

Course Manual
Diploma in Legal Studies



HKUSPACE

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LAND LAW AND CONVEYANCING PRACTICE

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Overview

Students embarking on their study of land law for the first time often find it to be a complex and difficult subject. The way to overcome this initial impression is to realise that there are two basic questions that have to be asked when analysing any question on land law:

1. What is the nature of the rights that a party holds in and over land?
2. Are these rights enforceable or binding against other parties?

The comforting thought is that once an appreciation of the nature of the different rights in and over land is reached, and the issues arising from the enforcement of these rights are identified, the answers fall into place in the manner similar to the pieces of a jigsaw puzzle.

In land law it is necessary to understand the roles played by the common law and equity, and how the two bodies of law interact. The common law rules can at times lead to “unfair” results so the role of equity typically operates to mitigate this unfairness. The maxims of equity – for example “delay defeats equity”; “he who seeks equity must do equity” (the clean hands rule); and “equity looks on that as done which ought to be done” - play a role in many areas of land law, including the various formalities, proprietary estoppel and co-ownership. Moreover, the most important product of equity - the trust - plays a major role in the area of co-ownership.

Land law in Hong Kong has been closely linked to land law in England. The sources of both areas of land law is the tenurial (from Latin *tenere* meaning “to hold”) principle that all land is held of, or from, another. The land itself belongs to the sovereign. Individuals own estates and interests in land. Despite the similarity in the sources of law, English and Hong Kong land law have in practice moved in different directions. This process began soon after the formation of Hong Kong as a colony in 1842. The Hong Kong Government adopted a policy of granting only leasehold estates (with the notable exception being Saint John’s Cathedral), which stands in marked contrast to the English system, where freehold tenure continues to be the ultimate in private ownership of land.

Hong Kong land law persists as a case law system with occasional, albeit significant, modifications by legislation. By contrast, the English system can be described as a legislative system with occasional important adaptations by the courts. Much English legislation has no counterpart in Hong Kong.

Of particular importance is the fact that there is no Hong Kong equivalent to s1(6) of the Law of Property Act 1925 (LPA), which prevents a tenancy in common subsisting at law. In England, where land is conveyed to two or more persons, the legal estate must be held on an inseverable joint tenancy. The position in Hong Kong is completely different.



Far from being prohibited at law, the majority of conveyancing transactions in Hong Kong involve the transfer of undivided shares (tenancies in common) in multi-storey buildings. A legal joint tenancy can be severed so as to create a legal interest in common. This is crucial in Hong Kong as a person who considers himself to be an “owner of a flat” actually is a tenant in common of the whole building. The legal estate involved is the residue of the government lease. A flat owner co-owns it together with all the other unit holders. When he wishes to sell his flat, he does so by selling his tenancy in common. It makes legal and practical sense, then, that what he is transferring is a legal estate.

The importance of multi-storey buildings in Hong Kong land law and conveyancing is also illustrated by the enactment in Hong Kong of s41 of the Conveyancing and Property Ordinance (Cap 219) (CPO), which, inter alia, enables positive land covenants - such as payment of management fees and maintenance or repair of buildings - to be enforced against successors in title of the burdened land. The CPO, as its name indicates, is the main source of legislation on land law and conveyancing in Hong Kong and it is essential that students have their own hard copies of this piece of legislation and become as familiar with it as possible.

Finally, it is worth noting that the existing system of protection of property rights in Hong Kong is vastly different from that in England and Wales. Hong Kong still has no system of registration of title, nor has it adopted the English system of land charges registration for unregistered land. Under the Land Registration Ordinance (Cap 128) (LRO), Hong Kong has a system of registration of instruments. In general terms an instrument is a document having legal effect. The equitable doctrine of notice applies in Hong Kong, but the relationship between it and the registration of instruments under the LRO is far from simple. The position is set to change, though, when the Land Titles Ordinance (Cap 585), enacted in 2004, finally comes into effect and the registration of title replaces the registration of instruments.

