Fones Christina v Cheong Eng Khoon Roland
[2005] SGHC 87

Case Number : OS 1314/2004

Decision Date : 03 May 2005

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Khoo Boo Jin (Wee Swee Teow and Co) for the plaintiff; Marina Chin (Tan Kok Quan Partnership) for the defendant

Parties : Fones Christina — Cheong Eng Khoon Roland

Land – Adverse possession – Conversion of land into registered land – Adverse possession acquired prior to conversion – Whether defendant entitled to claim adverse possession of land – Whether s 50 of Land Titles Act applied retrospectively – Section 50 Land Titles Act (Cap 157, 1994 Rev Ed)

Land – Adverse possession – Factors constituting adverse possession of land – Whether defendants had continuous, open and exclusive physical possession coupled with intention to possess – Whether aggregation of separate periods of possession allowed

3 May 2005

Tay Yong Kwang J:

1 In this action, the plaintiff claims a declaration that she is entitled to possession of that part of Lot 99567W Mukim 15 highlighted in yellow in the plan annexed to the Originating Summons ("the strip of land in issue") as the owner of an estate in fee simple and that the defendant has no right, title or interest in the strip of land in issue by adverse possession.

The plaintiff's case

2 The plaintiff is the owner and occupier of the property at Lot 99567W Mukim 15 known as 12 Toronto Road ("No 12"). She became the owner on 14 September 1966 when No 12 was then Lot 20-81 Mukim 15. On 20 December 1966, No 12 was brought under the regime of the Land Titles Act (Cap 157) ("LTA") through the then current Land Titles Ordinance 1956 (No 21 of 1956), ("1956 LTO") and a qualified Certificate of Title was issued in respect of it. On 2 April 2002, the Certificate of Title became unqualified upon the cancellation of the caution.

3 The defendant is the owner and occupier of the property at Lot 99568V Mukim 15 known as 10 Toronto Road ("No 10"). His late father, Cheong Chee Hock, had been the owner of No 10 since May 1960. No 10 was then known as Lot 20-80 Mukim 15. In April 1991, the defendant became the owner of No 10 when the property was conveyed to him.

4 No 10 is at the immediate right of No 12 when one looks at the two properties from outside their main gates. No 12 is on higher ground, with a slope declining towards No 10. The legal boundary line between the two properties, which was somewhere in the middle of the slope, was marked by two boundary stones affixed in the ground.

5 When the plaintiff first moved into No 12, there was a hedge between the two properties but the hedge was planted at the top of the slope rather than along the legal boundary line. The said hedge was L-shaped and continued along the front of No 12. No 10 also had a hedge running along its front but that hedge stopped at the legal boundary line up the slope. There was therefore a small gap

between the hedges of No 10 and of No 12. All this was evidenced by field sketches done by the government authorities in January 1955.

6 In the 1970s, the plaintiff's late husband and the defendant's late father decided to replace the hedge with a fence. The fence was constructed along the line where the hedge of No 12 used to be, that is, along the top of the slope. Sometime in the 1980s, the two men replaced the old fence with a new chain link fence and that stands to this day, still along the top of the slope. Part of the slope that belonged to No 12 was therefore on the other side of the fence. This portion of the slope between the fence and the legal boundary line is the strip of land in issue in this action. According to the plaintiff's surveyor, it measures 41.2m². However, the defendant's surveyor measured it as occupying 40m².

7 The plaintiff is now 73 years old and is living at No 12 with a maid. She decided to sell No 12 because of her age and health problems. However, potential buyers have expressed concern that the fence between No 12 and No 10 does not run along the legal boundary line. One interested party decided not to proceed with the purchase of No 12 after speaking to the defendant and learning that the defendant would make a claim against No 12 for the strip of land in issue. The plaintiff, upon learning about the defendant's intention, was surprised and disappointed as that was the first time she had heard about his intended claim against her property.

