

“Residual Development Potential”: What counts

LAWRENCE H.C. PANG

FRICS FHKIS AACI MBA MSc(Finance) CFA

ISA Certified Arborist (Certification ID: HK-0716A)

Cinat Company Ltd v. The Attorney General [1995] 1 HKLR 128 (PC).

- The triangular lot was formerly reserved for use as an MTR station.
- A commercial building on the Triangular Lot was not possible as “the development potential of the [Triangular Lot] site has been used up or exhausted.”



*Ashley 121 Limited v. Appeal Tribunal (Buildings)
& Building Authority*, HCAL 49 of 2010, dated 23
February 2011
([2011] 2 HKLRD 728)

- Ashley intended to provide for a shop and auxiliary facilities with a gross floor area of 3.359 sq. m. or 36.16 sq. ft. to be erected on the Triangular Lot.
- Apart from the Triangular Lot, a Strip Land about 650 sq. ft. (abutting on the northwest boundary of the Carson Lot) was surrendered to Government for an earlier widening of Electric Road.
- The Appeal Tribunal concluded that, in the Approved Amended Plan in 1978, the 650 sq. ft. of the Strip Land had been wrongly deducted from the gross area of the site for Carson Mansion.
- Now that the mistaken deduction of the 650 sq. ft. having been discovered, it is only fair to re-attribute to the Triangular Lot the excess of its development potential that was used.

Building (Planning) Regulations, r 22(1)

Where, between ground level and a height of not less than 5.5 m or, where the Building Authority is satisfied that there will be no obstruction to vehicular traffic using the street, 3.3 m above ground level, a building on a class A, B or C site is set back from a boundary of the lot on which it is erected, being a boundary that abuts on a street, and, **with the consent of the Government**, the part of the lot that is thereby not built upon is dedicated to the public for the purposes of passage-

(a) the site coverage for the building or for any one part of the building may be exceeded by an addition of

$$\frac{1500 \times \text{area of the lot so dedicated to the public}}{\text{area of the site} \times \text{height of the building}}$$

; and

(b) the plot ratio for the building or, if the building is a composite building, for the domestic part of the building may be exceeded by 20 % or an addition of

$$\frac{5 \times \text{area of the lot so dedicated to the public}}{\text{area of the site on which the building is erected}}$$

, whichever is the less.

Building (Planning) Regulations, r 22(2)

Where part of a lot, being a part that abuts on a street, is acquired by the Government, either by agreement or by resumption under the Lands Resumption Ordinance (Cap 124), for the purpose of street widening, the Building Authority may permit-

- (a) the site coverage for a building erected on that lot to exceed by an addition of:

$$\frac{1500 \times \text{area of the part of the lot so acquired by Government}}{\text{area of the site} \times \text{height of the building}}$$

- (b) the permitted plot ratio for the building or, if the building is a composite building, for the domestic part of the building to exceed by 20 % or an addition of

$$\frac{5 \times \text{area of the part of the lot so acquired by Government}}{\text{area of the site on which the building is erected}}$$

, whichever is the less.

Ownership or Prospect of Control

- Lord Fraser's dictum in *AG v. Cheng Yick Chi* [1983] 1 AC 14 (PC): a 'site' for the purposes of the BPR can only include land which he owns or which he has a realistic prospect of controlling.
- The Court in *Ashley 121 Limited* assumed it was bound by it.
- *Ashley's* application for Alterations and Additions (A & A) works to Carson Mansion (situated on the Carson Lot adjoining the northwest boundary of the Triangular Lot), making use of the development potential of 650 sq. ft., was refused.

