

HONG KONG / JUDGMENT

SHING LUEN FAT v. SHING CHI PING

COURT

District Court

DECIDED

14 March 2011

CASE / FILE NUMBER

DCCJ3789/2010

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bjbj DCCJ 3789/2010 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION CIVIL ACTION NO. 3789 OF 2010

BETWEEN SHING LUEN FAT Plaintiff and SHING CHI PING Defendant

Coram: His Hon Judge Leung in chambers (open to public) Date of hearing: 10 March 2011 Date of decision: 10 March 2011 Date of handing down reasons for decision: 14 March 2011 D E C I S I O N The parties are indigenous members of the village of Shing Uk Tsuen (vK\Qg) f land by virtue of adverse possession against the Defendant. Before this court on 10 March 2011 was the inter parte hearing of the Plaintiff s applications for interlocutory injunction. At the end of the hearing, I granted the injunction pending the trial of the action. I now give my reasons.

Background

Lots Nos. 254 and 256 of Demarcation District No.123, Yuen Long, are adjoining plots of land in the Village. The Plaintiff s father was the owner of Section C of Lot No.254. In July 1980, Section C of Lot No.254 was sub-divided into 3 subsections which were assigned to the Plaintiff and his 2 brothers. The Plaintiff became the owner of Subsection 1 of Section C (the Plaintiff s Property). Lot No.256 used to be owned by the Defendant s uncle, Shing Yat Wan. Upon the passing of the uncle in 1981, the Defendant s aunt inherited the land. In December 1991, the Defendant s aunt assigned the land to him. The Plaintiff s case is that prior to 1960, Lot No.256 was bare land. Since then, his parents and family had exclusive occupation of the portion of Lot No.256 adjoining what is now the Plaintiff s Property. A building had been constructed there for residence, storage and pigsty. A brick wall had been built around that portion of land leaving a narrow pathway serving as access to the Plaintiff s Property from the public road. Part of the building was damaged during the typhoon in about 1962. However what was left behind remained to be so used by the Plaintiff s family until 1971. Since 1971, that portion of Lot No.256 has been used for storage purpose. By the commencement of this action, there were trees, pots of plants and various

articles belonging to the Plaintiff kept there for his florist business. In the plan annexed to the Statement of Claim, the plot of land in question is identified as the Remaining Portion of Lot No.256; and is coloured pink (the Property). The pathway within the Property is also identified (the Pathway). The Plaintiff complains that in late August 2010, the Defendant caused to be put up a notice at the Property demanding the removal of all the Plaintiff s articles from there. In early September 2010, the Defendant erected an iron gate on the Pathway but was dismantled after police intervention. Correspondence between the parties solicitors regarding the rights over the Property began. A meeting was also convened by the village representative on 9 September 2010 to resolve the dispute between the parties; but the meeting was ended with no conclusion. On about 5 October 2010, the Defendant caused 2 iron gates to be erected on both ends of the Pathway which effectively blocked the access to the Plaintiff s Property from the public road. The Plaintiff claims that his family did not know the registered owner of the Property; but had all along treated the same as their own. The Plaintiff claims to have acquired possessory title over the Property by virtue of exclusive possession for over 20 years since 1980. As against the Defendant, the Plaintiff claims to have in any event acquired possessory title for over 12 years since the Defendant became the owner of the Property in December 1991. In the premises, all the rights and interest in the Property of the Defendant and his predecessors in title have been extinguished by virtue of sections 7 and 17 of the Limitation Ordinance, Cap.347. Alternatively, the Plaintiff claims a right of way and easement of the Pathway by prescription. Since the commencement of action in early November 2010, the Plaintiff s solicitors have been requesting for confirmation by the Defendant solicitors as to whether the latter had instruction to accept service on behalf of the Defendant. The answer, which was in the negative, came only on the last day of 2010. Upon the understanding that the Defendant resides mostly in the Netherlands, the Plaintiff was prepared to apply for leave to serve the writ out of jurisdiction. On 26 January 2011, the Plaintiff took out an inter parte summons for interlocutory injunction in the following terms: (1) Order that the Defendant be restrained from doing anything to interfere with the Plaintiff s occupation of the Plaintiff s Property and/or the Property coloured pink as per the Plaintiff s Affirmation dated 25th January 2011, including the Pathway and the Plaintiff s properties kept on that Property, whether by himself or by his agents or representatives, pending the trial of this action; (2) Order that the Defendant do within 1 day dismantle the Iron Gates erected on the Pathway in front of the Plaintiff s Property, failing which, the Plaintiff is entitled to dismantle and dispose of the same and the Defendant shall indemnify the Plaintiff s costs dismantling and disposal of the Iron Gates; The summons was fixed to be heard on 31 March 2011. However, on the following day, the Defendant apparently engaged some contractor to demolish the remaining building and brick wall structure on the Property as well as to remove the Plaintiff s articles there. This prompted the Plaintiff to take out an ex parte application on the same day for an injunction basically in the same terms as the above summons. On the same day, the Plaintiff managed to serve the writ and the other court documents on the Defendant personally. The learned Deputy Judge hearing the ex parte application granted the restrictive part of the injunction (i.e., paragraph (1)) and fixed the return day of 31 January 2011. On the return day of the ex parte application, the case came before this court. I gave directions to the parties for the filing of affidavits. I also decided to bring forward the hearing of the inter parte summons to 10

