

LAND COMPENSATION & VALUATION LAW IN HONG KONG

Third Edition

Gordon N Cruden



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2009

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ISBN: 978-988-8016-13-6

Printed in China.

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Preface to Third Edition

In the decade that has passed since the second edition the legislature has continued to enact a variety of important property related ordinances. The executive has at least competed in issuing a large number of regulations and orders. The judiciary has been increasingly called upon to perform the essential role of determining major property law disputes, resolving statutory ambiguities and, at times, having to discern the ratio of prior decisions.

One consequence has been the need in this edition to deal with new legislation and case law. Hence, there are new chapters on the compulsory resumption of land for urban renewal, compulsory purchase by majority owners of minority shares, government rent and the environment. The environment chapter now extends from pollution control to the new Environment Impact Assessment Ordinance. The length of some chapters has, reluctantly, been increased to deal with ever increasing case law, particularly at an appellate level. An exception, with the demise of the rent controls and security of tenure under Parts I, II, IV and V of the Landlord and Tenant (Consolidation) Ordinance, is that the relevant chapter is now mainly limited to the common law. The expiration of Part I has resulted in the deletion of the chapter on the Demolished Buildings (Redevelopment of Sites) Ordinance.

Important relevant case law of the past decade includes the judgment of the Court of Final Appeal in *Agrila* on post-1997 Government rent and the complex relationship with the Rating Ordinance. This was followed by the application of those principles to the assessment of Government rent in *Best Origin*, the first of over 50 multi-million dollar disputed rent assessments. The controversial issue of when resumption compensation may include development value reached the Court of Final Appeal in *Yin Shuen*. The new compulsory purchase power of majority owners led to a modified valuation practice, approved by the Court of Final Appeal in *Capital Well*, even if still an area requiring statutory amendment. Major public concern impressively led by articulate members of the community, successfully culminated in the Court of Final Appeal's *Protection of the Harbour* judgment. Other Court of Final Appeal judgments include, on environment impact assessments, *Shui Wing Steel*, and on noise control, *Step In*. Disputes over Government lease user conditions, adverse possession and other land issues, particularly in the New Territories, continue unabated — *Raider* and, *Cheung Tat Fuk*. In the important area of town planning the Court of Final Appeal delivered judgment in *Delight World*. The slow progress with improvements to the Town Planning Ordinance has maintained the wider importance of the Buildings Ordinance where appellate judgments include *Mariner International Hotels*. The decisions of the Lands Tribunal, particularly on complex valuation issues,

continue to be significant, with some of these decisions being reported in English law reports. This continues a tradition reflected in earlier Tribunal decisions, cited with approval by English appellate and other courts.

This edition could not have been completed without the assistance of many other persons. I am obliged to the Chief Justice for allowing me, when visiting Hong Kong, to use the outstanding facilities of the High Court Law Library. My thanks are due to the Librarian and her helpful staff. I have also had the advantage of discussions with the President of the Lands Tribunal, Justice Lam, and Member, Patrick M W Lo. The Member's valuation expertise and ability to explain complex valuations in clearly written decisions is incidentally making a significant contribution to the standards of the Hong Kong valuation profession. I have had valuable meetings with the Commissioner of Rating and Valuation, Mrs M Brown, JP and Assistant Commissioner Jack Cheng; Dick Barron of the Lands Department; Ivan Chung of the Town Planning Department; and Pius Cheng and Ricky Tse of the Urban Renewal Authority. My thanks are also expressed to Professor John Podd of Massey University, with international expertise in health risks, caused by electro-magnetic fields, for his advice, including reference to Hong Kong research, on the potential effect of electro-magnetic fields on the diminution in value of land, subject to electricity easements. On a personal note, my respects to Denis Chang SC, a doyen of Hong Kong property lawyers, who when the invitation to prepare this edition surprised me, stated with his characteristic optimism, that there was a need for a new edition. To quote an early 20th century English prime minister's much used words, I will just have to "wait and see".

This edition has continued to be a family affair. On my Hong Kong visits, I have stayed with my elder children. Their help extended beyond hospitality. Hamish continually found on the internet much needed departmental publications and relevant new judgments. Liza Jane, with considerable Hong Kong property law expertise, made a significant contribution to this edition, keeping me abreast of major changes in statutory law, recent judgments and current civil law procedural reforms. Also sharing the boredom of proof reading. I also had the benefit of comparative town planning law assessments and details of expert witnesses codes of conduct from my younger daughter Harriet, a senior planning policy analyst in Wellington.

I am also most grateful for the advice, efficiency and continued support of the Editorial Department of Lexis Nexis Asia, including their tolerant handling of, at times, an ever changing manuscript.

