

Fong Mi Yee v Lao Kim

Date of Judgment: 4 November 2020

District Court

DC

Civil Action No 949 of 2016

DCCJ 949/2016

Citations: [2020] HKDC 991
[2020] HKEC 3442

Presiding Judges: Judge KC Chan

Phrases: Land law - ownership of land - adverse possession - whether established

Counsel in the Case: Mr Leung K W William, of William K W Leung & Co, for the plaintiff
The defendant was not represented and did not appear

Cases cited in the judgment: [Bolton Metropolitan Borough Council v Musa Ali Qasmi \(1999\) 77 P&CR D36](#)
[JA Pye \(Oxford\) Ltd v Graham \[2003\] 1 AC 419](#)
[Powell v McFarlane \(1979\) 38 P&CR 452](#)
[Wong Tak Yue v Kung Kwok Wai & Another \(No 2\) \(1997-98\) 1 HKCFAR 55](#)

JUDGMENT:

Judge KC Chan

1. This is a straight forward claim of adverse possession of the premises known as First Floor, No 118 Wing Kwong Street, Kowloon ("the Property") by the plaintiff Madam Fong Mi Yee ("Fong") against the defendant who became the registered owner thereof by the registration on 19 February 1972 of the Letters of Administration of the Estate of the late Madam Lao Po who was the registered owner prior.
2. I will refer to the building erected on No 118 Wing Kwong Street, of which the Property is part, as "the Building". The Building is an old one, having been erected in the 1950's.
3. The Writ herein was issued on 1 March 2016. Fong, however, passed away shortly after on 16 April 2016. Mr Ho Kong ("Ho"), Fong's son-in-law and the sole Executor of Estate of Fong, now represents her estate.
4. The defendant did not appear at trial to contest. He did not file an Acknowledgement of Service with a Notice of Intention to Defend. He was absent throughout the proceedings in this action. I was satisfied that I should proceed, and so proceeded, with this trial in the absence of the defendant as (a) the substituted service of the Writ herein has been held to have been properly effected by the Order of Deputy District Judge Y W Hew dated 23 December 2019, and (b) by the affirmation of Ho filed on 23 October 2020, due notice of this trial has been given to the defendant in the manner required by the Order of Registrar Lui dated 16 July 2020.

Applicable legal principles

5. The principles regarding adverse possession are trite:-

- (a) To successfully claim adverse possession, the squatter must show that he has been in continuous and exclusive physical possession of the property with the requisite intention to possess, the *animus possidendi*, for the requisite limitation period ¹, and in this case, 12 years;
- (b) What constitutes a sufficient degree of exclusive physical control depends on the circumstances of the case and, in particular, the nature of the land and the manner in which land of that nature is commonly enjoyed. What must be shown is that the alleged possessor has been dealing with the land as an occupying owner might expect to deal with it ²;
- (c) The requisite intention is to exclude the world at large, including the owner, from the land so far as is reasonably practicable and so far as the law allows ³;
- (d) Regarding the question of intention to possess, it is a question of fact, and whether it can be established depends on an assessment of all the circumstances in a particular case ⁴; and
- (e) Evidence of subjective intent should be approached with caution. Intention is normally better assessed by inference drawn from the acts of the possessor in the light of nature of the land and its use ⁵.

The evidence and findings

6. Ho gave evidence for the plaintiff's case. I find him an honest and reliable witness. I accept his evidence, which was uncontested, and as set out below. Moreover, many of the factual matters he spoke of are well supported by documentary evidence, which I will refer to by way of footnotes.

7. Ho started dating Miss Treesana Yu ("Yu"), the daughter of Fong since November 2003. He then worked as a renovation contractor. They were married in January 2007. Ho had been in good relationship with Fong who had told him matters concerning the Property that occurred prior to 2005. He has personal knowledge of the matters relating to the Property that occurred after.