March 2011. By consent, the ex parte injunction was also continued until then. By now, one of the 2 iron gates erected by the Defendant at the Pathway has already been removed. Though also described as an iron gate, the one that remains now, as depicted in the photographs produced, is in fact an iron scaffold lined with barbed wires erected at the Pathway right in front of the main iron gate of the Plaintiff's Property (the Iron Scaffold). The Defendant's case is that the Plaintiff's family did enter into possession of the Property in the 1960s. But that was pursuant to the permission of his uncle who owned it. Further, the Plaintiff's family had abandoned the Property since 1962. It was only in 2005 when the Defendant discovered that the Plaintiff used the Property for storage of potted plants. Upon the Plaintiff's agreement not to use the Property for planting and not to cause anything to be constructed there, the Defendant allowed the Plaintiff to continue to use the Property for the Plaintiff's florist business. In late August 2010, it was discovered that the Plaintiff attempted to erect a scaffold structure on the Property. The Defendant therefore revoked his permission to the Plaintiff. The Defendant opposed the continuation of the ex parte injunction. He also opposed the application for the mandatory injunction compelling him to remove the Iron Scaffold. The principle There was no dispute that for deciding whether to grant an interlocutory injunction, the test is whether there is a serious question to be tried; and where the balance of convenience lies: see *American Cyanamid Co v Ethicon Ltd* [1975] AC 396; *Hong Kong Civil Procedure 2011*, Vol.1 at 29/1/9. Serious question to be tried The Defendant criticised the Plaintiff for failing to disclose that the Plaintiff's family actually knew the owner of the Property. What the Defendant referred to is what was apparently said by the Plaintiff's sister during the village meeting on 9 September 2010 mentioned above. Then suggestion was made that the Property was purchased by the Plaintiff's father at HK\$300. The Defendant argued that such allegation contradicts the Plaintiff's pleaded case that the Plaintiff's family never knew the true owner of the Property throughout the years. As a matter of principle, it is arguable whether any belief on the part of the Plaintiff's father that he purchased the Property, which would be factually wrong, necessarily excludes the fact or intention to possess the Property to the exclusion of the entire world: see *Wong Luen Chun v Secretary for Justice* [1998] 4 HKC 122. As a matter of fact, the documents merely reveal that the Plaintiff's father purchased Section C of Lot No.254 from his predecessor in title in 1958 at HK\$320. As to how the suggestion about the purchase of the Property by the Plaintiff's father came about during the village meeting in September 2010, the Plaintiff's sister and Shing Yat Kwong, who is the brother of Shing Yat Wan who used to own the Property, also gave their explanations. Their evidence, if accepted, would tend to explain that such suggestion was the result of mere belief passed on as multiple hearsay rather than assertion of fact. Apart from the Plaintiff's sister and the other uncle of the Defendant mentioned above, the Plaintiff's camp consists of the Plaintiff's other sister (and administratrix of their mother's estate), the village representative and the contractor engaged by the Plaintiff to repave the Pathway in 2000. They have made affirmations in support of the Plaintiff's case. The photographs taken before the demolition work carried out by the Defendant on 27 January 2011 indeed depict the remains of building structure on the Property and the brick wall surrounding the Property that the Plaintiff refers to. The Defendant's camp consists of the Defendant's clan aunt, another village representative and a fellow villager. They have also filed affirmations in support of the Defendant's case. Clearly the dispute between the parties in respect of the history