Chapter 1

Landholding in Hong Kong: Nature and Types of Property

Upon completing this chapter you should be able to:

1. Explain the meaning of property.
2. Distinguish real property from personal property.
3. Distinguish movable property from immovable property.
4. Explain the doctrine of tenure and the doctrine of estates.
5. Describe the nature of freehold and leasehold estates.
6. Define land.
7. Explain the limits placed on a claim to airspace.
8. Apply the rules on the right to airspace.
9. Define fixtures and fittings and explain the significance of the distinction.
10. Explain the rules on the distinction between fixtures and fittings.
11. Outline the levels of formality.
12. Describe how a legal estate in land may be created, transferred or disposed of.
13. Outline the exceptions for the requirement for a deed.
14. Explain the requirement for writing.
15. Outline the requirements for an enforceable contract for the sale of land.
16. Explain, in outline, the doctrine of part performance.
17. Explain, in outline, the doctrine of proprietary estoppel.

1.1 Introduction

In this chapter we will look at the various types of property and, in particular, the meaning of land. Section 3 of the Interpretation and General Clauses Ordinance (Cap 1) (IGCO) defines “property” in Hong Kong and this definition includes “land”.

A distinction is made between real and personal property. Property is real if the courts can restore the property itself by a real action (an action *in rem*) to a disposed owner. There are two types of real property: corporeal hereditaments and incorporeal hereditaments. A hereditament is a right that is capable of passing to heirs by way of inheritance. The former include, in the main, land and buildings and all other things that are part of or attached to land. The latter include such rights as easements and profits.

Personal property is that which can be recovered by a personal action (an action *in personam*). This gives the court the choice of ordering the item in question to be returned or an equivalent sum of money awarded instead.



It is important to note that in Hong Kong, land law is not concerned with real property. This is because virtually all land in Hong Kong is leasehold property. Leases have a unique character and are technically classified as chattels real to reflect their hybrid nature. So, in Hong Kong, it is the distinction between personal property and chattels real that is important, rather than the distinction between real and personal property.

It should also be noted that some Hong Kong ordinances indicate a distinction between movable and immovable property rather than a distinction between chattels real and personal property respectively. However, the wording of the definition of land as contained in s2 of the CPO shows that the terms “land” and “immovable property” are almost identical.

Hong Kong land law is largely based on English law with both deriving from the same source. However, while there are many similarities between the two jurisdictions, they have more recently moved in different directions. One major difference between Hong Kong and England is the fact that most people in Hong Kong live in multi-storey buildings, which creates special circumstances requiring a different legal approach. This is most evident in the area of legislation. You will see examples of this as we work through the course. For instance, in the area of land covenants (see Chapter 3), s41 of the CPO removes many of the restrictions of the common law still present in England, while in the area of co-ownership (see Chapter 4) Hong Kong does not have equivalent legislation to the Trusts of Land and Appointment of Trustees Act 1996.

There is no absolute ownership of land at common law in either England or Hong Kong. Instead an individual owns a bundle of rights and obligations, which will subsist for a period of time. It is important for you to be able to identify the different types of rights in land and whether or not they are enforceable against third parties. We will start with leases, then study easements, land covenants, mortgages, co-ownership rights and licences, as well as other less common rights associated with land use.

In the latter part of this text we will deal with conveyancing, that is the transfer of title in land by way of sale and purchase. The seller is called the vendor and the party acquiring the land is called the purchaser.

As mentioned above, it is important to note that land law in Hong Kong is not concerned with real property. There is no freehold land in Hong Kong, except for St John’s Cathedral, and the leasehold estate is the most important estate in Hong Kong.

Under Article 7 of the Basic Law, all land in Hong Kong belongs to the PRC with the HKSAR Government responsible for the management, use and development of the land and for leasing of the land to individuals.

Chapter 1

1.2 The Meaning of Property

At common law, “property” was anything that could be owned. In Hong Kong, s3 of the IGCO defines property as including:

“ ...

- (a) money, goods, choses in action and land; and
- (b) obligations, easements and every description of estate, interest, and profit, present or future, vested or contingent, arising out of or incident to property as defined in (a).”

1.2.1 Real property and personal property

It used to be at common law that only certain legal actions were available to force a defendant to return property to its rightful owner. These were known as real actions, or actions *in rem*. Initially these actions were only available for the recovery of freehold land, and so such property became known as real property. Freehold estates last for an indefinite period. There is no freehold land in Hong Kong (St John’s Cathedral excepted). Hong Kong land, therefore, does not fall within the traditional classification of real property.