Questions Outstanding:

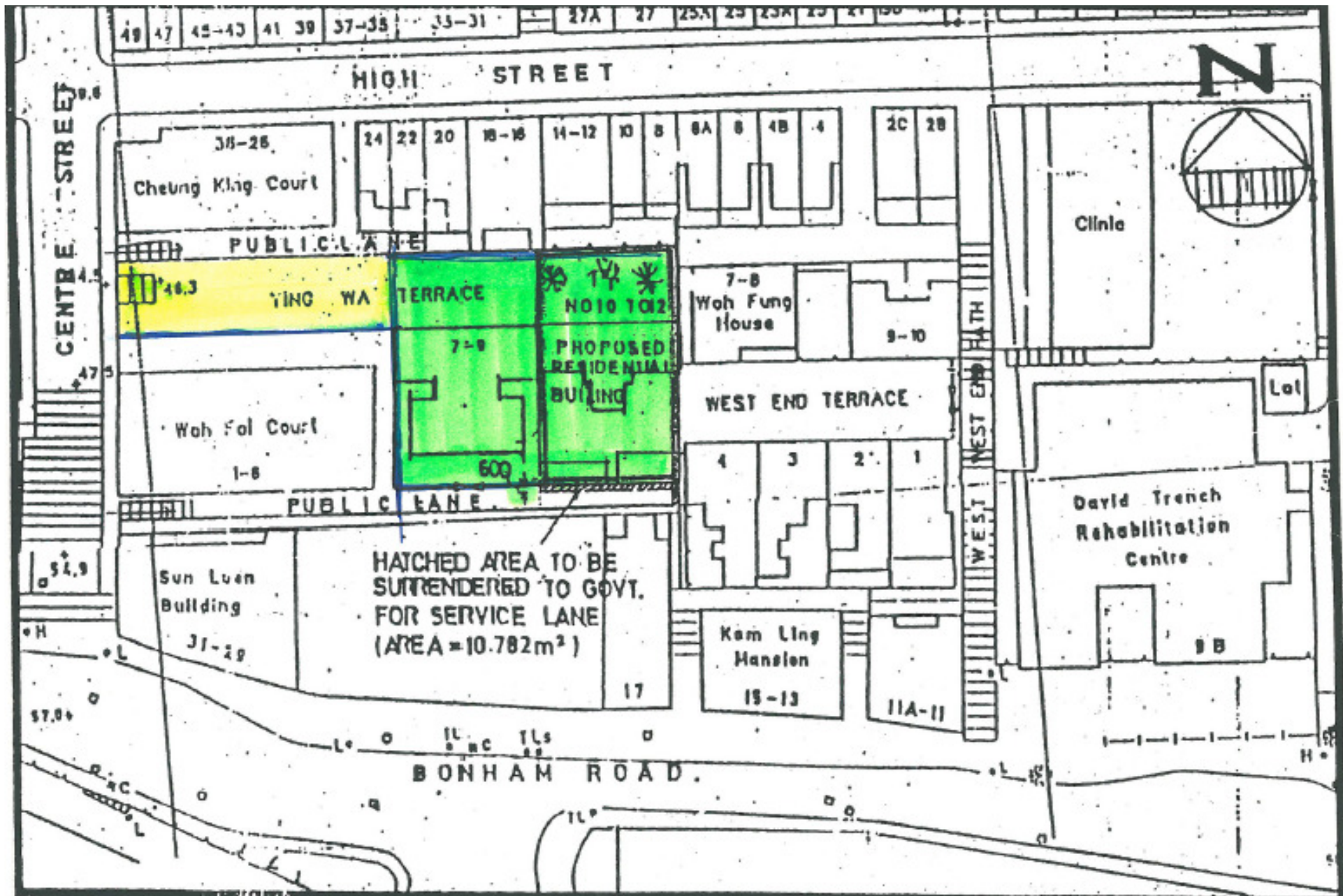
- How much of the development potential of the 650 sq. ft. associated with the Strip Land remains available in light of the mistaken deduction?
- Whether such development potential is properly attributable to the Triangular Lot by reason of the sequence argument and the development history of the original site?
- Whether any development potential attributable to the Triangular Lot is sufficient to support the building of a shop and auxiliary facilities on the Triangular Lot?

Building Authority v. Dobrowen Investment Limited & Appeal Tribunal (Buildings),

HCAL 20 of 2011

- In 1996, DIL proposed to build two blocks of flats, one to be Phase I, at Nos. 10 - 12 Ying Wa Terrace and the second block, to be Phase II, would be located at Nos. 7-9 Ying Wa Terrace.
- Now Phase I and the units therein having been sold out to private buyers, the Government argued that the developer must not be allowed to include the right of way in front of Nos. 7-9 in the development as part of the area of the site for Phase II under Regulation 23(2) (a) of the Building (Planning) Regulations.





