

Status:  Judicial Consideration or Case History Available

Tam Wing Chung v U Ha Min

19 April 2017

Court of First Instance

CFI

High Court Action No 1598 of 2014

HCA 1598/2014

Citations: [2017] HKEC 790

Presiding Judges: Deputy Judge Marlene Ng in Chambers

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

Counsel in the Case: Mr William Leung, of William K W Leung & Co, solicitors for the plaintiff
The defendant, acting in person and absent

Cases cited in the judgment: Wong King Lim v Incorporated Owners of Peony House [2013] 4 HKC 295
Law Yuk Fong v Man Chung Wai (unrep., HCA 2195/2015, [2017] HKEC 57)
Nam Ching Wun v Tsun Un Pawn Shop (unrep., HCA 2151/2008, [2016] HKEC 2540)
Tsang Cho Kiu v Lam Tsat Fuk (unrep., HCMP 1077/2013, [2013] HKEC 1955)

Judgment:

Deputy Judge Marlene Ng in Chambers

Introduction

1. The defendant (" D ") was/is the registered owner of premises known as Rear Portion on 4th Floor, No 68A To Kwa Wan Road, Kowloon (" Premises "). 1 The plaintiff (" P ") claimed that since 1993 he and his then wife Madam Wong Yuk Fong (" Ex-wife ") had occupied/used the Premises for a continuous period in excess of 12 years.

Procedural history

2. On 14 August 2014, P commenced the present action against D for declarations that (a) D's title (if any) to the Premises had been extinguished prior to the commencement of the present action by virtue of the provisions of the Limitation Ordinance Cap 347 (" LO "), (b) P was the owner of the Premises, (c) all the estate, right, title, interest, term and term of years, claims and demands and all rights of way (if any), privileges, easements and appurtenances in and to the Premises were vested in

P, and (d) P was entitled to exercise all rights of occupation and possession of the Premises which D would be entitled to exercise as the registered owner thereof. P also sought an order that P be registered as the owner of the Premises in the Land Registry, and for all consequential directions to compel D to take steps to convey/transfer title over the Premises to P.

3. The Writ of Summons specified service addresses in Burma (now Republic of the Union of Myanmar) ("Burma" or "Myanmar") for D. On 25 August 2014, P filed the affirmation of his solicitor Mr Leung King Wai William ("Mr Leung") for leave to issue a concurrent Writ of Summons and to serve the same out of jurisdiction on D in Burma. Exhibited to such affirmation is P's witness statement dated 22 August 2014 with enclosures ("Statement").

4. On 12 September 2014, Master H Au-Yeung granted leave for P to issue a concurrent Writ of Summons and to serve the same out of jurisdiction on D in Burma.

5. On 20 October 2014, P issued the concurrent Writ of Summons in the present action. By November 2014, P's solicitors realised the concurrent Writ of Summons could not be served on D at the available service addresses in Burma as they were incomplete, incorrect and/or outdated.

6. On 28 August 2015, P filed the affirmation of Min Thein (an advocate or practising lawyer of the Supreme Court of Myanmar employed by Rajah & Tann NK Legal Myanmar Company Limited) that set out his legal opinion on the laws of Myanmar as to service of process. He opined that all Writs of Summons (or summonses) under Myanmar law should be personally served, but the Myanmar court may order substituted service if the defendant is evading service or the writ/summons cannot be served in the ordinary way, but the plaintiff will have to establish that every reasonable effort to trace the defendant has been unsuccessful. He further opined that service of a writ/summons by way of advertisement in the English language or Myanmar language newspaper is an accepted mode of substituted service under Myanmar law, which applies equally to service of a properly notarised and legalised writ/summons issued out of a foreign court without need for further order from a Myanmar court.

7. On 4 September 2015, Master S Lo granted leave for substituted service of the concurrent Writ of Summons and such order on D by substituted service by way of advertisement in the Myanmar Times in Burma once in the English language and once in the Myanmar language ("Substituted Service Order").

