

ARE T'SOS REALLY TRUSTS?



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Traditional Chinese forms of communal landholding, t'so and t'ong, are habitually referred to by judges and authors as trusts. This article investigates the basis for this description and examines whether and to what extent the description is legally accurate. It concludes that there is considerable doubt as to whether they really are trusts.

Introduction

The Chinese customary phenomena of collective ownership, *t'so* and *t'ong*, by which much land in Hong Kong's New Territories has long been held, defy analysis in terms of the common law system. They have been variously described as institutions, organisations, associations, entities, endowments, settlements, funds and trusts. Those nouns are often qualified by a word indicative of their familial nature (clan, lineage, ancestral or hereditary) or of their purpose (worship, ritual, cult or charitable). These descriptions are at best approximate, for the phenomena are emanations of Ming and Tsing China.¹ Their preservation in modern common-law Hong Kong is a matter of irony if not perversity and is the result of historical happenstance.

The most frequent noun applied to *t'sos* and collective landholding *t'ongs* is the trust. The use of the language of trusts in this connection is so pervasive that it has become axiomatic that these ancient institutions are legally trusts. So when Deputy High Court Judge Lam (as then he was) essayed a summary of the law relating to *t'sos* in June 2002, he stated confidently that "it has been established that the concept of trust is applicable to a *Tso* with the managers as trustees and the members as

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¹ Endowments for the worship of ancestors by *t'so* and *t'ong* became popular after edicts of successive Tsing emperors in the 18 century encouraged the practice, although some existed before then (information from Prof Anthony Dicks). In 1904, at least a quarter of the land in the New Territories was estimated to be held by *t'so* or *t'ong*: Hayes, *The Great Difference, Hong Kong's New Territories and Its People 1898-2004* (HKUP, 2006), p 182, n 17.

beneficiaries”.² A similar, if more dogmatic, statement, made by Chu J (as then she was) three months later, is contained in another summary.³ Likewise, when Hong Kong land law texts deal with *t’so* and *t’ong*, the authors have no hesitation in labelling them Chinese customary trusts.⁴ The practice has spread to historical and sociological accounts of customary land tenure. So Professor Hugh Baker calls *t’so* and *t’ong* ancestral trusts and Doctor James Hayes calls them customary trusts.⁵

Yet, how can these descriptions be legally accurate? The trust is a concept of the common-law system. *T’so* and *t’ong* are concepts of customary law. In their summaries both judges recognised this apparent contradiction but drew no conclusions from it. Deputy Judge Lam was content simply to note that the imposition of a trust upon a *t’so* “is an application of concepts of English law to a Chinese customary institution”, as if this was perfectly natural. He went on to say, however, that “by reason of local circumstances” certain concepts in English trust law, such as the rule against perpetuities, had been held to be inapplicable, without observing that this was inconsistent with the idea that a *t’so* is a trust. Chu J merely noted what Deputy Judge Lam had said. No alarm bell rang that might have led the judges to trace the origin of the suggestion that a *t’so* is a trust and to question its authenticity.⁶

It will be the contention of this article that whilst applying the description “trust” to *t’so* and *t’ong* might seem convenient, it is at best an approximation and is dubious legally. The assertion, which has become an assumption, that these customary institutions are trusts is built on a flimsy foundation which has never been tested at appellate level.

Most of the cases in which a customary land institution has been described as a trust concern a *t’so* rather than a *t’ong* of the communal landholding variety, so in what follows “*t’so*” will be used for simplicity to indicate the customary institution. The description “*t’ong*” occurs in respect of organisations which have no connection with the New Territories or with customary collective landholding, whereas “*t’so*” is always a description for clan and family land ownership named after

² *Leung Kuen Fai v Tang Kwong Yu (or U) T’ong or Tang Kwong Yu Tso* [2002] 2 HKLRD 705 at 717.

³ In *Tang Kam Wah v Tang Ming Yat* (unrep., HCA 10141/1998, [2002] HKEC 1443) para 68.

⁴ Lee and Goo *Hong Kong Land Law* (3rd edn, 2009), pp 488–493; Wilkinson and Sihombing, *Hong Kong Conveyancing* Vol. 1, Law and Practice I [31] and [46]; Nield, *Hong Kong Land Law* (2nd edn), Ch 8.

⁵ H.R.D. Baker, *A Chinese Lineage Village* (Cass, London, 1968), Ch 4; in Ch 7 Baker calls them “kinship-ritual trusts”; Hayes, *The Great Difference*, n 1 above, Ch 3; in the new introduction to the reissue of *The Hong Kong Region 1850-1911* (Hong Kong University Press, 2012), Hayes refers to them as “corporate lineage trusts” (p xiv).