BLOCK PLAN

SCALE 1:1000

Reg. 23(2) of the B (P) R

- In determining for the purposes of calculating the permitted site coverage and plot ratio under regulation 20, 21 or 22 the area of the site on which a building is erected-
 - (a) no account shall be taken of any part of any street or service lane; and
 - (b) there shall be included any area dedicated to the public for the purposes of passage.
- Under Buildings Ordinance (BO) s.16(1)(d), the Authority retains a discretion whether or not to approve plans.* The Authority may, but need not necessarily, disapprove of plans where an enactment such as r.23(2)(a) may be contravened.

* *Quebostock Ltd. v. The Building Authority & Another* [1986] HKLR 467 & *Building Authority v. Head Step Ltd.* (1996) 6 HKPLR 87

Legitimate Expectation

- Conduct can form the basis of a legitimate expectation: *Ng Siu Tung & Others v. Director of Immigration* (2002) 5 HKFCAR 1 at 43G-44B.
- *Cheng Yick Chi* did not clearly state what type of control is necessary, nor how ownership is to be proved and if so, at what time ownership must be demonstrated.
- By Clause 9(f) of the DMC for Nos. 10 - 12 Ying Wa Terrace, the developer reserved unto himself the right to change, amend, vary, add and alter the “*Approved Plans*”.

東方日報 - 2011年11月10日

- 英華閣發展商Dobrowen Investment Ltd. 及7至9號的發展商加永發展，支持建築物上訴審裁處的意見，指在批核圖則階段，發展商並無法定責任交代誰是相關地皮的擁有人或是否享有控制權。
- 但法官認為，如果展開工程後才發現業權問題，會浪費之前準備圖則的時間及資源。
- 建築事務監督亦指英華閣單位已出售，質疑發展商是否仍然擁有業權。



The Mei Foo Saga

[Remaining Portion of New Kowloon Marine Lot No. 25 (NKML 25 R.P.)
and Section B of New Kowloon Marine Lot No. 25 (NKML 25 S.B)]

- Lately residents of Mei Foo Sun Chuen have been up in arms over consent given to New World or more properly Billion Star Development Limited to develop a site of a former liquefied petroleum gas storage facility within the estate into a high rise block (of 4,788.4 m²) impeding views, light and air.