The errors and indiscretions, of course, remain mine. On that qualified basis, an attempt has been made to state the law as at 28 February 2009.

Gordon Cruden
Palmerston North
New Zealand.
28 February 2009.

Preface to Second Edition

Since publication of the first edition, the historic Hong Kong constitutional change has been the resumption of sovereignty on 1 July 1997 by the People's Republic of China. The legal consequences included the promulgation of the Basic Law providing Hong Kong with a new constitution. At a domestic law level, the land related New Territories Leases (Extension) Ordinance and Government Rent (Assessment and Collection) Ordinance, implementing the provisions of Annex III of the Joint Declaration, later incorporated in the Basic Law, have been enacted. The Court of Final Appeal has also been established, replacing the former right of appeal to the Privy Council, while there have been consequential judicial and other statutory nomenclature changes.

In addition, during the past decade, there has been a major increase in land compensation and related legislation. This has included the Railways Ordinance, Land Development Corporation Ordinance, Land (Compulsory Sale for Redevelopment) Ordinance, Sewage Tunnels (Statutory Easements) Ordinance, Land Drainage Ordinance, Marine Parks Ordinance, Block Government Lease (Cheung Chau) Ordinance and Home Ownership Scheme premia appeal rights under the Housing Ordinance. The lengthy town planning consultative process produced the 1992 Report of the Special Committee on Compensation and Betterment, and resulted in the publication of the 1996 Town Planning White Bill. Major land issues were litigated in *Shun Fung Ironworks Ltd v Director of Buildings and Lands* [1995] 2 AC 111, [1995] 1 HKC 417, [1994-95] CPR 275 (disturbance compensation), *China Light & Power Co Ltd v Commissioner of Rating and Valuation* [1994-95] CPR 618, [1997] CPR 181, 220 (rating), *Chung Ping-kwan v Lam Island Development Co Ltd* [1996] 2 HKC 447, [1995-96] CPR 1 (possessory title), *Niceboard Development Ltd v China Light & Power Co Ltd* [1994] HKDCLR 69 (electricity easement compensation), *Attorney General v Fairfax Ltd* [1997] HKLRD 243, [1997] CPR 249 (acquiescence to lease non-compliance), *Henderson Real Estate Agency Ltd v Lo Chan Wan* [1997] HKLRD 258 (town planning), *Fok Lai Ying v Governor in Council* [1997] HKLRD 810 (resumption orders); and *Ma Wan Farming Ltd v Chief Executive in Council* [1998] 1 HKLRD 514 (resumptions and the Bill of Rights).

The preparation of this edition has been facilitated by valuable assistance from a number of persons. I thank Mr Justice Yam, President of the Lands Tribunal, Presiding Officer Judge ZE Li, Members NT Poon, Esq and PWK Lo, Esq, and Tribunal staff for their help, including the supporting facilities generously provided during my recent visit to Hong Kong. During previous years I also had the invaluable benefit, for more than a decade, of the valuation expertise of the former Member, Mr Michael Phillips. I am also grateful to my

daughters Liza Jane Cruden for information on 1 July 1997 legal procedural changes and Harriet Cruden for comparative town planning comments based on the New Zealand Resource Management Act 1991. This edition would also have been more delayed if Roger John, assisted by my son Hamish Cruden, had not generously supplied a computerized scan of the first edition. Finally, my thanks are due to the Editorial Department of Butterworths Asia.

GNC

30 December 1998

Preface to First Edition

This book attempts to bring together the principal Hong Kong legislation dealing with land compensation and valuation law as well as the case law which has arisen from those statutory provisions. Major legislation in this field includes ordinances which grant the Government the power to resume compulsorily privately owned land. Under those ordinances, private land may be resumed for new towns, public institutions, the mass transit railway, roads, reclamations and for other public purposes. In other countries, this statutory process of resumption is more commonly called compulsory acquisition or compulsory purchase.

The deliberate reference in the title to valuation law in fact broadens the scope of the book considerably beyond resumptions. In this wider context, the subject matter extends to landlord and tenant legislation, antiquities and monuments, buildings, country parks, electricity networks, mines and quarries, pollution, possessory titles, rating, revenue law, town planning and control of obstructions in relation to the airport.

The legislative approach in Hong Kong has usually been to enact separate ordinances for each of these subjects. Historically, the ordinances have been passed at different periods and their individual contents still tend to reflect changing views of resumption and valuation practice. Some of the historical developments have been broadly outlined in the Introduction. This fragmented legislative approach has also made it necessary, in most cases, to devote a separate chapter for each ordinance.