⁶ *T’sos* have been accepted to be trusts in subsequent cases, eg: *Wong Kam Pok Tso v 李強* (unrep., DCMP 2197 2006, [2010] HKEC 469); *Mak Lai Chuen v Lau Kar Yau* [2009] 3 HKC 217.

a common ancestor. However, there is no distinction between the *t'so* and the communal landholding ancestral *t'ong* which is material to the question of whether they are trusts.⁷

Analogies with Trusts

A *t'so* certainly exhibits similarities to a trust. The founders of a *t'so* put land into it, reminiscent of a settlor placing land upon trust. The income from the land is used for the benefit of descendants of the founders through the male line, those descendants resembling beneficiaries under a trust. The income is often also used for religious, educational and welfare purposes, which call to mind charitable trusts.⁸ *T'sos* have managers, analogous to trustees. The land is usually registered in their names as well as that of the *t'so*.

The appellation has gone beyond convenient approximation, however. The courts in Hong Kong seem to regard *t'so* as settlement trusts.⁹ Judges and some experts have taken to calling and treating the managers as trustees in law and calling and treating the descendants as beneficiaries at law. Judges have imposed trustee duties upon the former for the protection of the latter.

This treatment is justified where the founder has made a declaration of trust and explicitly appointed managers as trustees when dedicating land to the *t'so*. In that event, the founder has chosen to adopt a mechanism from the common law system so as to create a settlement of the land upon trustees for the benefit of the members of the *t'so*. Such a declaration is, however, rare and could have occurred only where the *t'so* was set up during the 20th century, after the common law came to the New Territories with British administration, and then only in the event that the founder engaged a solicitor to set up the trust.¹⁰ The great majority of *t'sos* are of greater vintage, having been founded under Tsing rule or earlier and being in place when the British took over. Although those *t'sos* were established entirely under Chinese customary law, yet the judicial practice has been to treat them as trusts.

⁷ In the author's experience, the colloquial expression "*t'so t'ong*", embracing both types of institution, is used by rural inhabitants.

⁸ But *t'so* and *t'ong* cannot be charitable in the legal sense since they do not benefit the public at large.

⁹ As, for instance, Deputy High Court Judge Tang (as then he was) expressly did in *Kan Fat Tat v Kan Yin Tat* [1987] HKLR 516.

¹⁰ An instance of such a settlement is that in *Chu Tak Hing v Chu Chan Cheung Kiu* [1968] HKLR 542. *Mak Lai Chuen v Lau Kar Yau* [2009] 3 HKC 217, DC may be another example.

Tang v Tang

The source of this practice is a judgment of Mills-Owens J in 1970, *Tang Kai Chung v Tang Chik Shang*¹¹ (hereinafter *Tang*) in which the institution of the *t'so* was first subjected to extended judicial analysis. The analysis was performed with the benefit of expert evidence as to Chinese law and custom, for the judge (in common with all members of the Hong Kong judiciary at the time) professed no special knowledge of these traditional institutions. The case was a dispute between members of a *t'so* of the extensive Tang clan from the northwestern New Territories: some wanted land held by the *t'so* in Demarcation District 121 near Yuen Long to be partitioned, others did not. The court decided that the law of partition did not apply because the *t'so* land was intended to be held perpetually and not to be alienated. In the course of a 42-page judgment, however, the judge described the nature of a *t'so* and examined its relationship with modern common law and statute. Amongst other matters he held that a *t'so* is a trust and the managers are trustees who are subject to the provisions of the Trustee Ordinance.

Early in the judgment, Mills-Owens J set out his understanding of what a *t'so* was. "Speaking generally," he said:

"A *tso* may be shortly described as an ancient Chinese institution of ancestral land-holding whereby land derived from a common ancestor is enjoyed by his male descendants for the time being for their lifetimes and so from generation to generation indefinitely."

The descendant automatically becomes entitled at birth to the interest in the land for life, the judge explained, and on death that interest merges with the interests of the surviving members of the *t'so*, automatically enlarging their interests.¹²

The judge's description was made with the benefit of having heard expert evidence as to Chinese customary law. It will be noted that the interest of the male descendant as described is an interest in the land, not in the *t'so*, and that there is no mention of the interest being merely beneficial. Indeed, in defining a *t'so*, Mills-Owens J does not mention the managers, the putative trustees and legal owners of the land, at all. This is not surprising because in giving this short definition the judge was

¹¹ [1970] HKLR 276.

¹² *Tang* at pp 279–280. The qualifications that Mills-Owens J was speaking generally and was attempting a short description should not be overlooked.

confining himself to customary law and Chinese customary law has no conception equivalent to a trust.

As described by the judge and by experts in Chinese customary law, the interest of a member of the *t'so* is a joint interest with other current living members. Entitlement to that interest arises automatically at birth and is not derived through some other person. The interest is not heritable; in that respect the interest is more like joint tenancy¹³ with its right of survivorship than tenancy-in-common which passes into the estate of a deceased co-owner. Unity of possession, unity of interest and unity of title are also present as with joint tenancy but not the fourth unity, that of time. According to Mills-Owens J's account, the interest of each member vests at birth and ends at death, occasions which will occur at different times for each member.