美孚新邨地圖



荔枝角公園一期

荔灣道

山景

往九龍

巴士總站

葵涌道

九龍巴士公司

第五期

第六期

第七期

第四期

第一期

第二期

第三期

第八期

石油業

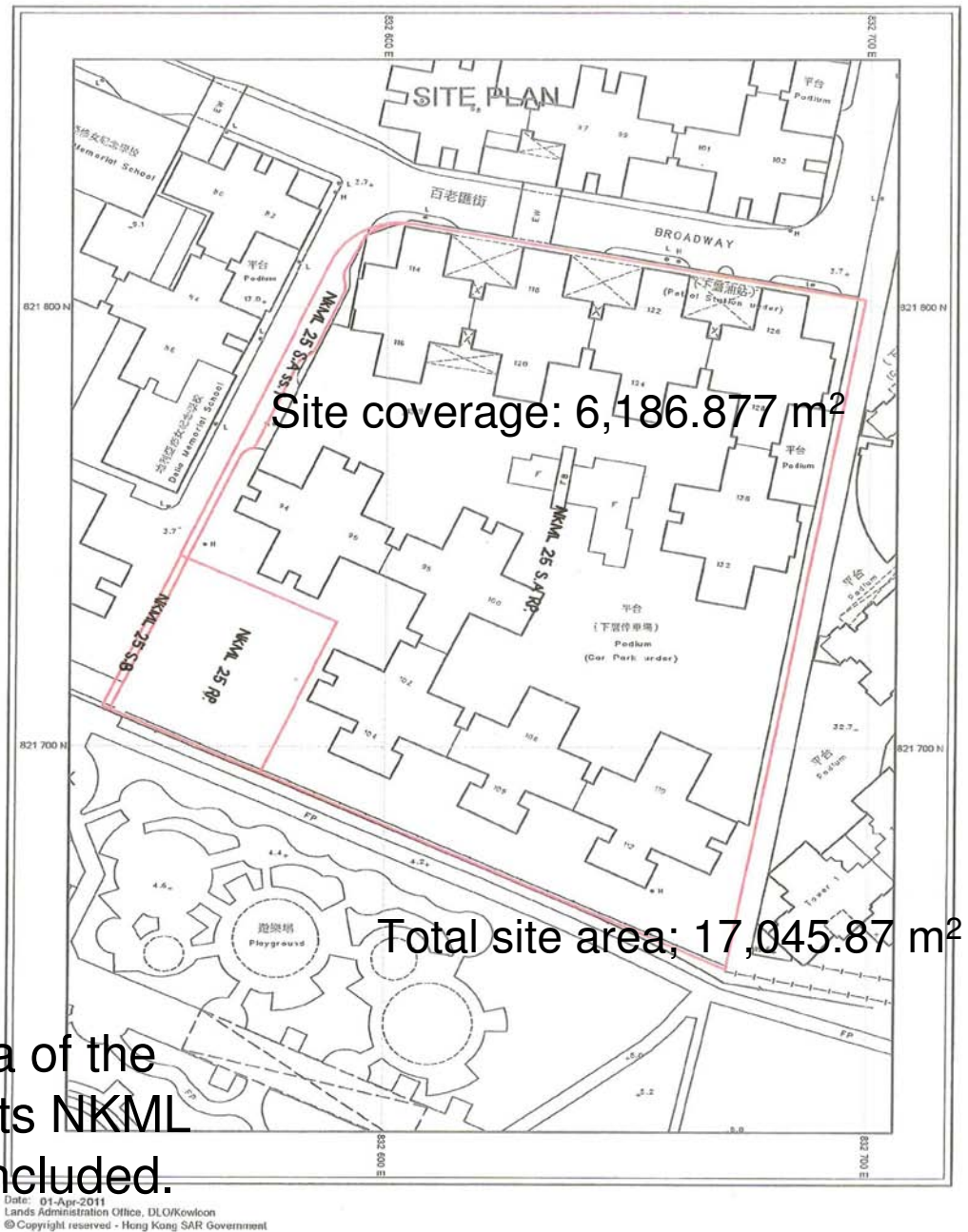
The History

- Building plans were approved in 1974 (the 1974 building plans) that covered the whole NKML25, including Phase 8 of Mei Foo Sun Chuen and the building of the LPG storage.
- In 1978, while Phase 8 of Mei Foo Sun Chuen was still under construction, the developer divided the lot into four separate portions,
 - NKML 25 S.A R.P. – which has been developed into Phase 8 of Mei Foo (site coverage: 6,186.877 m²)
 - NKML 25 R.P. – which was once used to accommodate the LPG storage. The facility was relocated in 1999.
 - NKML 25 S.B – which forms part of a private road and
 - NKML 25 S.A ss.1 – which forms another part of the aforementioned private road.

Source: [Response of the Development Bureau on a Residential Development next to Phase 8 of Mei Foo Sun Chuen \(i.e. Remaining Portion of New Kowloon Marine Lot No. 25 \(NKML 25 R.P.\) and Section B of New Kowloon Marine Lot No. 25 \(NKML 25 S.B\)\)](http://www.devb.gov.hk/filemanager/en/content_31/Mei%20Foo%20-%20Factual%20Account%20of%20Issues%20ENG.pdf) (www.devb.gov.hk/filemanager/en/content_31/Mei%20Foo%20-%20Factual%20Account%20of%20Issues%20ENG.pdf)

- According to the transaction records and the deed of mutual covenant of Phase 8 of Mei Foo Sun Chuen, owners of Phase 8 have only purchased the separate titles (undivided shares) of NKML 25 S.A R.P.
- They also have the rights to access and pass through NKML 25 S.A ss.1, but not its ownership.
- They do not own the lots of the controversial development site (i.e. NKML 25 R.P. and NKML 25 S.B).