8 Although the defendant had instructed surveyors to survey the boundary between the two properties in May 2004, he did not write to the plaintiff to make any claim in respect of the strip of land in issue and did not lodge any claim or caveat against it. In June 2004, the plaintiff wrote a letter to the defendant to explain that she was getting on in years and needed to move to a smaller house and asked for his written confirmation that he would not object to moving the fence to its correct position along the legal boundary line upon the sale of No 12. The defendant did not give her the written confirmation sought.

9 In August 2004, the plaintiff's solicitors wrote to the defendant repeating the request for such written confirmation. On 23 August 2004, the defendant, through his solicitors, indicated in writing for the first time that he was entitled to the strip of land in issue by way of adverse possession. The plaintiff's solicitors then invited the defendant to commence proceedings to stake his claim if he was serious about it. As the defendant refused to do so, the plaintiff was compelled to commence this Originating Summons so that she would be able to sell her property.

10 This Originating Summons, with its supporting affidavits, was filed on 6 October 2004 but it was only on 5 November 2004 that the defendant first lodged a caveat claiming an interest in the strip of land in issue by virtue of having acquired title by way of adverse possession. The caveat did not state the date such title was allegedly acquired. However, in his affidavit filed in these proceedings, the defendant claimed that the period of adverse possession was that prior to 20 December 1954 and all the way up to 19 December 1966 ("the relevant 12-year period"), a continuous period of at least 12 years before No 12 was brought under the LTA.

11 The plaintiff submitted that as the defendant was not in possession of the strip of land in issue during the relevant 12-year period, his claim could only be based on the adverse possession of his predecessors-in-title, none of whom had made any allegation of adverse possession, and the burden of proving such adverse possession rested on him. The defendant's predecessors-in-title during the relevant 12-year period were Emile Le Mercier (December 1954 to May 1960) and the defendant's father (May 1960 to December 1966). Both have passed away. The plaintiff's predecessor-in-title in respect of No 12 during that period was the late Francis Anthony Rodrigues

(December 1954 to September 1966).

12 In January 1955, there was no fence or hedge enclosing any part of the strip of land in issue. There were only the L-shaped hedge in No 12 and a separate hedge in No 10 which stopped at the legal boundary line. Those hedges have since been replaced by fences. Surveys done by the plaintiff's and the defendant's respective surveyors showed that the present fence and the former hedge at the top of the slope could not have been in exactly the same position. A hedge, being a natural feature, would have a thickness which could vary along its length and also may not be in an exact straight line from end to end. There were also discrepancies in the dimensions stated in both surveys.

13 In 1997, the plaintiff made a successful claim by way of adverse possession on a narrow strip of land on the other side of No 12, measuring some 23.8m². That strip had not been brought under the LTA and was maintained by the plaintiff since 1966. She made the claim against it after the Land Office informed her that it had been abandoned for three years or more and would be forfeited to the State unless a claim was established within six months from its notice to her. The owner of that strip of land could not be located and the plaintiff's application to court was therefore advertised in the newspapers. Her claim was uncontested. During one of her meetings with the defendant, he stated that since she had successfully claimed some 24m² against the owner at the other side of No 12, he should be entitled to claim at least that amount of land from her on the side in issue. The plaintiff failed to see the logic of this contention.

14 During the course of these proceedings, the defendant even sought to broaden the scope of his claim in adverse possession by claiming not only the strip of land in issue but also a small grass-covered plot outside his wooden fence at No 10, sloping towards the road and supported by No 12's low retaining wall ("the smaller plot in dispute"). This smaller plot has not been the subject of any survey.

The defendant's case

15 The defendant, who was born on 7 December 1946, stated that he would have seen No 10 sometime in 1954 when his father was looking for a property to buy for the family. He remembered that the physical boundary between No 10 and No 12 was a hedge at the top of the slope. After considering various housing estates, his father decided to buy a property in the Namly estate. However, the developer went into financial difficulty and his father withdrew from the deal. Other properties were then considered, including those which had been seen before. In 1960, his father purchased No 10 from Emile Le Mercier, the first owner since July 1954.