The character for *t'so* (祖) simply implies the male descendants of the person whose name precedes that character.¹⁴ The method of customary landholding under a *t'so* defies categorisation in common law terms. But what is clear is that it is a form of co-ownership and that each member (living male descendant) receives a direct interest in the land. It is therefore on the face of matters perplexing that later in his judgment Mills-Owens J declares the *t'so* to be a trust with the managers (registered with the District Office) as trustees, for that would mean that the members would have merely an equitable interest as beneficiaries and that the sole legal owners of the land, who should be registered at the Land Registry as such, would be the managers and not the *t'so*.

What impelled Mills-Owens J to that declaration? The judge relied on the terms of the Crown lease of 1905 under which the land had been granted (or perhaps more accurately, re-granted) to the *t'so* by the new administration in the name of King Edward VII for a term of 75 years with right of renewal for a further 24 years less three days.¹⁵ As is common with rural New Territories land, the lease took the form of a block grant, that is to say one deed of lease covering all the lots in an entire district. This had been used in order to simplify the process of making mass grants following the acquisition of the New Territories in 1898, since there were many thousands of lots for which Crown leases had to be issued and the administration was anxious to levy Crown rent on the owners as soon as

¹³ Or the defunct method of joint ownership, coparcenary.

¹⁴ As recorded on the Land Register and the Crown lease and before that on the Ching land register.

¹⁵ Thus, if the option were exercised, taking the term to 27 June 1997, ie shortly before expiry of the United Kingdom's holding of the New Territories.

possible so as to meet the costs of running the “new territory”.¹⁶ The body of the lease was printed and in general terms, applicable to all the lots in the district. Details of the individual lots which were the subject of the grant were given in a schedule at the end of the lease. The schedule was in common form with columns for the number of the lot, its size, its use, its address, the term, the name of the owner (ie grantee) in Chinese and in English, the Crown rent and so on. The entries under the columns were written in manuscript. Where the grantee of a particular lot was a customary institution, the practice was to name against the lot number the *t'so* or *t'ong* and follow this with the names of the managers, all in Chinese. In the next column was a translation (or, more accurately, a transliteration) of the Chinese names into English.¹⁷ In the case of *t'sos* and *t'ongs*, there would be a transliteration of the name of the *t'so* or *t'ong* followed by the name in English of each manager. In the schedule in question, as no doubt in many others, this name was followed by “(trustee)”.

On the basis of this parenthetical word, Mills-Owens J concluded that the grant had been made to the managers as trustees in law.¹⁸ In other words, the trust had been created not by a settlement but by the Crown grant.

Crown Lease Schedule

To the mind of this writer, there are substantial grounds to doubt the correctness of this conclusion. First, it overlooks what is manifest from the contents of the schedule, that the name of the grantees in English followed by “(trustee)” is a transliteration or translation of the Chinese entry in the immediately adjacent column. Therefore, the entry in English has no force additional to that of the Chinese characters. Only if the Chinese entry contained the equivalent of “trustee” could that word have effect to impose a trust. Unfortunately, the Chinese entry is not reproduced in the judgment but it seems highly unlikely that any indication of trusteeship would have been given there. The description favoured for the managers of a *t'so* was the Cantonese “sze lei”, meaning

¹⁶ The Hong Kong Government had been instructed by the Colonial Office in London that the New Territory (as it was initially called) was not to place a financial strain on the colony: Hayes, *The Great Difference*, n 1 above, p 30 and p 193, n 3.

¹⁷ Mills-Owens J refers to it as a translation but the column in schedules seen by the author is headed “transliteration” which is a more accurate description of the contents of the column. This is also the experience of Dr James Hayes (personal communication).

¹⁸ *Tang* at p 304.

nominee, manager or administrator. In the 19th century, there were no Chinese characters for a trustee. The modern Chinese term (信託), “shun talk” in Cantonese, is a 20th century commercial innovation believed to be derived from the Chinese name adopted by western trust companies. This was not used in connection with managers of *t'so*. In any event, the concept of a manager is different from that of a trustee. This is so in English and is apparent also in Chinese traditional usage from the custom that *sze lei* would not act without the blessing of all the members of the *t'so*.

The presence of parentheses around “trustee” may also be significant. They suggest that the description is incidental and may not have been used in the Chinese but is an explanation added in English. It is as if whoever filled in the columns by hand was concerned to indicate that each of the three names was not an owner as such but was a representative of the *t'so*. In other words, the choice of “trustee” was not made in order to reflect a status or impose a trust but to emphasise that the grant was made to the *t'so* itself and to explain why three individual names follow the name of the *t'so* in the owner column. The composers of the details in the schedule may have felt that the description “manager” was insufficiently legalistic.

