

HONG KONG / JUDGMENT

HILDER CO LTD v. PERSONS UNKNOWN

COURT

Court of First Instance

DECIDED

29 January 2007

CASE / FILE NUMBER

HCMP1868/2000

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bjbj HCMP 1868/2000 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 1868 OF 2000

IN THAT MATTER of all those pieces or parcels of ground registered in North Land Registry as Lots No. 860, 861, 863 and 864 in Demarcation District No. 95, Kwu Tung, New Territories, Hong Kong.

BETWEEN HILDER COMPANY LIMITED Plaintiff and PERSONS UNKNOWN Defendants

Before: Hon Reyes J in Chambers Date of Hearing: 29 January 2007 Date of Judgment: 29 January 2007

J U D G M E N T

INTRODUCTION

On 14 June 2000 Hilder obtained an order from Master Kwang for possession of land in Kwu Tong Demarcation District 95, including Lot No.860. The order (made pursuant to RHC Order 113) was obtained in default of appearance by any persons claiming to occupy the land. When Hilder sought to enforce the order, Mr. Wong Yat Yau (among others) claimed to have occupied part of the land for many years. Mr Wong resisted eviction. Eventually, in November 2000, Hilder obtained vacant possession of the land. On 19 July 2004 Mr. Wong (through his solicitors) issued a summons to be joined as a party to these proceedings and to set aside the June 2000 possession order insofar as Lot 860 is concerned. Mr. Wong says that he had been unaware of the proceedings which had led to Hilder s obtaining its order. Mr. Wong says that he was never

properly served with the originating summons initiating those proceedings. In any event, Mr. Wong claims to have been in adverse possession of Lot 860 for at least 20 years before Hilder issued the originating summons on 12 April 2000. Mr. Wong's summons came before Master Hui for substantive hearing on 1 November 2006. But Master Hui adjourned the application to me as a judge. Master Hui thought that, in light of Order 113 Rule 8, he had no jurisdiction to set aside an order for possession. He awarded the costs thrown away by the adjournment to Hilder with certificate for 2 counsel. Mr. Wong now seeks leave to appeal (out of time by 6 days) against that costs order. II. DISCUSSION In this section, I will consider the following questions:-

- (1) Whether it is appropriate to join Mr. Wong as a party.
- (2) Whether service of Hilder's April 2000 originating summons was irregular.
- (3) Whether Mr. Wong's claim of adverse possession has a real prospect of success.
- (4) Whether there is prejudice to Hilder.
- (5) Whether Master Hui's costs order should be set aside. A. Whether joinder As Mr. Wong claims an interest in Lot 860 and as there is evidence supporting such claim, he is a proper person to be joined to these proceedings. I would make an order joining him as a defendant. Mr. Benjamin Yu SC (appearing for Hilder) submits that Mr. Wong cannot be joined as party under Order 113 Rule 5. According to Mr. Yu, to be joined as a party under that rule, one must be in occupation of the land. Having been evicted from the land as of November 2000, Mr Wong is no longer in occupation of the land (even if he once may have been). Thus, Mr. Yu concludes that Mr. Wong has no locus to be joined. I disagree. Whether or not Mr. Yu is right in his construction of Order 113 Rule 5, that rule is expressly without prejudice to Order 15, Rule 6. Order 15, Rule 6 empowers a Court at any time to add, as a party, any person whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon. It seems to me that Mr. Wong is such a person. B. Whether service irregular Order 113 Rule 4 requires that an originating summons for possession be served on any unknown persons who may be in occupation of relevant land by affixing a copy of the summons ... to the main door or other conspicuous part of the premises. At the hearing before Master Kwang, affirmation evidence was adduced stating that service of the originating summons had been effected by leaving copies of the documents at each of Lot Nos. 860, 861, 863 and 864 ... (hereinafter collectively known as the Premises). The affirmation stated that the documents were affixed at main entrance of each of the Premises being the conspicuous part of the Premises. The affidavit finally deposed to the fact that there were no letter boxes at the Premises. No further details of service were provided to Master Kwang. I understand from Mr. Yu that there may be photographs of the service in respect of Lot 860. But these were not adduced before Master Kwang. I do not think that the master could have without further information made the order for possession. The evidence is that in 2000 Lot 860 was open land. It is therefore far from clear what would have constituted the main entrance or the conspicuous part of Lot 860. In the absence of further particulars, I do not think that the