16 Emile Le Mercier has passed away but the defendant spoke to Mrs Le Mercier who recalled the physical boundary being located at the top of the slope and how she used to plant flowers on the slope, treating it as part of No 10. No affidavit was made by Mrs Le Mercier on this. The defendant explained that the elderly lady was extremely reluctant to discuss her days at No 10 as that brought back some very unhappy memories for her and he did not want to press her to make any statement or affidavit. However, he managed to track down one of his former neighbours, Mathiew Roy Stevens ("Mathiew"), who has made an affidavit in these proceedings.

17 Toronto Road is a sloping road and many of the properties along it have slopes separating their compounds, with the legal boundaries running along the slopes but with the physical boundaries invariably at the top of the slopes. That was the way the houses along that road were developed as it was the sensible and practical thing to do. Similarly, the initial physical boundary between No 10 and No 12 was a hedge at the top of the slope. Later, a fence was erected where the hedge stood.

Some time later, the hedge was removed, leaving only the fence to separate the two properties. When that fence was replaced with another one, the plaintiff's husband had it erected along the top of the slope again. The fence thus came to be where it stands now because of the physical boundary put in place by the developers and not because the plaintiff and her husband permitted it to be so.

18 The owners of No 10 have always treated the slope as part of their land and they maintained it by having the grass growing thereon cut regularly and reinstating it whenever soil erosion took place. The defendant's family had pet dogs which enjoyed running up and down the slope, contributing to the soil erosion. Some seven years ago, a large section of the slope at the back of the compound collapsed and the defendant had to spend about $15,000 to put it right. At no time did the plaintiff attend to the problem or pay for the rectification works.

19 In 1991, when the defendant became the owner of No 10, the house, the fence and the front gates were torn down and the entire property was rebuilt, with the strip of land in issue regarded as part of No 10. There was no protest from the plaintiff that the fence separating the two properties should be re-located to the legal boundary. Similarly, when the plaintiff renovated No 12, she maintained the physical boundary between the two properties at the top of the slope.

20 The field sketches prepared by the government authorities in January 1955 also showed that the physical boundaries did not coincide with the legal boundaries in the properties along Toronto Road. Since the first owners of No 10 bought it in July 1954, the hedge at the top of the strip of land in issue must have been planted there before 20 December 1954.

21 The defendant explained that he referred to the plaintiff's claim on the other side of No 12 only in the context of trying to achieve an amicable, holistic solution to the dispute. He had suggested involving the other property owners along Toronto Road as they all faced the same difficulty of having physical boundaries which did not coincide with the legal boundaries. However, the plaintiff was only interested in having the strip of land in issue so that she would not have any problems selling No 12. The negotiations therefore fell through.

22 The defendant also claimed that he realised, after consulting a surveyor, that the area marked out earlier by him as the strip of land claimed in adverse possession actually showed only the area in so far as it was within the physical boundary of No 10. He now claimed that his adverse possession extended to the smaller plot in dispute mentioned earlier (in [14] above).

23 In July 2004, the plaintiff sent her surveyors to the defendant's property without prior notice. Nevertheless, the defendant accommodated them. A subsequent visit made by him and his wife to No 12 to re-open negotiations did not result in any resolution. The plaintiff then sprung another surprise on him by attempting service of the court documents on him at No 10 instead of asking his solicitors whether they had instructions to accept service of process. As he was out of Singapore, substituted service was thereafter effected.

24 Mathiew (see [16] above), a writer, was born on 28 September 1949. His uncle became the owner of 45 Florida Road around June 1954. Florida Road links up with Toronto Road. From around August 1954 until 1974, Mathiew stayed over in his uncle's house frequently on weekends and during most of the school holidays. It became like a second home to him and he became familiar with the surroundings, including Toronto Road. He also got to know many of the boys living in that housing estate, including the son of Emile Le Mercier (the previous owner of No 10). In 1974, Mathiew, together with his parents and his sister, moved into 45 Florida Road and lived there until 1981.