of use and occupation of the Property during the period between 1960 and 2005 is a serious question to be tried. Balance of convenience Mr Siu categorised the Defendant's demolition of the building features on the Property and removal of the Plaintiff's properties inside the Property as conduct calculated to destroy the Plaintiff's evidence of exclusive possession of the Property. I can understand Mr Siu's observation, in view of the fact that this happened after the Defendant's solicitors had been put on notice of the Plaintiff's intention to commence legal proceedings. Where does the balance of convenience lie? Even according to the Defendant's own case, the Plaintiff has been using and occupying the Property for storage of potted plants for his florist business with his consent since 2005. The photographs depict that the trees, potted plants and various articles were indeed kept behind the brick wall features surrounding the Property. This was the situation immediately prior to the alleged revocation of the Defendant's licence and the demolition work carried out by the Defendant. There is no suggestion or evidence that the Defendant intends to use the Property for any specific purpose. He has emigrated to the Netherlands since 1972 and does not ordinarily reside at the Village. The prejudice that the Defendant may suffer in practical terms if the injunction is continued is not readily apparent. The photographs depict the destruction of the plants and properties that the Plaintiff has kept on the Property by the Defendant. That cannot be undone. But to say that that becomes the status quo to be maintained pending trial is questionable. Immediately prior to that, the Plaintiff had the use of the Property for his florist business. According to him, he still needs the use of the Property for his business. Further, the Iron Scaffold now blocks the access to and egress from the main gate of his own property. All these have seriously affected the life of his family. The Defendant criticised the Plaintiff for failing to disclose the fact that he has been gaining access to his own property through the entrances to his brothers' adjacent properties. But it was indeed the Plaintiff who revealed in his first substantive affirmation in support of his applications that he manages to do so with his brothers' consent. Further the Plaintiff explained that whilst his younger brother has been helpful, his elder brother is unhappy about the Plaintiff's family gaining access though his property, which immediately adjoins the Plaintiff's property. At the moment, this remains feasible as the elder brother's building is under renovation. But there is no basis for the Plaintiff to believe that the gap between his elder brother's property and the Plaintiff's Property would not be closed when the renovation is over. Both he and the other deponents have affirmed that personal conflict has already arisen between the Plaintiff and the elder brother out of that situation. Whilst the Plaintiff manages to gain access via his brothers' properties, he could not do so as of right and is not in position to assert any right of way. The fact is that the main entrance of his own property is effectively blocked by the Iron Scaffold lined with barbed wires. The balance of convenience tilts in favour of the Plaintiff. Mandatory injunction However, it was argued on behalf of the Defendant that the American Cyanamid test does not operate insofar as the interlocutory mandatory injunction to remove the Iron Scaffold is concerned. Mr Wong for the Defendant submitted that for a mandatory interlocutory injunction to be granted, the court must feel a high degree of assurance that in the trial, it will appear that the injunction has been rightly granted: see *Shepherd Homes Ltd v Sandham* [1971] 1 Ch 340; *TKI Limited & Anor v New Happy Limited & Anor* [1995] 1 HKC 551. What Mr Wong submitted is right. However one should bear in mind what underlies the caution of the court is the risk of injustice to the defendant at the end of

the day if the mandatory injunction has not been rightly granted. It is such risk of injustice that leads the court to take extra care in weighing the balance: see also Hong Kong Civil Procedure 2011, Vol.1 at 29/1/30. In *Shepherd Homes Ltd*, the court held (at 348E-F) that a mandatory injunction that requires the dismantling or destruction of something already erected or constructed will result in a consequent waste of time, money and materials if it is ultimately established that the defendant was entitled to retain the erection. However if the circumstances are that justice requires the grant of mandatory injunction at an interlocutory stage, then such an injunction should be granted irrespective of whether the court has a high degree of assurance as to the merits of the applicant's case. Where the injunction sought is not expensive to comply with, or is not irreversible or would not effectively pre-empt the trial, the court may well grant the injunction without requiring a high degree of assurance even if the injunction is mandatory in nature: see Hong Kong Civil Procedure (above) at 29/1/30 (referring to *Wu Wei v Liu Yi Ping*, HCA 1452/2004 (30 January 2009)). In the present case, the mandatory injunction is sought to have the Iron Scaffold removed. As mentioned above, there is no suggestion or evidence that the Defendant intends to use the Property for any specific purpose now or in the near future. Except for manifesting his right over the Property, the Defendant erected the Iron Scaffold for no real purpose other than to block the main entrance of the Plaintiff's Property. As far as the photographs depict, the Iron Scaffold was apparently bolted onto the ground of the Pathway. There is no suggestion of hardship, let alone difficulty, in removing the Iron Scaffold. Unlike any substantial structure erected for a defendant's specific use or purpose (such as that contemplated in the judgment of *Shepherd Homes Ltd* above), the removal of the Iron Scaffold in the present case should not entail any consequent waste of time, money and materials, if the Defendant's entitlement to put it there is ultimately established at trial. Any waste should be adequately compensated by damages. The risk of injustice in requiring the removal of the Iron Scaffold is outweighed by the inconvenience caused by its existence to the Plaintiff in the interim. The two parts of the injunction prayed for in the summons are parts of the same relief for the Plaintiff's purpose. Effect cannot be fully given to the part restraining the Defendant from interfering with the Plaintiff's use and occupation of the Plaintiff's Property in the interim, if the mandatory part compelling the removal of the Iron Scaffold is refused. Order For the above reasons, and with adjustment to the scope, I granted the interlocutory injunction in the following terms: Until the trial of this action, the Defendant be restrained from doing anything, whether by himself or by his agents or representatives, to interfere with the Plaintiff's use and occupation of the Plaintiff's Property and/or the Property coloured pink as per the Plaintiff's Affirmation dated 25 January 2011 including the Pathway and the Plaintiff's properties kept on the Property (such use and occupation by the Plaintiff shall not include any work or undertaking of a structural nature on the Property). The Defendant do within 48 hours dismantle the Iron Gate erected on the Pathway in front of the Plaintiff's Property (defined as Iron Scaffold above), failing which the Plaintiff is entitled to dismantle and dispose of the same. The Plaintiff also asks that in the event that he had to dismantle and dispose of the Iron Scaffold, the Defendant should indemnify him against the cost of that. The issue of the cost of the removal of the Iron Scaffold should be considered as part of the claim for damages. Therefore I now clarify and, if necessary, vary my order made in court to the effect that such indemnity shall not form part of the order. Costs As to costs, Mr Wong

