

HONG KONG / JUDGMENT

LI YAU KEE WAN v. CHEUNG SING MAN

COURT

Court of First Instance

DECIDED

3 May 2007

CASE / FILE NUMBER

HCA67/2006

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bjbj HCA67/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE ACTION NO.67 OF 2006

BETWEEN LI YAU KEE WAN Plaintiff and CHEUNG SING MAN Defendant

Before : Hon Poon J in Chambers Date of Hearing : 12 March 2007 Date of Decision : 3 May 2007

D E C I S I O N

Introduction

AUTONUMOUT The defendant is the registered owner of Lot 809 Remaining Portion in Demarcation District 453, Lo Wai Village, Tsuen Wan, New Territories. AUTONUMOUT In June 2005, the plaintiff purchased the property known as No.141, Yi Pei Chun, Lo Wai Village, Tsuen Wan, New Territories (the Property) from one Madam Yau Sau Ming (Madam Yau). The Property consists of a house and a garden. The front garden lying on the south-western side of the Property and part of the house encroach onto Lot 809 Remaining Portion (the Disputed Area AUTONUMOUT On 9 March 2006, the plaintiff commenced the present action, claiming declaratory relief that the defendant s title to the Disputed Area had been extinguished and that the plaintiff has acquired a possessory title to the Disputed Area and consequential relief. AUTONUMOUT The plaintiff now applies for summary judgment for the whole of the Disputed Area or, alternatively, the portion of the Disputed Area upon which the house had been constructed, erected and stands. An overview of the plaintiff s case AUTONUMOUT The plaintiff s case may be briefly stated thus. AUTONUMOUT Madam Wong and her predecessors-in-title had enjoyed exclusive and uninterrupted possession of the Property since at least the 1950s. Madam Wong had therefore in adverse possession of the Disputed Area for more than 20 years against

the defendant, which possession is now being continued by the plaintiff. The plaintiff relies on sections 17 and 7(2) of the Limitation Ordinance, Cap. 347. AUTONUMOUT The plaintiff further complains that the defendant has wrongfully trespassed the garden area (the Trespassed Area) by entering into it, cutting open and removing the wired fence and gate lying on the south-western boundary of the Property and depositing quantities of wooden materials thereon on 27 June and 4 July 2005, and by erecting 3 signings thereon warning against any entry of the area and/or removal of property therefrom on 18 July 2005. Madam Yau s evidence AUTONUMOUT The plaintiff relies on the evidence of Madam Yau. She had this to say in her affirmation

3. I had been residing at the Property for some 50 years before I eventually sold to the Plaintiff. In the early 1950 s, my late Husband together with our friend Mr. So Sik Sang () purchased the Property. There is now produced and shown to me marked Exhibit SMWT true copy of the Conveyance on Sale dated 4 September 1952 signed between the then vendor, Mr. So and my late Husband. After the purchase, my late Husband, our family and I, together with Mr. So and his family, moved to the Property and resided there. At that time, the Property comprised a wooden house and private garden. The boundary of the Property was marked out by brick walls and wired fences, erected along two footpaths adjacent to the Property, one at the south-western side and one at the north-eastern side, respectively. The outer boundaries of the Property remained the same throughout all these years. That is to say, since when I started residing there in the 1950 s, the Property already included the Disputed Area, which was all along used, occupied and possessed by us to the exclusion of anybody else. Some 10 years later in the 1960 s, Mr. So and his family moved out of the Property. He sold his share of interest in the Property to my late father-in-law, Mr. Wong Hing Yau (my late Father-In-Law) who was residing in the Property with my late Husband and me at that time. There is now produced and shown to me marked Exhibit SMWY-2 true copy of the Conveyance on Sale dated 21 May 1965 signed between Mr. So and my late Father-In-Law. At all material times, the Property including the Disputed Area was all along enclosed and fenced-off, and we have all along been in continuous and exclusive occupation and possession, and using the same as private property and private territory. In the early 1970 s, my eldest son Mr. Wong Yeung was married. My late Husband and I considered that the wooden house was too small for our family. Therefore we decided to erect a stone house on the Property. In December 1972, my late Husband applied to the Tsuen Wan District Office for approval. In April 1973, our application was approved. There is now produced and shown to me marked Exhibit SMWY-3 true copy of the approval letter of the Tsuen Wan District Office dated 6 April 1973. The two-storey stone house was completed in or about 1974. In the 1980 s, my late Father-In-Law gave his share of interest in the Property to my late Husband. There is now produced and shown to me marked Exhibit SMWY-4 true copy of the Deed of Gift dated 7 June 1985 signed between my late Father-In-Law and my late Husband. On 7 July 2000, my late Husband passed away. In the course of the administration of his estate, I verbally agreed to sell the Property to the Plaintiff. I received the deposit from the Plaintiff in August