master could have been satisfied that the originating summons was properly served and any person (such as Mr. Wong) claiming to occupy Lot 860 had adequate notice of the 2000 proceedings for possession. In the absence of further evidence on service before me now, I am unable to hold that the originating summons was properly served. In my view, service was irregular and, subject to the question of prejudice considered below, the order for possession ought to be set aside on this basis alone.

C. Whether Mr. Wong's claim has real prospect of success Counsel on both sides agree that, regardless of any regularity or irregularity of service and subject to the question of prejudice and delay, I have a discretion to set aside the order for possession if Mr. Wong's contention of adverse possession has a real prospect of defeating Hilder's claim. Given my conclusion on irregularity of service, it is actually unnecessary for me to consider this question. Indeed, it is undesirable that I should express any opinion on the merits of this case as that could prejudice any future determination of this matter. Nonetheless, I should state that, even if service had been regular, I would still have set aside the order for possession. This is because, in my view, Mr. Wong's claim for adverse possession has a real prospect of success. Mr. Wong and his mother affirm that to the best of their knowledge, information and belief, their family had been in occupation of Lot 860 for at least 20 years prior to their eviction in 2000. There is evidence in the form of aerial photographs that significant parts (but not necessarily all) of Lot 860 have been under cultivation between 1976 and 1993. Between 1993 and 1996 Lot 860 appears from aerial photographs to have been progressively less and less cultivated and to become more and more derelict. Mr. Yu suggests that this shows the Lot has been completely abandoned. But I am unable to say on the basis of the photographs alone, without cross-examination of Mr. Wong and his mother and the surveying experts being relied on by each side, that Mr. Yu's conclusion is the correct one to draw. The fact that land has become less cultivated (perhaps significantly less cultivated) is not necessarily evidence that Mr. Wong and his family ceased to occupy (or intend to occupy) Lot 860. For instance, there is affirmation evidence from Mrs. Wong that in about 1994 income from the cultivation of Lot 860 was unstable. Mr. Wong had to work as a site labourer to earn a steadier income. Mrs. Wong was left to farm Lot 860 (or part of it) herself until her back became painful. The family then had to consider using the land for other purposes, such as open storage. In such situation, it would not be surprising if Lot 860 became progressively less farmed. A mother alone may not be able to cultivate as much as a family working together. But such reduction in the farming of Lot 860 does not necessarily signify an intention to cease occupying or to abandon Lot 860. Indeed, even in the photographs for 1993 to 1996 showing less farming and increased wild vegetation in Lot 860, paths of some sort running through the land appear to have been maintained. Therefore, I cannot at this stage dismiss Mr. Wong's case off-hand as Mr. Yu invites me to do. There is a degree of conviction in Mr. Wong's affirmation evidence which is supported (although admittedly not entirely) by the available photographic record.

D. Whether prejudice The application to set aside comes some 4 years after the order was obtained. There has been undoubted delay. But I do not think that the delay is inexcusable. Mr. Wong learned about the proceedings in around November 2000 when he attempted to resist eviction. In December 2000 he sought the assistance of the village representative Mr.