Despite this diversity, there remains an underlying unity, exemplified by the number of fundamental principles common to many of the ordinances. This unity extends beyond Hong Kong to the law of other common law jurisdictions. These same principles are reflected and developed in Privy Council decisions and in the judgments of the courts of other common law countries. One of the attractive features of the law in action in Hong Kong is the impressive and sophisticated use of relevant case law from other jurisdictions. This is particularly true of land compensation and valuation law. The reference in the text to English, Scottish, Canadian, Australian, New Zealand, Indian and other overseas cases reflect the reality of this desirable and continuing practice.

Where an ordinance is principally concerned with land compensation and valuation issues, an attempt has been made to deal with its provisions comprehensively. In other ordinance, only part of their statutory provisions may relate to these issues. In such cases, the treatment of an ordinance is largely limited to the land compensation and valuation issues. Reference to other parts of the ordinance is only made to the extent necessary to understand more fully the compensation and valuation issues. For example, the chapter on the Landlord

and Tenant (Consolidation) Ordinance is mainly concerned with compensation and rent provisions. No attempt is made to cover the wider and very important provisions dealing with non-compensatable recovery of possession, relief against forfeiture or distress.

I should also issue the caution, so far as the concept of valuation is concerned, that this is a work on the law of land valuation and not on the principles of land valuation. The author is a lawyer and not a valuer. The art of valuation, increasingly reliant on the application of scientific methods, is a separate discipline from the law of valuation. However, an adequate understanding of one requires at least some knowledge of the other. A chapter on valuation methods has therefore been included but it adopts a very broad and generalized approach. The limited aim is to provide the lawyer and other persons, without valuation qualifications, with some background awareness of the methods and techniques a valuer may use in carrying out statutory and other valuations.

One complicating valuation factor in Hong Kong is that, for many years, the government has operated administratively a system of voluntary ex-gratia payments, in favour of persons who might otherwise have brought claims for compensation, as of right, for judicial determination. This area of ex-gratia payments is strictly beyond their scope of a work on land compensation and valuation law. However, the highly formalized machinery which has evolved is of considerable practical importance. Ex-gratia payments have therefore been dealt with in a separate chapter. The same chapter, conversely, also touches on premia which land owners and developers may be required, in a variety of circumstances, to pay to Government.

The approaching expiration of the New Territories lease in 1997 was the real catalyst for the now agreed upon resumption of sovereignty by China over the whole of Hong Kong. The final chapter considers the provisions of the Joint Declaration. In particular, the land provisions of Annex III are examined as well as the functions and decisions of the important Sino-British Land Commission.

To the extent that this is a work covering a relatively wide field not previously encompassed within one book, I had at one stage considered submitting some of the draft chapters to others experienced in those areas for comment. In the event that course was not followed. I am acutely aware of the potential benefits thereby forfeited. In part, I refrain from doing so because of my judicial position. However, the principal obstacle arose from the manner in which, over a period of more than two years, the manuscript was drafted. Progress was at best erratic and varied from last minute alterations and additions. If these did not wholly exhaust the author, they place a considerable strain on the timing and tolerance of the publishers. All these factors combined to make reference of draft chapters to others impractical.

There still remain a large number of people to whom I am indebted. I am obliged to the Chief Justice, Sir Denys Roberts and to the Registrar of the Supreme Court Mr NJ Barnett, for their encouragement and approval to reprint various rules and practice directions. A number of Heads of Departments also granted permission to reprint extracts from ordinances, subsidiary legislation and departmental publications, while several of their officers rendered further valuable assistance. In this regard, I express my thanks to the Attorney General, Registrar General, Director of Buildings and Lands and the Commissioner of Rating and Valuation and their officers. I am particularly grateful for the valuable assistance and co-operation given, often under unreasonable pressure of time, by the Registrar, Lands Tribunal, Mr YH Ho and his very competent and

conscientious staff. My thanks are also due to the Editorial Department of Butterworths (Asia) for their efficient handling of what at times must have been an intractable manuscript.

To my wife Patricia I record my appreciation for her unfailing and indispensable support. Together with my younger daughter, Harriet, they were also too often obliged to accept the fact that at times I spent far more weekends in my Chambers than at home. I also thank our eldest children, Hamish and Liza Jane, both undergraduates of Victoria University of Wellington, for doing proofreading and rendering other assistance, when visiting Hong Kong during university vacations.

The law was intended to be stated as at 1 July 1986. However, due to the skill and co-operation of publisher and printer, it has been possible at a late stage, to include more recent changes made under the Landlord and Tenant (Consolidation) (Amendment) Ordinance 1986, whose sections variously come into force on 1 August 1986 and 19 December 1986.

GNC
31 July 1986

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