25 Mathiew remembered the slope at No 10. He and the boys in the neighbourhood often used it as a slide while Emile Le Mercier lived there and continued to do so when the defendant's father became the owner of No 10. He recalled that the hedge separating No 10 and No 12 was at the top of the slope and that a fence was later erected there. Subsequently, the hedge was removed, leaving only the fence there.

The decision of the court

26 Adverse possession may be established by aggregation of separate periods by different persons so long as there is continuity between the said periods (*Jubilee Electronics Pte Ltd v Tai Wah Garments & Knitting Factory Pte Ltd* [1996] 2 SLR 39). The adverse possessor must also show that he was in factual possession of the land in question and that he had the requisite intention to possess it: see Robert Megarry & William Wade, *The Law of Real Property* (Sweet & Maxwell, 6th Ed, 2000) at p 1308. The possession must be actual, open, continuous and exclusive, and without the licence of the documentary owner of the land: see Kevin Gray & Susan Francis Gray, *Elements of Land Law* (Oxford University Press, 4th Ed, 2004) at p 403.

27 Emile Le Mercier (the first owner of No 10) and Cheong Chee Hock (the defendant's father) were the owners of No 10 during the relevant 12-year period. The plaintiff pointed out that neither of them made any claim of adverse possession of the strip of land in issue. However, Emile Le Mercier could not stake such a claim since he was in occupation of No 10 for a period of some six years only. The defendant's father had no occasion to expressly state that he was making such a claim. Indeed, there was never any need to.

28 The physical boundary was always at the top of the slope and the strip of land in issue was always regarded by the owners of No 10 as part of No 10. Even the plaintiff and her late husband showed by their conduct (in particular, leaving the hedge where it was and building a fence where the hedge stood) that they had always accepted that position. They could have been mistaken as to where the legal boundary was but that did not convert what was adverse possession by the defendant and his predecessors-in-title into occupation by permission of the true owner. Exclusive possession does not entail the erection of high fences or the planting of hedges all round the strip of land in issue, although such action would be strong evidence of an intention to exclude others. There was no need to encircle the strip of land in issue in any event because the plaintiff and her husband had already shut themselves out by their L-shaped hedge, leaving it to the owners of No 10 to maintain that strip (for instance, cutting the grass thereon) and to do what they wished with it. If there had been an intruder on the strip of land in issue, one would imagine it would be the owners of No 10 who would question him as to his purpose there. As far as the owners of No 12 were concerned, the intruder would have been on the other side of the hedge or the fence and in No 10. Clearly, there was continuous, open and exclusive physical possession coupled with the intention to possess. The original hedges were already in place in January 1955 and it is therefore entirely reasonable to hold that the position must have come about at least some months before January 1955.

29 I note the contention that hedges are natural features which would change in size over time, that the field sketches of January 1955 would not show the precise location of the hedges, that the hedge and the original fence that was constructed between No 10 and No 12 could not have been on the same straight line and that there were some discrepancies in the dimensions stated in the separate surveys done on behalf of the parties. With respect, I think that is a contention in trivialities. The hedge would have been grown on the flat portion of the land in No 12 at the edge just before the land begins to slope downwards toward No 10. Logically, the original fence would have

been erected along the side of the hedge nearer to No 10 so that the fence enclosed the hedge within the compound of No 12. The fence would have been erected along a straight line and any part of the hedge that got in the way of the builders would have been easily trimmed off. At any rate, taking the existing fence as the demarcation line would be the most sensible thing to do.

30 On the other hand, I did not accept the defendant's belated claim of adverse possession of the smaller plot in issue. It did not feature until very late in these proceedings and appeared to have been included just for good measure. The evidence also did not support the defendant's claim to this smaller plot outside the physical boundary of No 10 because the plaintiff's external, low retaining wall extended to this smaller plot.