8. Sometime in 2005, Ho started co-habiting with Yu. Fong suggested them to live in Unit B of the Property so that they could save the expenses of renting a flat elsewhere. On various occasions in 2005, Fong told Ho:-

- (a) Fong had a good friend known as 楊火川 ("Yeung"). Yeung was 5 to 6 years older than Fong, so Yeung was about 58 years old in 1999. They had then known each other for 6 to 7 years. Indeed, Yeung was a family friend as Fong would take her children to visit him.
- (b) In around December 1999, Fong and Yeung met for yum cha in a Chinese Restaurant. Yeung told Fong that he would soon leave Hong Kong to work abroad for an uncertain period and asked Fong to look after the Property. Afterwards, Yeung brought Fong to the Property. There, Yeung told Fong that he was entrusted by the owner to look after the Property, but the Property was in a state of dilapidation and had some existing problems, and that he could neither sell it, nor had the the money to renovate it to enable it to be rented out. Yeung further said that he would contact Fong after he had settled abroad. Yeung however had not left with Fong the means to contact him nor disclosed the particulars of the owner of the Property. On that occasion, Yeung left the keys to the Property to Fong. That was the last time Fong had seen Yeung.
- (c) Since then, Fong had been paying for the rates and government rents of the Property ⁶.
- (d) However, Yeung had not contacted her at all and she had no means to contact Yeung.
- (e) In June 2003, Fong received notice that the Building Authority by 2 orders required works to be done to the external walls of the Building to make it safe and works to be done to the external drainage ("the Repair Orders") ⁷. That would mean she need to expend another substantial sum, which by then in all likelihood Fong could not be recouped from Yeung who had long lost contact. Fong then decided to treat herself as the owner of the Property, and not only would she paid for the repairs required by the Repair Orders, but she would also incur a substantial amount to alter and renovate the Property, even though without the consent or agreement of Yeung, so as to rent it out.
- (f) Fong did spend about HK\$150,000 in about June to September 2003 to partition the Property into 2 separate units - unit A ("Unit A") and unit B ("Unit B") and completely renovated them, which works included, among others, building partition walls, installing

iron gates and doors for each of the 2 units, installing 2 brand new electric distributor boxes, one for each unit, with new electric wirings, building a new kitchen and bathroom for one of the units, replacing the old windows with aluminum ones, repainting the walls and re-tiling the floors. Fong also purchased and installed new household appliances, such as air conditioners, electric heaters for the 2 units.

(g) Subsequently by late 2004, she did pay for the share of costs for the works required by the Repair Orders attributable to the Property in the total sum of HK\$16,700⁸.

(h) Fong then rented the 2 units out and pocketed the rents as her own.

9. Pausing here, it can be seen from the land search record of the Property that since May 1991 until October 2015, there was 21 instances of registration against the Property of a Charging Order Nisi and then Absolute, the latter of which was obtained by the Commissioner of Inland Revenue against Lao Kim, the Administrator of the Late Lao Po on 26 June 1991. That might explain what Yeung said to Fong regarding "existing problems".

10. Going back to the evidence of Ho and as said, in 2005, Ho and Yu moved in to live in Unit B. Since 2006, Fong also moved to live in Unit A to help out the household chores of the couple, and since late 2007, to take care of their new born baby. In 2008, Ho and Yu purchased a flat offered through the Sandwich Class Housing Scheme, and Ho, Yu, their baby and Fong moved together to live there.

11. After learning from Fong of the above and in 2006, Ho did a land search of the Property and discovered that the registered owner of the Property was the defendant. Then after, Ho accompanied Fong to District Councillor's Office and later to the office of Home Affairs Department to enquire about the situation regarding the Property. They were advised by the Free Legal Advice Scheme at the latter office that Fong's action might amount to adverse possession, which would require a period of 12 years. Ho said Fong then decided to wait.

12. After they moved out from the 2 units, Unit A and Unit B had been rented out and Fong had been pocketing the rents as her own⁹. Fong had also paid for all the shares of maintenance costs of the Building attributable to the Property. She also attended meetings of the Incorporated Owners of the Building as the owner of the Property.

13. In March 2016, Fong commenced this action.

14. As said, I accept Ho's evidence and find the above proved.

Discussion

15. On the above facts, it is clear that Fong obtained possession of the Property in December 1999 as a licensee or maybe even a trustee of Yeung/the owner. Mr Leung for the plaintiff did not contend otherwise. If Fong continued to possess the Property as a licensee/trustee, she would not have the requisite animus possidendi, as then she would be possessing the Property pursuant, and not adverse, to a permission given her by Yeung/the owner.