As for the calculation of site area of the development project, only the lots NKML 25 S.B and NKML 25 R.P. are included.



Building Control

- According to the building plans of the development project approved by the BD in October 2010, the domestic gross floor area of the proposed development at NKML25 R.P. and NKML25 S.B is 4 788.4 square metres.
- 590 square metres have to be deducted from the site's total area of 1,354.655 square metres due to the restrictions on site coverage which was used to support the development parameters of the completed buildings of Phase 8 of Mei Foo Sun Chuen.
- Calculated using a total area of 765 square metres (i.e. after the deduction), the domestic plot ratio under the B(P)R is 6.26, which is in line with the permitted plot ratio of 6.8 for this particular site as prescribed in Schedule 1 of the B(P)R.
- The development project has not used the lot area of Phase 8 of Mei Foo Sun Chuen in the calculation of the development parameters of the development project.

NKML25 S.B

- That part of the site not previously taken up by the LPG plant and its protective wall was left open with no boundary demarcation;
- It consists of a thin strip of paved land (some 1.85m in width) running from north to south along the length of the site's western boundary.
- It is paved in a manner indistinguishable from the paving used to cover the public areas and walkways around the neighbouring residential blocks;
- Physically therefore the 'paved areas' of the site appear to be part and parcel of the surrounding public areas.



Building Authority v Appeal Tribunal

HCAL 147 of 2002, 25 July 2003

[“the Estoree litigation”]

- It was conceded by the Authority that no legally enforceable right of way or right of passage over that area of the site (or indeed any of the paved area of the site) was vested in the public or any third parties.
- Absent dedication to the public or the existence of third party rights of way, the Court was slow to interpret the Regulations in such a manner as to nevertheless restrict the owner of a site from utilising his own land when the Regulations are open to an interpretation that is more benign.

Private interest in such residual development potential has been compromised?

RE: Ho Mei Ling,

HCAL 51 of 2011, 29 August 2011

Buildings Ordinance, s.14

No person shall commence or carry out any building works or street works without having first obtained from the Building Authority-

(a) his approval in writing of documents submitted to him in accordance with the regulations; and

(b) his consent in writing for the commencement of the building works or street works shown in the approved plan.

Buildings Ordinance, s.16(1)

- The Building Authority may refuse to give his approval of any plans of building works if the plans are not such as are prescribed by, for instance, Building (Planning) Regulations;
- Such public duty cannot be extended to deal with the distribution of development potential between different owners of adjoining lots.

Judgment of the Privy Council in *Cinat*

- “... once the development potential of an unbuilt on piece of land has been utilized for the purpose of calculating the site coverage and plot ratio of a permitted building, that potential is exhausted and cannot be relied on again.
- If it were otherwise any purchaser of the unbuilt on land, or even the original developer himself, would be in a position to claim that he was entitled to build on it in accordance with the regulations.
- That would defeat the whole purpose of the regulations, which is to secure that in a particular locality the density of commercial and domestic buildings is no greater that accords with the public interest.”

RE: Ho Mei Ling, HCAL 51 of 2011, 29 August 2011

- It was accepted that plot ratio and site coverage are not proprietary rights.
- Section 14(2) of Buildings Ordinance makes it clear that the approval of plans and the consent of the Building Authority would not confer any title to land.
- Nor does an approval grant any exemption from or permit any contravention of the Buildings Ordinance or any other enactment.
- It was held in “the Estoree litigation” that Section B was not a street because of the absence of third party rights over that area.
- The existence of open space, even with unrestricted access thereto, does not unquestionably or indisputably lead one to the conclusion that the area is a street*.
- The court would only intervene when it can be shown that the Building Authority acted unlawfully, unfairly or irrationally.

* The 590 sq.m. deduction was larger than the total area of Section B and the pedestrian area.