2004. Then I permitted the Plaintiff to use, occupy, possess and enjoy the Property including the Disputed Area. The sale was completed on 17 June 2005. There are now produced and shown to me marked Exhibit SMWY-5 to SMWY-8 true copies of the Letters of Administration dated 21 December 2001, the Power of Attorney dated 4 May 2005, the Agreement for Sale and Purchase dated 27 May 2005 and the Assignment dated 17 June 2005 respectively.
15. Since the Disputed Area was already all along included as part and parcel of the Property and was enclosed and fenced-off as private territory, my late Husband and I all along believed that the Disputed Area was part and parcel of our private property and belonged to us as part and parcel of the Property. Therefore, we had all along been in continuous and exclusive occupation and possession.
16. As abovementioned, the whole Disputed Area was enclosed and fenced-off. Part of the Disputed Area was in fact built upon and occupied by part of our house, whilst other parts of the Disputed Area were private garden. If my late Husband and I had not genuinely believed that the Disputed Area belonged to us, we would certainly not have erected permanent structures, namely our house, thereupon. AUTONUMOUT It is not disputable that the stone house referred to by Madam Yau was erected in about 1974 and has been there all along. The main points relied on by the defendant AUTONUMOUT The principal defence raised by the defendant in the Defence and Counterclaim is that his uncle, Mr Cheung Cheng Fat (the Uncle), who was responsible for the management of the Lot 809 at all material times, granted an oral licence to Madam s husband, Mr Wong Kwan (Mr Wong) to use and enjoy the Disputed Area without any licence fee on the condition that the Uncle would at any time revoke and terminate the licence at his request (the Licence). The defendant became the sole owner of Lot 809 subject to the Licence. To honour the wishes of the Uncle, the defendant did not revoke the Licence until Mr Wong and his family sold the house erected on the Disputed Area. I will call this the Licence Point. AUTONUMOUT The further points raised by the defendant in his evidence are :
- (1) The Disputed Area had not been enclosed as alleged by the plaintiff. I will call this the Enclosure Point.
- (2) The plaintiff does not have ownership on one of the Lots where the Property is situated, namely Lot
794. I will call this the Ownership Point. AUTONUMOUT Additionally, Mr Yam, counsel for the defendant, raised queries about the assignment dated 17 June 2005 (the Assignment) and the confirmatory assignment dated 28 February 2006 (the Confirmatory Assignment) which effected the conveyance of the Property from Madam Yau to the plaintiff. I will call this the Assignments Point. Mr Yam also submitted that it is questionable if the plaintiff has both exclusive possession of and the requisite intention to possess the Disputed Area. I will call this the Adverse Possession Point. AUTONUMOUT I will discuss these points in turn. The Licence Point AUTONUMOUT The existence of the Licence is in dispute. In her affirmation,

Madam Yau denied that the Uncle had ever granted any licence to Mr Wong as alleged. She said Mr Wong and she all along believed that they owned the Disputed Area; that the Uncle had never told them that he or the defendant owned the Disputed Area. She stressed that and they would not have invested considerable money (together with obtaining authorization and government approval) in building the erecting the House had she known then that the Disputed Area did not belong to them. AUTONUMOUT Chan, counsel for the plaintiff, submitted that the defendant has failed to condescend on the particulars of the Licence either in the pleadings or evidence. I agree. Accordingly, I have considerable doubt on the veracity of the defendant s case on the existence of the Licence. AUTONUMOUT Leaving the factual dispute aside, Mr Chan submitted that the Licence, even if established, does not assist the defendant. The Licence allowed Mr Wong to use and enjoy the Disputed Area. On any view, the Uncle could not have, under the Licence, granted permission to Mr Wong and Madam Yau to build a house, thereby erecting a permanent structure thereon. When they did so in 1974, that would have been in flagrant breach of the Licence, rendering them trespassers since then : see *Hillen & Pettigrew v. ICI (Alkali)* [1963] AC

65. I also agree. AUTONUMOUT For the above reasons, the Licence Point must fail. The Enclosure Point AUTONUMOUT It is Madam s evidence that the Property including the Disputed Area had all along been enclosed and fenced off and that she and her husband had along enjoyed exclusive possession of the Disputed Area. The plaintiff gave evidence including photographs taken back in the 1980s and the 1990s to corroborate her evidence. The plaintiff also relied on the expert report prepared by Ms Helen Chan of Helen Chan Professional Land Survey Limited dated 20 March 2006 in which Ms Chan, after reviewing the relevant evidence including aerial photographs taken since the 1950s, concluded that the Property had been surrounded by fences since 1955. AUTONUMOUT The defendant himself has not given any evidence that is capable of directly contradicting Madam
- s. Instead, he sought to rely on a number of matters. AUTONUMOUT First, the defendant relied on the survey report prepared by his expert, Mr Geoffrey Kwong Che Sing of Geoffrey Kwong Land Surveyor Limited , dated 20 October 2005. Mr Kwong contradicted Ms Chan by concluding the Property had not been surrounded by fences since
1955. However, Mr Kwong did say that the fences were there since
1971. In other words, even on the defendant s own expert evidence, the Property had been fenced off since 1971, some 35 years before the commencement of the present action. I fail to see how Mr Kwong s evidence can assist the defendant. AUTONUMOUT Second, the defendant relied on the evidence of one Mr Wah. In early October 2004, Mr Ki (), the plaintiff s husband engaged Mr Law to renovate and repair the Property, including erecting brick walls at the western side, the south-eastern said and the north-eastern side of the Property. Mr Li told him that as some part of the land was not owned by him, it was not necessary to re-erect the wired fence at the south-western said of the Property with brick walls. Mr Li answered Mr s evidence in his third affirmation but I do not think I need to dwell on the details. For having considered Mr s evidence carefully, I do not think it supports the

defendant's case that the Property was not enclosed as contended by the plaintiff.