16. For the following reasons, I find it proved on balance of probabilities that Fong had changed her intention in mid-2003 to one that amounted to the requisite animus possidendi, based not solely on Fong's subjective intention (as said by Ho), but mostly based on Fong's acts and the circumstances as explained below:-

(a) I accept and find that Fong was put in a dilemma in June 2003. By that time, she had already paid on behalf of Yeung/the owner government rates and rents for 3 and a half years in thousands of dollars, and this outlay would be continuing, while Yeung had not contacted her, as he promised, for 3 and a half years. Yet, the repairs mandated by the Repair Orders would require the expenditure of yet another sum in tens of thousands of dollars. In the circumstance, I find it very highly probable that she had to make a decision as to what to do with the Property at the time.

(b) The alteration and renovation works done to the Property in mid-2003 were extensive and costed a substantial amount. They were done without the consent or agreement of Yeung. Fong had to know that as such, and if Yeung were to return to Hong Kong or somehow Yeung/the owner were to make a claim, she might have to yield up possession of the Property, when at the same time and in all likelihood she would not be reimbursed

by Yeung for such costs of such alteration and renovation works.

(c) Further still, as such a licensee/trustee and unless with the consent of the owner, Fong had no right to make the unauthorized alterations to the Property, and she would have been liable to Yeung/the owner, to reinstate the Property to how it had been.

(d) Yet, Fong made the alterations and borne such substantial costs; and without any prospect of recouping the same, she continued without fail to pay the government rates and rents as well as the Property's share of the repair costs of the Building.

(e) Since mid-2003, Fong had either been occupying the Property for self-use or been receiving the rents without any suggestion or indication that she intended to account the same to Yeung/the owner.

(f) Considering all these, I accept and find that when making the alterations and spending the substantial amount there for, Fong was not doing it as a licensee/trustee of Yeung/the owner, but she was doing it as the owner the Property against the rights and interests of Yeung/the owner.

17. Regarding the requisite physical possession, it is very clear, and I find, that since mid-2003, Fong had been in possession of the Property in a manner that satisfy the requirement.

18. In the premises, I conclude that Fong had shown that she had continuously possessed the Property adversely for over 12 years prior to the issuance of the Writ herein.

Disposal

19. I therefore give judgment to the plaintiff and grant the following order as sought:-

(1) A declaration that the defendant's title, interest and/or rights in and/or over the Property has been extinguished by virtue of section 17 of the Limitation Ordinance Cap 347; and

(2) A declaration that Fong Mi Yee had been in adverse possession of the Property for a period of no less than 12 years prior to the commencement of this action, and she (now her Estate) has thereby acquired and is entitled to possessory title, interest and/or right in and/or over the Property.

20. The plaintiff asked at trial that there be no order as to costs. I so order.

21. I thank Mr Leung for his assistance.

¹ [Powell v McFarlane \(1979\) 38 P&CR 452 JA Pye \(Oxford\) Ltd v Graham \[2003\] 1 AC 419](#) Wong Tak Yue v Kung Kwok Wai (1997-98) 1 HKCFAR 55 ; ;

² supra

³ supra

⁴ Wong Tak Yue v Kung Kwok Wai (1997-98) 1 HKCFAR 55

⁵ [Bolton Metropolitan Borough Council v Musa Ali Qasmi \(1999\) 77 P&CR D36](#)

⁶ See the Demands for Government Rates issued on divers date since 13 November 2000 at p.459 to 506 of Trial Bundles and the Government Rent Demands Notes issued on diver dates since 9 August 2000 at p.507 to 545 of Trial Bundles

⁷ The orders, both dated 7 May 2003 were issued pursuant to section 26 and 28(3) of the Buildings Ordinance and were registered in the Land Office as memorials UB9272022 and UB 9272023

⁸ See bank payment slips and receipts at p.600-603 of Trial Bundles

⁹ See the tenancy agreements for Unit A and Unit B at p.399 to 422; and rental receipts at p.423 to 453 of Trial Bundles