asked for costs in the cause whereas Mr Siu argued that his client should have his costs of these applications in any event. Mr Siu criticised Ping for setting out to destroy the evidence of his client's possession. This prompted the ex parte application soon after the application for interlocutory injunction has been taken out. Mr Siu's comment is understandable; but an adverse costs order against Ping on this basis should better be left to be decided by the trial judge who will be in a better position to make findings of the conduct of the Defendant now complained against by the Plaintiff. I also took into account the Defendant's offer of undertaking through counsel at one time and the actual reduction in the scope of the injunction. I therefore ordered that the costs of the application by inter parte summons be in the cause while the costs of the application by ex parte summons be reserved to be decided by the trial judge. I certified the engagement of counsel. Others By summons dated 8 March 2011, the Defendant applied for leave for extension of time for filing the Defence and (if any) Counterclaim. This was uncontroversial and granted. The Defendant has 21 days to file and serve his pleading; and the Plaintiff has 28 days thereafter to file his Reply and (if any) Defence to Counterclaim. Costs of the summons be in the cause. Simon Leung District Judge Mr Stanley SIU instructed by Messrs Wong Kwan & Co for the Plaintiff Mr 1udk gdJ) gdJG xmbWbLbA hIW^ h&A= hIW^ hIW^ hIW^ hIW^ hIW^ hIW^ uZLZ hs3\$ gdf(gdf(gd?^ {e{e{Ze{ zlzllzl hs3\$ hs3\$ hs3\$ hs3\$ hs3\$ vlaWaWa h Z[h Z[hs3\$ gdp6 gd<Y gd<Y gdp6 gdp6 gd Z[h Z[h Z[gd<Y gd"" gdID }o}o}a hu>T hu>T hu>T gdp6 gdID gdyp gdV{ hu>T } sh}}}} hFAO hu>T zozozozo hFAO hFAO hu>T hu>T gdV{ gdID mcmXm hFAO hIW^ hIW^ hu>T wl\RG< hu>T hu>T hIW^ hIW^ gd;q gd;q gdIW^ gdV{ hu>T ~vrvd G H I J K L M N O P Q R S T U V [Content_Types].xml Iw}, \$yi} _rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml w toc'v)I`n 3Vq%'#q x)r :TZaG I u3 L+M2 e\O\* \$\*c? )6-r IqbJ#x ,AGm T[XF64 E)`# R>QD =(K& =al- 4vfa 0%M0 theme/theme/_rels/themeManager.xml.rels 5 6?\$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/.relsPK theme/theme/themeManager.xmlPK theme/theme/theme1.xmlPK theme/theme/_rels/themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://schemas.openxmlformats.org/drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2" tx2="dk2" accent1="accent1" accent2="accent2" accent3="accent3" accent4="accent4" accent5="accent5" accent6="accent6" hlink="hlink" folHlink="folHlink"/> fo+# %538>nZ %538 fo+# & 6" CACV Jeannie MY MokSo Normal.dotm setup Microsoft Office Word Judiciary CACV Title Microsoft Office Word 97-2003 Document MSWordDoc Word.Document.8

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