Yiu Wing Loy. Mr. Yiu engaged solicitors to pursue the case of Mr. Wong (among others). The solicitors corresponded and obtained their instructions through Mr. Yiu. Mr. Wong left the matter with Mr. Yiu whom he trusted. Unfortunately, Mr. Yiu did little. He failed to give the solicitors instructions. Mr. Wong did not discover this until around 2002. Mr. Wong then tried to obtain help from LegCo. He also sought legal aid in February 2002. The application for legal aid was far from straightforward. It was not until December 2003 that the Director of Legal Aid extended Mr. Wong's coverage to encompass an application to set aside the order for possession. In early 2004 Mr. Wong was also involved as a defendant in similar litigation relating to another piece of land. Mr. Wong's defence in that case was being threatened with a strike-out. Advice had to be sought and that led to a deed being executed whereby the interests of his mother and father in relevant land (including Lot 860) in the Kwu Tong area were gifted to Mr. Wong. There was further a complication in the form of the passing away of Mr. Wong's father in April 2004. Taken in the round, while the setting-aside summons might have been brought a few months earlier than July 2004, on balance (in light of the history just summarised) I think it would be wrong to shut Mr. Wong out on the ground of delay. I am fortified in this conclusion by the absence of real evidence of prejudice on the part of Hilder. Hilder says that it has been considering plans for the development of the area in question. But there is no evidence of the precise sort of deliberations and planning which Hilder has pursued since obtaining possession in November 2000. It is not apparent, for instance, whether Hilder presently intends to develop its lots or simply to hold the same as part of a land bank. E. Whether costs order should be set aside In my view, the costs order was wrong in principle. Leave to appeal out of time should be granted and the costs order should be set aside. Applications to set aside a possession order are typically heard by judges in chambers. It follows that, by Order 32 Rule 11, masters have jurisdiction to hear such applications. Doubt has arisen because (according to Hong Kong Civil Procedure 2007 Note 113/8/12 (pp.1292-3)) when Rule 1A was added to Order 113, then Rule 8 was not amended. Rule 1A authorises masters to hear Order 113 proceedings. On the other hand, Rule 8 states that The judge may ... set aside or vary any order made in proceedings under this Order . The reference to the judge was not changed to (say) the Court (which would include both judge and master) I do not think that the doubts are founded. All Rule 8 says is that a judge may set aside an order. Rule 8 makes it plain that a judge may do so, for example, even if the original order had been made by a master. In such case, there would no need to appeal to the judge against the master's order. The enactment of Rule 1A is thus consistent with the reference to the word judge in Rule 8. Rule 8 does not say that only a judge may set aside an order. On the contrary, Rule 1A makes it clear that a master's jurisdiction in Order 113 matters is not limited. Indeed, it would be odd if a master could not set aside his own order. Order 32 Rule 11(1)(f) states that a master has no jurisdiction where the rules require a judge (and only a judge) to hear a matter. In my view, Order 113 Rule 8 is not such a provision requiring a judge alone to deal with setting aside an order for possession. Thus, contrary to another suggestion in Hong Kong Civil Procedure 2007 Note 113/8/12, Rule 8 does not preclude the application of Order 32, Rule 11. Consequently, the master did not have to adjourn the hearing before him. He could have

heard the application himself. Costs need not have been thrown away as a result of any adjournment. Mr. Wong should not have been penalised by an adverse costs order. As for the delay in applying to appeal against the costs order, that is a matter of only 6 days. That was due to delay in the Director of Legal Aid giving approval for the costs order appeal. There is no real prejudice by my giving leave for the appeal to be heard out of time. If there had been an adjournment because the case merited hearing by a judge, the appropriate order would have been costs in the cause. A similar order should apply here. I would substitute an order of costs in the cause for the costs order made by Master Hui. III.

CONCLUSION Mr. Wong is to be joined as a party to these proceedings. The 14 June 2000 order for possession is set aside in relation to Lot 860. Mr. Wong is granted leave to appeal out of time against Master Hui's costs order. The appeal against the costs order is allowed. The appropriate order should instead have been costs in the cause of Mr. Wong's application to be joined as a party and to set aside the order for possession. I shall hear counsel on the costs of the several applications before me and on directions for the expeditious resolution of this dispute. (A. T. Reyes) Judge of the Court of First Instance High Court Mr. Benjamin Yu, SC leading Ms. Sara Tong, instructed by Messrs Kao, Lee & Yip, for the Plaintiff. Ms. Gladys Li, SC leading Mr. Hectar Pun, instructed by Messrs Yuen & Partners, for the Defendants. PAGE - 1udk 1udk H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V i\$&`G "LHK "LHK hccw (for Susan Kwan only).dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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