8. On 24 June 2016, P filed the 2nd affirmation of Min Thien to affirm that notice of the present action and the Substituted Service Order had been duly advertised in the Myanmar Times once in the English language on 29 January 2016 and once in the Myanmar language on 2 June 2016. He confirmed such service was an accepted mode of substituted service under Myanmar law without need for further order by a Myanmar court. He further confirmed that under Myanmar law notice of the present action and the Substituted Service Order had been served by the aforesaid advertisements and effected on 2 June 2016.

9. The 28-day period for D to file acknowledgment of service had expired, but D had not filed any acknowledgment of service and/or any Defence to date.

10. On 20 October 2016, Master J Wong granted retrospective leave for renewal of the concurrent Writ of Summons.

11. On 24 November 2016, P filed a summons ("Summons") pursuant to Order 65 rules 5(1)(d) and 9 and Order 13 rule 6 of the Rules of the High Court ("RHC") to apply for (a) leave to dispense with service of the Summons and (b) leave to enter judgment against D in respect of the reliefs set out in paragraph 2 above.

12. On 24 December 2016, P filed Mr Leung's 10th affirmation for leave to dispense with the requirement of service of the Summons under Order 65 rules 5(1)(d) and 9 of the RHC. On 5 January 2017, Master Hui granted an order that service of the Summons be dispensed with pursuant to Order 65 rule 9 of the RHC.

13. The Summons came before me for hearing on 12 April 2017 ("Hearing"). P appeared by his solicitor Mr Leung. D was absent.

Declaratory relief and default judgment

14. I rely on but will not repeat here the legal principles set out in paragraphs 13-20 in my judgment in *Law Yuk Fong v Man Chung Wai & Another* HCA 2195/2015

, unreported. 2 Here, P claimed to be the adverse possessor in occupation of the Premises, and the sole relief sought in the present action was declaratory relief. D did not participate in the proceedings despite being notified by substituted service, and P had made the Statement to condescend upon the merits of his claim. By reason of the discussion on the merits below, I am satisfied that justice could not be done if P was to be denied the declaratory relief sought.

Legal principles on adverse possession

15. I rely on but will not repeat here the principles set out in paragraphs 22-23, 25-29 and 32-34 of Law Yuk Fong .

P's claim

16. Mr Tam Chung Yip (" Father ") and Madam Wong Kam Chi (" Mother ") were P's parents who had since passed away in 2004 and 1983 respectively. D was a Malaysian Chinese businessman. The Father was born in 1920, and until his death he was D's sworn brother. P was born in Mainland China on 14 September 1965. The Father (then 45 years old) brought P to Hong Kong a few days after his birth. Since then until 1986, P lived with the Father at a flat in Luen Wo Hui, Fanling, New Territories (" LWH Flat ").

17. In/about 1964 (ie shortly after D purchased the Premises in 1962), D left Hong Kong to return to Burma. Before he left for Burma, D asked the Father (then 44 years old) to look after the Premises for him and he left the title deeds/documents in respect of the Premises (" Title Deeds ") with the Father for safe custody.

18. The Father let the Premises to various tenants over the years:

July 1972 - August 1977: The Premises were let to a Mr Wong Yi Fung.

December 1977 - December 1992: By 3 successive written tenancy agreements from 8 December 1977 to 7 December 1985 and thereafter by an oral tenancy agreement until December 1992, the Premises were let to a Mr Ho Man Ming (" Mr Ho ").

P produced copies of the written tenancy agreements in (b) above and also rental receipts issued by the Father to the aforesaid 2 tenants.

19. In 1983 (when P was 18 years old), the Mother passed away. In 1986, P moved out of the LWH Flat and rented a flat in Kowloon Tong where he resided with his friends until 2 January 1992.

20. The Father made various efforts over the years to locate D's whereabouts but they were to no avail. In 1987, the Father (who was then 67 years old) instructed Messrs Chan, Law & Wai to send 3 letters all dated 12 November 1987 to D's 3 last known addresses in Burma with a view to find out his intentions in respect of the Premises. But there was no reply. On 2 February 1988, the Father made a statutory declaration to record his unsuccessful efforts over the years in locating D's whereabouts, which statutory declaration had been registered in the Land Registry under memorial no 3636009.