Who were those composers? The entry itself would probably have been the work of a clerk since there were 477 block Crown leases with accompanying schedules created between 1905 and 1910;¹⁹ these would have recorded the details of hundreds of thousands of lots. The clerk would have been acting on instructions from more senior staff who in turn would have based the entries on the findings of the surveyors. Each block lease indenture and each schedule was checked and signed off by an assistant land officer who was responsible for the demarcation district to which the lease referred and who was also a member of the Land Court.²⁰ This court was an informal tribunal so the members did not need to have legal qualifications: in fact the officers were cadet administrators, so they were well-educated civil servants. The officer's signature indicated that the lease had been “examined and found correct” before it was signed by the Governor on behalf of the Crown. Even so, many mistakes in the leases were subsequently uncovered.²¹ It seems unlikely that the checking would have involved an investigation as to whether the “trustees” really

¹⁹ Information from Mr Roger Nissim, former District Lands Officer and Adjunct Professor at the Department of Real Estate and Construction of the Faculty of Architecture, University of Hong Kong.

²⁰ Information from Dr James Hayes. The Land Court is considered further below.

²¹ Hayes, *The Great Difference*, n 1 above, p 39 and p 199, n 53.

were trustees in law or a conscious decision to give them that status. Rather, the word was probably a standard translation of the characters for “sze lei”.

In any event, the schedule contains no words of grant: it is merely a record of details pursuant to the grant in the body of the lease. That body declared its purpose to be to grant a lease “to the several persons, clans, families, and ‘*t’ongs*’ whose names are set out in the Schedule hereunder written”.²² The operative words stated that the King “doth hereby grant and demise unto each Lessee ALL that piece or parcel of ground situate, lying and being in Survey District No. 121 in the NT in the Colony of Hong Kong set out and described in the Schedule hereto opposite to the name of such Lessee ... according to the lot number set out in the Schedule hereto opposite to the name of such Lessee”.²³ There is no mention here of status or capacity except that of lessee. There is no indication that the grant is in any way qualified by the words in the schedule. The grantee named in the schedule is the *t’so* which, having no personality separate from its members, consists of its members.

Since the grant was plainly intended to be to the *t’so* (the living male descendants of the ancestor after whom the *t’so* is named) rather than to the individual managers, the intention cannot have been to constitute the managers as trustees. Trustees are by definition legal owners of the land which they hold on trust so, had the three names been truly trustees, the owner column in the schedule should have begun with them rather than the *t’so*, perhaps adding that they were holding for the benefit or on behalf of the *t’so* or its members. But this treatment would have been in defiance of the words quoted above from the start of the lease by which it is made apparent that grantees could include customary institutions: clans, families and *t’ongs*.

Contemporaneous Legislation

A grant to the institution rather than to the managers as trustees would have been entirely consistent with the nature of *t’so* and with the contemporaneous legislative treatment of them. In 1905 not only were block grants made to owners of New Territories land, including *t’so* and *t’ong*, but an ordinance was passed dealing with customary

²² Tang, p 289. The wording reflects that used in contemporaneous legislation, now s 15 of the New Territories Ordinance, Cap 97.

²³ Tang, p 290. There is an obvious typographical error in the report in that it says “demise unto each Lease” rather than Lessee.

law and with managers of traditional institutions.²⁴ That legislation provided, in what is now s 13 of the New Territories Ordinance,²⁵ that the courts may apply customary law: this was interpreted in *Tang* as being obligatory.

Another section of the 1905 legislation, now s 15 of the New Territories Ordinance, made convoluted provision regarding managers. Where land was held in the name of a “clan, family or tong”, a manager was to be appointed by the clan, family or *t'ong* to represent it.²⁶ The appointment was to be reported to the District Office and, if proved, was to be approved by that office which would register the name on a register of managers. The manager would then have “full power to dispose of or in any way deal with the land as if he were the sole owner thereof”, subject to the consent of the District Office to the transaction. The manager was also to be personally liable for payment of rent and charges and for observance of the covenants and conditions in the lease. Furthermore, every instrument regarding the land executed or signed by the registered manager in the presence of and attested by the District Officer was to be effectual for all purposes as if executed and signed by all the members.

These provisions are inconsistent with a manager being a trustee. First, the section expressly refers to the land being held in the name of the clan, family or *t'ong*, not as being held by the managers as trustees for them. Second, the section deals with the appointment of a manager, not a “manager and trustee”; indeed it does not mention trust or trustee at all. If the intention had been to impose upon managers the obligations of a trustee, what would have been simpler than to say so? The section was interfering with the customary law by bestowing upon the manager powers of sole ownership. If the government's intention also had been to interfere with custom by imposing trustee duties upon the manager, one would have expected that to be in the legislation as well.

Instead, the section refers to the members of the family or *t'ong* appointing a manager “to represent it”, in other words to act as an agent. If the manager had been intended to be a trustee, he would not have been a mere representative but the legal owner of the land. Elsewhere in the ordinance there is a reference to trustees, so the absence of the

²⁴ New Territories Land Ordinance 1905.

²⁵ Cap 97.