Discretion of Building Authority

- Under s.14 & 15(1) of Buildings Ordinance, the Building Authority's statutory function and duty is to apply the relevant statutory provisions to examine the building plans submitted for approval.
- Under s.16(1)(d), the Authority retains a discretion to approve plans even though an enactment such as Building (Planning) Regulations or any approved or draft plan prepared under the Town Planning Ordinance (Cap 131) may be contravened.

Another Opportunity or Trap?

- The division of a lot into sections or sub-section is governed by the lease conditions, which is a separate system from the BO and the two have no underlying relationship.
- From a legal point of view, if the maximum plot ratio is not fully utilised, there exists residual plot ratio and this is a separate issue from the division of the lot.



Inland Lot No. 906 Remaining Portion



Right of Light

- If a new building limits the amount of light coming in through a window and the level of light inside falls below the accepted level, then this constitutes an obstruction.
- A “right to light” is an easement. In other words, it is a right enjoyed with a one parcel of land (the “dominant tenement”) over another parcel of land (the “servient tenement”). The dominant tenement carries with it the right to receive light in a lateral direction to an aperture in a building on it without interruption from the servient tenement.

Right of Light in Hong Kong

- Right to light was seldom discussed in Hong Kong.
- In two cases concerning **right to light**, the Hong Kong Courts in *Belilos v. Ng Li Shi* (Decision dated 26/1/1893 and reported as a Supplementary Note to *In Re Tse Lai-chiu deceased* in [1969] HKLR 202) and *Foo Kam Shing* refused to extend the prescription right to leaseholds in Hong Kong.
- Section 5 of *the Supreme Court Ordinance* ('SCO') of 1873 provides that
'Such of the laws of England as existed when the Colony obtained a local legislature, that is to say, on the 5th day of April 1843, shall be in force in the Colony, except **so far as the said laws are inapplicable to the local circumstances of the Colony or of its inhabitants, and except so far as they have been modified by laws passed by the said legislature.**' (emphasis added)

The Application of English Law Ordinance

- ‘3. The common law and the rules of equity shall be in force in Hong Kong, so far as they may be applicable to the circumstances of Hong Kong or its inhabitants and **subject to such modifications thereto as such circumstances may require**, save to the extent that such common law or any such rule of equity may from time to time be modified or excluded by—
 - (a) any Order in Council which applies to Hong Kong;
 - (b) any Act which applies to Hong Kong, whether by express provision or by necessary implication; or
 - (c) any Ordinance.’
- ‘4. (1) Subject to the provisions of this section and of any other Ordinance, the law of England as set out in the following Acts shall be in force in Hong Kong, that is to say—
 - (a) the Acts specified in the second and third columns of the Schedule to the extent specified in the fourth column thereof **subject to such modifications thereto as the circumstances of Hong Kong may require**;
 - (b) any other Act which applies to Hong Kong by virtue of—
 - (i) any Order in Council;
 - (ii) any express provision in the enactment, or by necessary implication; or
 - (iii) any Ordinance.’
- Section 5 of *SCO* of 1873 was repealed by section 7 of *AELO* in 1966.

The Law –
China Field Limited v. *Appeal Tribunal (Buildings)*,
[2009] 5 HKLRD 662; (2009) 12 HKCFAR 342

- Right to light is protected in England and Wales under common law, adverse possession or by the Prescription Act 1832.
- Art.8 of the Basic Law maintains our common law (save to the extent that it may be adjudged unconstitutional or altered by local legislation).
- Lost modern grant is the only method by which rights of way and other easements may be acquired in Hong Kong in the absence of an actual grant, express or implied.
- People who openly and peaceably exercise a right over their neighbour's land for more than 20 years without interruption surely expect to be allowed to continue to do so and may have made their arrangements accordingly.

Compensation / Damages

- Damages were awarded based on the loss of ability to prevent the infringement of right instead of on the loss of amenity.

Tamares (Vincent Square) Ltd. v. Fairpoint Properties (Vincent Square) Ltd.
[2007] EWHC 212 (Ch.); [2007] 14 EG 106

Additional Reference:

**Jonathan Karas, QC (2007) Rights to Light,
*Royal Institution of Chartered Surveyors***