AUTONUMOUT Third, the defendant queried why no fence was erected between the boundary of the other Lots upon which the Property stands. Mr Li in his third affirmation said :

23. The Property does and did lie on part of the land of Lot

794. All along, Lot 793, Lot 795, a large portion of Lot 794, a small portion of Lot 796 together with the Disputed Area comprise the Property. For this reason, there is and was never any wall or fence erected amongst these lots of land. AUTONUMOUT In my view, it is a complete answer to the defendant's query. AUTONUMOUT For these reasons, the Enclosure Point also fails. The Ownership Point AUTONUMOUT It is not in dispute that Lot 794 is registered in the name of one Lao Ting Yan. The plaintiff's case is that she and Mr Li do not know him at all. AUTONUMOUT In my view, the fact that Lot 794 is vested in Lao's name is simply irrelevant to the present dispute which concerns the parties' title in the Disputed Area in Lot 809 Remaining Portion. The Ownership Point must fail. The Assignments Point AUTONUMOUT Yam asked a number of questions about the Assignment and the Confirmatory Assignments, including why some lots were mentioned in the Confirmatory Assignment but not the Assignment, and why there was no mention of the Confirmatory Assignment in the plaintiff's affirmation. I need not dwell on them. Suffice it to say that I have duly considered them and find no substance in any of those questions. No triable issue can be raised from the Assignments Point. The Adverse Possession Point AUTONUMOUT It is trite that a person claiming to be in adverse possession must have both possession and the requisite intention to possess : see *Wong Tak Yue v. Kung Kwok Wai & Another* [1998] 1 HKLRD 241, per Li CJ at p.249H. AUTONUMOUT In my view, the evidence before me overwhelmingly supports the plaintiff's claim that her predecessors-in-title had adverse possession of the Disputed Area and the requisite intention to possess since 1950s and that is also her case since she became the owner of the Property. AUTONUMOUT The Adverse Possession Point must fail as well. Other points AUTONUMOUT For completeness, I wish to briefly deal with the following points. AUTONUMOUT First, Mr Yam made submissions on the purchase price of the Property and queried why the plaintiff would agree to enter into the transaction. Mr Chan submitted that the plaintiff was at the time aware of the fact that part of the Property encroached onto Lot 809 Remaining Portion. She was advised by Mr Kwong about the situation and then entered into the sale. Mr Chan submitted that plainly the plaintiff was content to acquire the possessory title only. I agree. AUTONUMOUT Second, Mr Yam asked why Mr Li would consider buying the Disputed Area from the defendant. This happened after the present dispute arose in the process of the parties' negotiations for possible settlement. I fail to see how that can assist the defendant. AUTONUMOUT Finally, a number of recent cases decided in the Court of First Instance suggest that it is arguable that a claim of adverse possession may contravene the Basic Law. At the beginning of the hearing, I referred Mr Yam to those cases and asked him if the defendant wished to take this Basic Law point. After taking instructions and having advised the defendant of the implications, Mr Yam told me that he would not. I will therefore just leave the matter there.

Conclusion

AUTONUMOUT For the above reasons, I will enter judgment for the plaintiff against the defendant for :

- (1) an order that the defendant whether by himself, his agents, servants or otherwise whosoever, be restrained from entering into the Disputed Area;
- (2) a declaration that the defendant's title to the Disputed Area had been extinguished;
- (3) a declaration that the plaintiff has acquired a possessory title to the Disputed Area;
- (4) an order that the defendant do remove all properties deposited by the defendant and/or his agents or servants into the Trespassed Area; and
- (5) damages for trespass to be assessed. AUTONUMOUT I will also make an order nisi that the plaintiff shall have the costs of her claim including the costs of this application, to be taxed if not agreed. (J. Poon) Judge of the Court of First Instance High Court Mr Jeremy S.K. Chan, instructed by Messrs S.K. Lam, Alfred Chan & Co., for the Plaintiff Mr Stephen Yam, instructed by Messrs Fan & Co., for the Defendant The Disputed Area is coloured pink in the plan marked as Appendix 1 to this Decision. The Trespassed Area is coloured green in the plan marked as Appendix 2 to this Decision. See paragraph 6 of the Defence and Counterclaim. Mr Kwong was in fact the surveyor engaged by the plaintiff to inspect the Property during the negotiations with Madam Yau for sale of the Property.

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