²⁶ Clan and family land refers to *t'so* and to *t'ong* in which a family has chosen to append the character for *t'ong* after the proper or informal (nick) name of an ancestor. The separate mention of *t'ong* was probably to ensure that s 15 covers non-family common landholding organisations such as temples, monasteries, nunneries and charities.

use of that word in s 15 is unlikely to have been an oversight.²⁷ The section institutionalised and adapted the existing practice in *t'so* and *t'ong* of appointing a “*sze lei*”, or rather a number of “*sze lei*”.²⁸ This is a Cantonese term which translates as manager or representative but not as trustee.

However, the best point that emerges from s 15 against the manager being a trustee arises from the express effect of the registration of the manager: he was to have full power to dispose of and deal with the land as if he were the sole owner thereof. If managers were trustees, they would not need this power and status because they would already have them. It is axiomatic, indeed elementary, that trustees of land are legal owners of the land. It would make no sense for the legislature to bestow upon managers the power of disposal of the land as if they were sole owners unless the legislators, and the drafters of the legislation in the government, were of the view that the managers were not already the sole legal owners of the land and therefore not trustees.²⁹

The evident purpose of s 15 is to facilitate dealings in the land. As Briggs J pointed out in 1966, but for the statutory appointment of the registered manager as sole representative, the land could be conveyed only if the documents were executed by all the members of the *t'so*, a cumbersome and inconvenient, and often impractical, requirement.³⁰ It might be added that it was not just conveyance of the land that would have been difficult. More importantly (since *t'so* land is in principle inalienable so sale would have been rare), the mortgaging of the land would have been hindered, as might the collection of government rent, rates and other charges and the enforcement of covenants in the government grant.³¹ None of these difficulties would have been encountered if the managers were also trustees.

Section 15 had an additional purpose: the protection of members of the *t'so* or *t'ong* from misfeasance by managers by requiring not only that managers be approved but also that any transaction be carried out with the approval and witnessing of the District Office. This, too, would have

²⁷ Section 18 of Cap 97. This argument was considered but rejected by Chu J in *Tang Kam Wah v Tang Ming Yat*, n 3 above, para 61, for reasons which are not convincing.

²⁸ The usual arrangement was that each *fong* or branch (or sub-branch) of the clan would appoint one of the managers.

²⁹ Most managers are members of the *t'so* or *t'ong* and therefore a joint owner in the capacity of a member but they are not the sole owners. Occasionally a manager is not a member, eg where she is the widow of a deceased manager: being female, she cannot be a member.

³⁰ *Lai Chi Kok Amusement Park (No. 2) v Tsang Tin-Sun* [1966] HKLR 124 at 130.

³¹ The efficient collection of Crown rent would have been a priority for the new administration in 1905 because of the Colonial Office direction in 1898 that the New Territories were not to be a burden on the finances of the colony: Hayes, *The Great Difference*, n 1 above, p 193, n 3.

been unnecessary had the managers been trustees, for the duties imposed in equity upon trustees would have provided protection to the members as beneficiaries.

Events of 1898–1905

It is not just the legislation at the beginning of the 20th century concerning customary landholding that points against an intention to impose a trust upon managers, the history of events at that time surrounding the acquisition of “the Hong Kong Extension” is also inconsistent with such an intention.

The new governor of Hong Kong in 1898 was Sir Henry Blake, a man of genial character with wide experience as a colonial administrator.³² Blake’s experience told him that it was important to reassure the local population that the change in administration would have little affect on their daily lives, particularly in respect of land and money. Accordingly when Britain took possession of “the new territory” in April 1899, Blake issued a proclamation in Chinese pursuant to the New Territories Order-in-Council by which the extension had been constitutionally incorporated into the colony of Hong Kong. The proclamation told inhabitants of the newly acquired area that their “commercial and landed interests will be safeguarded and ... usages and good customs will not in any way be interfered with”.³³ This was not legislation but it showed the government’s intention and policy towards land in the New Territories.

In order to emphasise the change in authority and to set a sound basis for the collection of revenue in the form of rent, Crown leases were to be issued to existing landholders and a reliable rent roll drawn up. To achieve this, and to ensure the protection of established landed interests, the new administrators had first to find out who owned what land. The land registry of the Chinese government was found to be inaccurate, so a complete survey of the 365 square miles of the New Territories had to be undertaken. Hong Kong lacked the expertise to perform this enormous task, so land surveyors were brought in from the Survey of India.³⁴ The great land survey, which began in 1899, took much longer to conduct than anticipated owing to adverse

³² Frank Welsh, *A History of Hong Kong* (Harper Collins, 1997), p 330.

³³ A translation of the proclamation is set out in the judgment of Roberts CJ in *Winfat Enterprises (HK) Co Ltd v Attorney-General* [1984] HKLR 32.