21. On 3 January 1992, P (then 26 years old) married the Ex-wife. P and the Ex-wife (" Couple ") lived with the Ex-wife's younger sister Madam Wong Yuk Ha (" 1st Sister ") and her family at the 1st Sister's flat in Shum Shui Po (" SSP Flat ").

22. The Father instructed Messrs Chan, Lau & Wai to determine the tenancy of the then tenant of the Premises Mr Ho. On 3 January 1992, Messrs Chan Lau & Wai gave written notice to Mr Ho to determine the tenancy and to demand delivery of vacant possession as well as payment of arrears of rent. Despite repeated requests and demands, Mr Ho still failed to comply with such demand. So the Father instructed Messrs Chan, Lau & Wai to commence legal action against Mr Ho in the Lands Tribunal to recover possession of the Premises and arrears of rent. On 18 May 1992, the Father obtained judgment against Mr Ho. On 7 December 1992, the Father recovered possession of the Premises.

23. Since 21 December 1992, the electricity account in respect of the Premises was in the name of the Father as evident from a copy letter by CLP Power Hong Kong Limited dated 5 June 2014.

24. P claimed that ever since his marriage he had any eye on the Premises. On 7 January 1986, the Father purchased Flat L, 3rd Floor, Po Hing Building, No 12 Boundary Street, Kowloon, Kong Kong (" PHB Flat ") for his own residence. By the first quarter of 1993, P felt he had to look for a matrimonial home for the Couple as they had been married for more than a year and it was unsuitable for them to share the SSP Flat with the 1st Sister and her family any longer. In any event, the SSP Flat was too small to accommodate both families. Since the Father continued to reside at the PHB Flat, P thought

the Couple could enter into possession of and live at the Premises (which were not owned by the Father). P had never met D all his life and thought it was unlikely that D would return to Hong Kong to claim possession of the Premises.

25. P claimed that since the first quarter of 1993 he was determined to occupy and possess the Premises to the exclusion of others (even D and the Father) for as long as possible. P took the keys to the Premises from the Father and lived at the Premises with the Ex-wife. P told the Father he was not prepared to live with the Father because of their differences in value/ opinion, and further told the Father to stay at the PHB Flat. After the Couple moved into the Premises, P replaced the door/keys to prevent the Father from entering into the Premises. P had since obtained from the Father the Title Deeds, and the Father continued to live alone at the PHB Flat and never visited the Premises.

26. After the Father passed away on 18 January 2004, probate of the Father's estate was granted to P on 18 August 2005. P was the sole beneficiary of the Father's estate under his will dated 6 September 1994, but the Premises (not being the Father's asset) were not part of his estate.

27. After P entered into occupation of the Premises in 1993, he assumed management and control of the Premises and, whether by himself or through the Ex-wife's youngest sister Madam Wong Yuk Fan ("2nd Sister") as licensee continued to openly occupy and use the Premises (either as his matrimonial home and/or for his use/benefit to the exclusion of others including the D and the Father) as trespasser and de facto owner without interruption:

1993-1997 (1st Period): P took the keys to the Premises from the Father and entered into possession/occupation of the Premises with the Ex-wife. P then excluded the Father from the Premises by replacing the door and keys. Since entering into occupation of the Premises, P carried out renovation and repairs by replacing the floor with new floor materials, repainted the inside walls, replaced the entrance locks (with new keys kept only by P and the Ex-wife). Only the Couple occupied the Premises during this period.

1997-2007 (2nd Period): On 21 February 1997, the Couple as joint tenants purchased a Home Ownership Scheme property at Flat 14 on 21st Floor of Block A, Hiu Lai Court, No 21 Kiu Kwong Street, Kowloon ("HLC Flat"). Before the Couple moved out of the Premises and into the HLC Flat, P orally granted a licence for the 2nd Sister to move into and live at the Premises without payment of licence fee on condition that she looked after the Premises for P and paid the outgoings of the Premises (eg management fees and utilities bills). Upon receipt of 3 demand letters dated 26 October, 15 November and 11 December 2001 by Messrs S K Lam, Alfred Chan & Co, solicitors for the incorporated owners of the building where the Premises were situated, P made contributions towards the Premises' share of the cost of building renovation. During this period, the Premises were occupied by the 2nd Sister according to the aforesaid licence.