Real property can be subdivided into corporeal hereditaments and incorporeal hereditaments. A hereditament is a right that can be inherited. Corporeal hereditaments include land, buildings, minerals, trees and other things attached to the land. Incorporeal hereditaments include such rights as easements and profits.

Personal property is that which can be recovered by a personal action or action *in personam*. The actual item in question may itself not be recovered but instead a sum of money may be awarded. Personal property includes chattels (choses in possession such as clothing and other personal articles), choses in action (such as for a debt) and a lease or tenancy.

Most Hong Kong land is leasehold, or to give it its technical name, “chattels real”. This reflects the history of leases that initially were only contracts between the landlord and tenant and only personal property. However, over time it became clear that a tenant could not operate her property without having certain powers, such as the right to keep other persons off her property. The lease, therefore, has evolved into what the law recognises as being more than merely personal property, and hence the classification as chattels real.



1.2.2 Movable and immovable property

As pointed out above, it is the distinction between chattels real and personal property that is important in Hong Kong. Some legislation in Hong Kong, such as s3 of the IGCO, rather confusingly use the terms “movable” and “immovable” property to distinguish between personal property and chattels real respectively. However, the difference is negligible as the statutory definitions of immovable property and land, as will be seen below, are virtually the same.

1.3 The Doctrines of Tenure and Estates

The doctrine of tenure was never introduced in Hong Kong but title to land remains firmly rooted in the twin concepts of tenure and estates: tenure refers to the fact that no person can own land – she holds land of another and is, therefore, a tenant.

Under the doctrine of estates a tenant does not own land but she does hold the abstract entity, the “estate”. This is an interest in land of a particular duration. The technical way of expressing that an estate is “owned” by someone in law is to say the estate “vests in” or is “vested” in that person. To vest an estate means to “clothe” someone with the rights that attach to that estate.

1.3.1 Freehold and leasehold estates

The two important estates today are freeholds and leaseholds. The former are granted for an indefinite period and, as noted above, are real property. As also noted above, the only land in Hong Kong that is freehold is St John’s cathedral. All other land in Hong Kong is leasehold, with the most important legal estate in Hong Kong being the government lease (see Chapter 2).

1.3.2 Legal estates and equitable interests

Section 2 of the CPO defines a legal estate as:

“...

- (a) a term of years absolute in land;
- (b) the legal interest in any easement, right or privilege in or over land for an interest equivalent to a term of years absolute; and
- (c) a legal charge.”

Part (a) refers to a lease, which will be discussed in Chapter 2, while a legal charge is the main type of mortgage (see Chapter 5).



Section 2 of the CPO then goes on to define an equitable interest as being:

“... any estate, interest or charge in or over land which is not a legal estate or a freehold ...”.

1.4 The Meaning of Land

Section 2 of the CPO defines “land” to include:

“... ”

- (a) land covered by water;
- (b) any estate, right, interest or easement in or over any land;
- (bb) the whole or part of an undivided share in land and any estate, right interest or easement in or over the whole or part of any undivided share in land; and
- (c) things attached to land or permanently fastened to anything attached to land.”

1.5 The Right to Airspace

The common law definition of land is that an owner of land owns airspace and all land below the surface, but not minerals (s3 of the Mining Ordinance (Cap 285)) nor treasure trove (s10 of the Antiquities and Monuments Ordinance (Cap 53)). However, the airspace owned is limited to the height necessary for the ordinary and reasonable use of the land (*Bernstein v Skyviews* [1978] QB 479).

In *Kelsen v Imperial Tobacco* [1957] 2 QB 344, the defendants committed a trespass where an advertising sign fixed to their property projected eight inches into the airspace above a single storey shop owned by the plaintiff. The evidence showed that the plaintiff had no intention of using the flat roof in any particular way and had not suffered any serious injury. Nevertheless, the court ordered the defendants to remove the signs within 28 days.

1.6 Fixtures and Fittings

As noted above, land includes “fixtures” - things attached to the land or permanently fastened to anything attached to the land (s2 of the CPO).