³⁴ The Survey of India, the land survey department of the government of India, still exists and is the oldest extant department of that government.

conditions (heat, ill health, mountainous terrain, language difficulties and uncooperative population) and was not completed until 1904.³⁵

There were disputes about ownership, so a Land Court was established in 1900 to adjudicate upon claims.³⁶ Titles were to be granted once the claims had been confirmed. Entitlements were judged in accordance with Chinese law and custom. This meant that members of the court had first to ascertain the relevant law, which delayed adjudication but showed that the new administration was serious in its promise to honour local custom.³⁷

The Land Court having completed its work by early 1905, the New Territories Land Ordinance was passed that year.³⁸ This gave the Land Officer and the courts power to enforce Chinese custom and customary right. As has been seen, it also provided for registration of managers of *t'so* and *t'ong* and gave them full power to deal with the land subject to the supervision of the District Offices. With the necessary information for the schedules and the legislation in place, block Crown leases could be issued with the term of their grant beginning as from 1898. The purpose of the block leases was to re-grant the land to the established owners in an administratively convenient way, not to alter the identity or status of those owners.³⁹

If the block leases of land to customary institutions had been intended to convert their managers from mere representatives into trustees, that would have been contrary to the terms of the proclamation which declared that landed interests were to be safeguarded and customs were not to be interfered with. In that event, members of *t'so* and *t'ong* would have been demoted from legal owners of the land to mere beneficiaries, and managers would have been promoted from their customary role as mere representatives of the owners to legal owners of the land.

Accordingly, the background to the grant of the block leases suggests that there was no intent to convert *t'so* and *t'ong* into trusts through

³⁵ Hayes, *The Great Difference*, n 1 above (p 32) suggests that the survey was completed in 1903.

³⁶ Land Court (New Territories) Ordinance 1900.

³⁷ Wesley-Smith, *Unequal Treaty* (Oxford University Press, Hong Kong, 1980), pp 94–97.

³⁸ Mills-Owens J says in *Tang* that the court finished its work in 1904 and Hayes, *The Great Difference*, n 1 above (p 36) is to the same effect, but Wesley-Smith in *Unequal Treaty* gives 1905; the latter seems more likely since the court could hardly conclude all adjudication until the survey had been completed.

³⁹ However, because in Imperial Chinese practice there could be an owner of the topsoil (or skin of the land) and an owner of the subsoil (or bones of the land), this did necessitate choosing between the two: generally, the former was chosen and granted a Crown lease; the latter was (somewhat dubiously) regarded as having a rentcharge only.

the medium of the government grant. Ironically, Mills-Owens J set out much of this background (but not the proclamation) in his judgment in *Tang* yet did not draw any lessons of interpretation from it. That may be because in 1970 the approach to the construction of contracts and deeds was more literal than now. During subsequent decades, a contextual, rather than textual, approach has found favour so that the courts now look at the words used in their setting. This includes the factual and legal background as well as the practical objects which the words were intended to achieve.⁴⁰

Opportunity for Re-consideration?

In one respect at least, Mills-Owens J's interpretation of the schedule to the Crown lease has certainly proved incorrect. In summarising the schedule's contents, the judge asserts that user of the lot is limited to the use stated under the heading "description of the lot": so a lot which is described as "padi" (as the land in question before him was) could not be used for any purpose other than rice-growing. The view that the use stated in the schedule was prescriptive (or restrictive) rather than descriptive was however exploded in 1982 when the Court of Appeal decided in *Attorney-General v Melhado Investment Ltd*⁴¹ that the description was just that and did no more than aid identification of the lot. Yet until then the view that the description of use was also a restriction on use had been held with a tenacity similar to the view that *t'sos* are trusts.

Is there an opportunity for a similar re-consideration of the trust view of *t'sos*? The view has been repeated so often, by so many judges, that it has taken on the appearance of a matter of precedent, even though (the author hopes) it has been demonstrated to lack a basis in principle. Nevertheless, the view has been expressed mainly at first instance. Where the Court of Appeal has accepted it, the view has not been in issue.

Therefore, in *Wong Shing Chau v To Kwok Keung* the point was conceded and not argued.⁴² No expert evidence as to the existence of trusts in Chinese custom had been presented at trial. Le Pichon JA summarised the propositions as to customary institutions made by Deputy Judge Lam in *Leung Kuen Fai* and stated that they were not challenged.

⁴⁰ *Jumbo King Ltd v Faithful Properties Ltd* [1999] 3 HKLRD 757 at 773 (CFA). There is also much more published research about New Territories land available now than there was in 1970.

⁴¹ [1983] HKLR 422.

⁴² (unrep., CACV 20/2008, [2008] HKEC 969) paras 9 and 12.

In *Tang Yau Yee Tong v Tang Mou Tso*, another dispute between members of the litigious Tang clan, Liu JA observed that in relation to *t'sos*, manager, trustee and *sze lei* were synonymous.⁴³ As a simple statement as to how these terms are used in fact, this observation is accurate: they tend to be employed interchangeably in the context of *t'so* and *t'ong* to mean the same thing. Liu JA seems to intend to convey no more than that. But if he had meant to make a finding that managers or *sze lei* are trustees (as one later judge in yet another Tang clan dispute appears to have thought),⁴⁴ the observation would have been incidental and unnecessary for the decision, so would have been *obiter dictum*.