2007-2013 (3rd Period): On 15 August 2007, the Couple sold the HLC Flat and moved back to live at the Premises together with the 2nd Sister. At/about the end of June 2008, the 2nd Sister moved out of the Premises, but the Couple continued to live there. In 2008, P commissioned a worker to carry out another extensive renovation/repair to the Premises for a fee of \$50,000. During this period, the Premises were initially occupied by the Couple with the 2nd Sister until the end of June 2008, and thereafter occupied solely by the Couple.

2013 - present (4th Period): On 14 January 2013, the Couple divorced and the Ex-wife moved out of the Premises. Since then P lived alone at the Premises.

28. Since P came into possession of the Premises in the first quarter of 1993, various accounts in relation to the Premises were placed under his name:

1st Period: The telephone account was in P's name since 1993 as evident from the relevant telephone bills.

3rd Period: Since 8 November 2007 electricity bills were addressed to P, and he paid such utility bills. Since 1 August 2007 demand notes for rates and government rent were also addressed to P.

4th Period: P presently paid all utility bills (electricity, water and telephone), rates, government rent and management fees in respect of the Premises.

29. During the 1st to 4th Periods, P used and still uses the address of the Premises as his

correspondence and residential addresses for all purposes, including utilities, rates, government rent and management fees bills and/or demand notes, and he paid such outgoings for the whole period save for the period from February 1997 to June 2008 when the 2nd Sister lived at the Premises under his permission and paid such expenses on his behalf.

30. P therefore claimed he had been in continuous and uninterrupted adverse possession of the Premises for a period of over 20 years since 1993, and sought declarations to such effect.

Discussion

31. Here, D did not give notice of intention to defend or file any affidavit evidence. On the materials before the court, it was plain that P by himself, the Ex-wife and/or his licensee the 2nd Sister had been in continuous and uninterrupted occupation of the Premises since 1993. There was no evidence of any claim to title by D or any other person since then.

32. Since the first quarter of 1993, P and the Ex-Wife had been in occupation of the Premises treating it as their own property and residence. They replaced the main door and keys, and took possession of the Title Deeds. They also kept out the Father who never lived at or visited the Premises. During the 1st to 4th Periods, P repaired, maintained and improved the Premises, and paid utility bills, rates, government rent and management fees in respect of the Premises (with bills and demand notes issued to P such that it was likely that P was the account-holders). P also granted a licence over the Premises to the 2nd Sister. In my view, it was clear that throughout the 1st to 4th Periods, P was an adverse possessor of the Premises.

33. In the circumstances, I am satisfied P had established factual possession over the Premises for over 12 years before commencement of the present action, and that the nature of his use and occupation of the Premises reflected an intention to exclusively occupy the Premises against D and the world at large. I find P had established possessory title over the Premises against the paper owner, ie D.

Conclusion

34. Accordingly, at the Hearing, I granted the following order:

a declaration that D's title, interest and/or rights in and/or over the Premises has been absolutely extinguished by virtue of section 17 of the LO;

a declaration that P has been in adverse possession of the Premises for a period of no less than 12 years prior to the commencement of the present action, and has thereby acquired and is entitled to possessory title, interest and/or rights in and/or over the Premises; and

there be no order as to costs of this action and of the Summons.

35. Mr Leung conceded P could not ask for an order to become the registered owner of the Premises. I agree there was no basis to seek such relief. Acquiring a possessory title through possession for the duration of the limitation period (even if established) does not operate as a statutory conveyance and does not entitle the holder of possessory title to be registered as owner in substitution of the paper-title owner. 3

1D purchased the Premises for the price of \$32,000 by an assignment dated 27 December 1962 registered in the Land Registry under memorial no UB386161

2HCA 2195/2015 (unreported, 16 January 2017)

3see

Wong King Lim v Incorporated Owners of Peony House [2013] 4 HKC 295
, 37,

Tsang Cho Kiu v Lam Tsat Fuk HCMP 1077/2013
, Mr Recorder Jat SC (unreported, 10 December 2013) paras 7-20, and

Nam Ching Wun v Tsun Un Pawn Shop & Others HCA 2151/2008 (unreported
, 22 November 2016) paras 164-170

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