extension Ordinance merely prolonged it. I think that I detect in the reasoning of Rogers VP some antipathy to the proposition that a squatter can, simply by wrongful occupation for a period which has now been reduced to 12 years, in effect, if not in legal theory, acquire a valuable property and leave the registered owner with the sole privilege of paying the rent. There is much to be said for this point of view, which was shared by Parliament in the United Kingdom when it passed the Land Registration Act 2002. Section 96(1) simply disapplies the

Limitation Act in its application to registered land, which means in effect almost all the land in England and Wales. Instead, a person who has been in adverse possession for more than 10 years can apply, on notice to the registered owner, to be registered in his place: see Schedule 6, para.1. An applicant is however not entitled to be registered merely because for upwards of 10 years he has been in adverse possession. He must also satisfy one of the conditions in para.5(2) of the Schedule. In a case like this, he would have to satisfy the first condition:

> "(a) it would be unconscionable because of an equity by estoppel for the registered proprietor to seek to dispossess the applicant, and
>
> (b) the circumstances are such that the applicant ought to be registered as the proprietor."

38. If that were the law of Hong Kong, then it seems likely that the appellants would fail. They would be unlikely to be able to establish an equitable estoppel in their favour. But that is not the law. Under the Limitation Ordinance, adverse possession is enough. So it seems to me a perfectly respectable policy for the Joint Declaration and the Ordinance to have been intended simply to preserve the status quo both for lessees and for squatters. That might explain why the draftsman used the language of extension in s.6 rather than the language of deemed grant which had been used in the New Territories (Renewable Government Leases) Ordinance some twenty years earlier.

39. I turn now to the cross-appeal in *Chan Suk Yin and another v. Harvest Good Development Ltd*. Deputy High Court Judge Muttrie found that the appellants and their predecessors had been in possession since 1951. This finding is not challenged. The question is whether for upwards of 20 years their possession was adverse. The registered proprietor says that it was not adverse because it was initially under a lease and subsequently by licence. The lease is admitted. It was

granted by the then proprietor to the 2nd appellant's first husband Tam Sun for ten years from 1951. After it expired in 1961, rent ceased to be demanded or paid. In the absence of the grant of a new lease or licence, time under the Limitation Ordinance would have started to run.

40. In 1961, at about the time that the lease expired, the registered title was acquired by Lee Shau Kee, Fung King Hei and Wong Shiu Kin, who are referred to in the evidence as "the three friends". The proprietor's pleaded case (para.13 of the amended Defence and Counterclaim) was that before and after their purchase of the land, the "three friends", with their servants and agents, visited the land and "expressly or by implication" permitted Tam and the 2nd appellant his wife to continue to occupy the land. The visits were described with great particularity. The previous owner Chu Shuk Han introduced the new owners, who said that they were not in a hurry to resume possession but did not want to tie themselves down to lease for a fixed term. They would give adequate notice when they wanted the land.

41. When it came to the trial, only one of the people alleged to have been present at that meeting in 1961 gave evidence. That was the 2nd appellant, who denied that it had happened. There was no evidence to the contrary from the three friends (only one of whom was still alive) or their servants or agents. Nor was there any reference to such a meeting in contemporary documents. The best that the respondent could do was a note made in 1993 by Mr Mok, a surveyor employed by the respondent, of a conversation with the 1st appellant, Chan Suk Yin, who was the 2nd appellant's daughter by a second marriage to a Mr Chan:

> "Checked the boundary with Ms Chan directly at the scene, the boundary as shown on the attached plan. First, the opposite party indicated clearly that she would not rent out subject lots; second, she admitted the ownership of the owner in respect of the land, meaning that the opposite party would not contest with the owner on land ownership; third, the main

> point concerned the structures, fruit trees, fish ponds, flowers and plants, etc. The opposite party requested for $600,000 for delivering vacant possession. According to Ms Chan, her father had started using the subject land since 1951. She could correctly state the names of the three owners. She further indicated that when Lee, Fung, Wong purchased the subject land, they had inspected the subject land personally and told her family members that they could continue to use the subject land. They had never paid any rent."

42. Reliance was of course placed upon the last two sentences in this note. Ms Chan denied in evidence that she had said anything of the kind and claimed that the note was a subsequent invention. But the judge found that it was a genuine note of a real conversation and conveyed the gist of what Ms Chan had said. Nevertheless, he said that it was inadequate, in the face of the 2nd appellant's denial, to prove that a licence had been granted. In 1961 Ms Chan was not yet born and must have been saying what she had heard, or thought she had heard, or claimed she had heard, from someone else. The judge said that he could not make a finding of fact that a licence had been granted. So the defence failed.

43. In the Court of Appeal, Rogers VP agreed with the judge's conclusion. He said that the record in Mr Mok's memorandum did not "inspire confidence" that a licence had been granted. The other members of the court agreed.

44. In my opinion the question was one of primary fact and it was open to the judge, after hearing all the evidence, to find that the evidence was inadequate to prove that a licence had been granted. Furthermore, this finding was concurred in by the Court of Appeal and there is no reason in the present case why this Court should depart from its normal practice of not disturbing concurrent findings of fact. The cross-appeal must therefore be dismissed.

45. I would allow all three appeals and dismiss the cross-appeal. The results are that in *Chan Tin Shi v. Li Tin Sung* the declarations of Deputy High Court Judge A Cheung (as he then was) are restored, in *Chan Suk Yin and another v. Harvest Good Development Ltd* the declarations of Deputy High Court Judge Muttrie are restored and in *China Overseas Grand Gain Property Development Ltd v Mok Yuen Fun and others* the order striking out the defence is set aside and the action remitted to proceed to trial. In each case the respondents must pay the appellants' costs in this Court and below.

Mr Justice Bokhary PJ :

46. All three appeals are allowed and the cross-appeal is dismissed, with the results stated in the concluding paragraph of Lord Hoffmann NPJ's judgment.

(Kemal Bokhary)	(Patrick Chan)	(R A V Ribeiro)
Permanent Judge	Permanent Judge	Permanent Judge

(Henry Litton)	(Lord Hoffmann)
Non-Permanent Judge	Non-Permanent Judge

Mr Andrew Mak (instructed by Messrs Chan & Associates) for Chan Tin Shi

Mr Patrick P Szeto (instructed by Messrs Ho, Tse, Wai & Partners and assigned by the Legal Aid Department) for Mok Yuen Fun & others

Mr Ronny KW Tong, SC and Mr Kenneth CL Chan (instructed by Messrs Haldanes) for Chan Suk Yin & another

Mr Edward Chan, SC and Ms Anita Ma (instructed by Messrs Yeung & Chan) for Li Tin Sung & 3 others

Mr Leo Remedios and Mr Frederick HF Chan (instructed by Messrs F Zimmern & Co.) for China Overseas Grand Gain Property Development Ltd

Mr Anthony Neoh, SC, Mr Ernest Koo and Ms Barbara Wong (instructed by Messrs Christine M Koo & Ip) for Harvest Good Development Ltd