Therefore, it is submitted that the question of whether *t'sos* are trusts remains open at appellate level. One might anticipate, however, that the Court of Appeal would be reluctant to disturb an assertion which has attracted widespread approval at lower judicial levels and which leads to convenient results. By calling *t'so* trusts, the courts give themselves the comfort of a familiar concept and access to a body of familiar rules which can be employed for the protection of members of these institutions.

Yet that protection is not really necessary, for customary and statute law already provides it. Any attempt by managers to sell *t'so* land for their personal benefit is rendered impossible by the customary requirement that there be unanimous clan support for the sale and by the provisions of s 15 of the New Territories Ordinance which impose formal requirements upon disposals of the land. Likewise, any dealing in the land such as a letting is regulated by the section and by the customary requirement that all managers consent to the dealing. The handling of rent or other income from the land, including distribution of compensation for land resumed by the authorities for public purposes, would also be the subject of unanimous decision by the managers under customary practice.

It might be said that the overlaying of a common-law institution upon a customary one is of little consequence and can do only good: the trust simply reinforces the dictates of custom. This is generally so where a dispute is between members or managers of the *t'so*, as most litigation concerning them is. However, where the dispute affects the rights of others, the effect of imposing a trust on the *t'so* is not so benign. This is illustrated by *Leung Kuen Fai*, the case in which Deputy Judge Lam reviewed the principles applicable to customary institutions. The plaintiff there had occupied *t'so* land without permission for a very long time and was claiming title by adverse possession. Had the owner been an individual, the plaintiff would

⁴³ [1996] 2 HKLR 212; the judge had been counsel for the successful defendant in *Tang*.

⁴⁴ Chu J in *Tang Kam Wah v Tang Ming Yat*, n 3 above.

have been able to repulse an action for possession and the owner's title would have been extinguished. However, the normal limitation period was held not to apply because the *t'so* was also a trust and its members were beneficiaries. This meant that the limitation period was not the normal 12 years from accrual of the owner's right of action but was 6 years from the attaining of the age of majority (the time of accrual of a cause of action for possession) by any beneficiary. Since new members of the *t'so* were continually being born, the limitation period was continually being extended. All the defendant had to show was that a child who was a member of the *t'so* had been born within the past 24 years (the statutory age of majority of 18 years plus 6 years' limitation period) to show that the statutory bar had not descended.⁴⁵ Thus the imposition of a trust gives *t'sos* a great privilege: as the judge observed, they are effectively immune from the law of limitation of actions.

Limits of the Trust

Even if the trust analysis based on the parenthetical translation in the schedule to the Crown lease were to be upheld after full consideration by the appellate courts, it would apply only to those lots for which the word "trustee" had been used in the schedule to describe the managers. The practice of those who composed and completed the schedules may not have been consistent. The author has come across one block lease schedule in which only Chinese descriptions appear to have been used. If the clerks and their seniors at the Land Office followed the habit of their counterparts at the Land Registry, they would have used the label "manager" as often as they used "trustee" and apparently without discrimination. Then there are Crown leases which have been lost and those that have schedules that are illegible. There would be no basis upon which to conclude that a trust had been imposed by the grant in such cases.

An Alternative Basis?

If there is no trust by grant, what of the possibility that *t'so* and *t'ong* are settlement trusts? By and large, since the decision in *Tang* judges have not asked themselves about the nature of the trust, being content merely

⁴⁵ This assumes that the statutory rather than the customary age of majority applies. Chinese custom was that a person attains majority at about the age of 14 (source: Prof Anthony Dicks).

to assert that a trust exists. An exception was *Kan Fai Tat v Kan Yin Tat*⁴⁶ in which 18 lots of land at Tseung Pak Long near Sheung Shui had been purchased and registered in the name of a *t'so* in and between 1935 and 1949. The then Deputy High Court Judge Tang said:

“I believe that in the event of a conveyance to a *Tso* the law will presume an intention to create a trust over the properties, in favour of members of the *Tso* from time to time, subject to such limitation or conditions as may be imposed on such properties by Chinese custom or customary rights affecting such land.”

This, then, is a different basis from that postulated by Mills-Owens J in *Tang*. There could have been no trust imposed by government grant in *Kan* because the founding of the *t'so* occurred after the block grants of 1905. Nor, apparently, was it a case of the founder creating an express trust with the aid of legal advisers as had happened with at least one other 20th-century *t'so*. Instead, the deputy judge's suggestion was that a trust was implied by law.

The judge in *Kan* cited no authority and gave no reasons for his assertion that the law presumes of intention by founders of a *t'so* to create a trust. Presumably, the presumption was thought to arise from the circumstance that the founders had put the land into the *t'so* by registering it in the name of the *t'so*. But, as has been seen, the effect of doing that was, according to Chinese customary law, to constitute members of the *t'so* joint owners of the land rather than mere beneficiaries, and not to constitute the managers as the owners, as they would have been had they been trustees. It is difficult to see how a court would be justified in presuming any intention from the placing of land into the ownership of a *t'so* except an intention to create a *t'so* and thereby make all living male descendants joint legal owners of the land. To presume an intention to create a trust with the managers as trustees and legal owners and the living male descendants merely beneficiaries would be inconsistent with that intention.

If, by saying that the putative trust was subject to such limitations imposed on the properties by Chinese custom or customary rights, the learned deputy judge meant to recognise the paramountcy of those rights in the question of whether there was a trust, he was in effect contradicting himself in the course of one sentence, for custom limits the manager's role to something less than that of a trustee and allows the members

⁴⁶ [1987] HKLR 516; hereinafter *Kan*.

rights exceeding those of a beneficiary. But perhaps the qualification “on such properties” was the deputy judge’s way of confining the effect of customary law to the land as distinct from the landholding: in other words, custom dictates only the terms of the trust so far as they relate to the land and does not affect the existence of the trust.

If the latter was what was meant, it is respectfully suggested that the distinction between the trust and its terms is unjustified and that any limitation of the effect of customary law to the terms of the trust is unsustainable. It is true that in *Tang Mills-Owens* J explained that the terms of the trust were the rules of customary law but this was an attempt to accommodate the customary law within the framework of the trust which he had deduced to arise from the schedule to the Crown lease. As it is hoped has been demonstrated, that deduction was not only dubious but was in plain contradiction of the nature of a *t'so*. In finding that there was a trust, the judge in *Tang* was failing to obey the injunction in s 13 of the New Territories Ordinance to apply customary law—ironically, because he himself had found that its application was mandatory. Similarly, in finding that there was a trust in *Kan*, the deputy judge was also failing to obey that injunction, in effect ousting the custom and amending the nature of a *t'so* by imposing a common-law construct upon it.

The basis of the imposition of a trust in *Kan* is as debateable as that in *Tang*. The founders of the *t'so* were said to have intended a trust, presumably a trust of the sort which arises when two persons have a common purpose with regard to property. Perpetual purpose trusts are not known to the common law system, unless they are charitable trusts. Although the purposes of *t'so* or *t'ong* can include religious and educational purposes, they are not charitable because the beneficiaries of the trust are not the general public but a limited class, certain male persons from a clan who also happen to be members of the *t'so* or *t'ong*. Proponents of the trust analysis would no doubt counter that it is here that custom trumps equity so as to allow a perpetual settlement: this is what Deputy Judge Lam seemed to imply in his summary in *Leung Kuen Fai*. But why at this point and not earlier? The very fact that proponents have to qualify the effect of their trust suggests that the trust analysis is flawed in the first place.

It was in any event straining matters to presume an intention by the founders of a *t'so* to impose a trust upon the managers of their *t'so*. Such a presumption was not necessary to give effect to the *t'so*. The founders were operating within the confines of Chinese custom. It is doubtful that they would have known what a trust and its consequences were. They expressly intended to create a *t'so*, not a

trust. The processes of conveyance of the land into and registration of it in the name of the *t'so* alone realised that express intention. The presumption or implication that the founders intended to create a trust is contrary to the evidence of their actions. Its effect is partially to nullify those actions.

Conclusion

The description of *t'sos* as trusts is based on repeated assertion but little analysis and very questionable reasoning. The description appears to be motivated by a desire of common lawyers to equate these customary institutions with another institution which is familiar to them and thereby to protect the members of those institutions. Two attempts have been made to explain the basis for the assertion. The first, by Mills-Owens J in *Tang*, relies upon the contents of the schedule to the block Crown lease to show the imposition of an express trust by grant. The second, by Tang Dep-J in *Kan*, simply states a presumed intention by founders of a *t'so* to settle the land on trust. Neither explanation is convincing.

T'sos are not trusts by government grant because that would be contrary to government policy at the time of the block grants, contrary to legislation contemporaneous with those grants, contrary to a reasonable interpretation of the terms of the grant and, not least, inconsistent with the contents of the customary law which gives *t'sos* their very existence. *T'sos* are not purpose trusts created by common intention because they are not charitable in nature and their creators have no intention to create a trust. The customary role of a manager is less than that of a trustee. The customary interest of a member of a *t'so* in the land is greater than that of a beneficiary under a trust. Indeed, the nature of a trust is in conflict with the nature of *t'sos*.

T'sos are inventions of Chinese rural culture and reflect the values of that culture: reverence for ancestors, importance of the land to identity, solidarity of family and clan, and male dominance. They have captivated administrators, historians, anthropologists, lawyers and judges who have come into contact with them. For generations they have been part of the social fabric of that part of San On county which became the New Territories. That fabric and those values have however been worn down with the passage of time. Education, prosperity, building and infrastructural development, urbanisation, modern travel and improved communications have all had their effect to undermine these customary institutions. Let us not add to the list by insisting that *t'sos* are trusts.