31 The plaintiff argued that even if the defendant was able to show adverse possession, the defendant had failed to commence any proceedings or lodge any application in respect of his claim within six months from 1 March 1994. The plaintiff relied on the Court of Appeal's decision in *Balwant Singh v Double L & T Pte Ltd* [1996] 2 SLR 726 and submitted as follows. Applying that decision to the facts here, No 12 was brought under the 1956 LTO on 20 December 1966 and, as at 1 March 1994, was therefore registered land held under the provisions of the Land Titles Act (Cap 157, 1985 Rev Ed) which was repealed by the Land Titles Act 1993 (Act 27 of 1993) ("the 1993 LTA") (when it came into force on 1 March 1994). The adverse possessor of land in No 12 could rely on ss 172(7) and 172(8) of the 1993 LTA since he was in adverse possession of registered land and was entitled to lodge an application for a possessory title to the land under the provisions of the repealed LTA. However, s 172(7) of the 1993 LTA would not apply to the defendant because as at 1 March 1994, no pending application for a possessory title had been lodged by him. Under s 172(8) of the 1993 LTA, the defendant could, within six months from 1 March 1994, "make an application to court for an order to vest the title in him or lodge an application for a possessory title to the land and the application shall be dealt with in accordance with the provisions of the repealed Act in force immediately before such date". Since the defendant failed to take advantage of the said s 172(8) within the stipulated period, then under s 50 of the 1993 LTA, "no title to land adverse to or in derogation of the title of a proprietor of registered land shall be acquired by any length of possession by virtue of the Limitation Act or otherwise". The defendant only made a claim on the strip of land in issue in November 2004 and was therefore a decade too late.

32 The Court of Appeal in *Balwant Singh v Double L & T Pte Ltd* held that by reason of the changes effected by the 1993 LTA, as of 1 March 1994, there were only three categories of claims for adverse possession:

(a) for land held under the common law system, if the adverse possessor did not have twelve years of adverse possession as of 1 March 1994, he would not be able to make a claim; conversely, if he had the requisite 12 years, he could rely on s 177(3) of the 1993 LTA to preserve his title;

(b) for registered land held under the provisions of the repealed LTA, the adverse possessor could rely on ss 172 (7) and 172(8) of the 1993 LTA;

(c) for registered land held under the provisions of the 1993 LTA, no adverse possession claims were allowed unless the said ss 172(7) or 172(8) applied.

The court also said that s 50 of the 1993 LTA did not apply retrospectively. It applied only in respect of adverse possession which had not crystallised into a possessory title when the land became registered land and not to adverse possession which had so crystallised because, in the latter

situation, the title of the documentary owner would already have been extinguished at the time of the conversion to registered land. As noted by the court (at 732, [24]), although s 177(3) of the 1993 LTA was omitted from the 1994 edition of the LTA (Cap 157, 1994 Rev Ed), it remained in force by virtue of s 5 of the Revised Edition of the Laws Act (Cap 275, 1995 Rev Ed).

33 Based on my finding above that adverse possession occurred some months before January 1955, the defendant's possessory title had already crystallised before 20 December 1966 when No 12 was brought under the provisions of the 1956 LTO. Accordingly, the plaintiff's title to the strip of land in issue was extinguished by the operation of the Limitation Ordinance in force at the material time when No 12 was still under the common law system. The plaintiff's claim in this action therefore fails.

34 I made the following orders:

(a) this Originating Summons is dismissed with costs;

(b) the defendant is entitled to adverse possession of the strip of land in issue, as indicated in the survey plan at p 13 of the defendant's Affidavit sworn on 24 November 2004, but not the smaller plot in dispute and that all rights and title of the plaintiff to the said strip of land in issue have been extinguished;

(c) the Registrar of Titles is to register this Order of Court accordingly; and

(d) the costs of Summons in Chambers No 7020 of 2004 (the plaintiff's application for leave to admit a further affidavit of Ong Lok Ping filed on 23 December 2004) be costs in the Originating Summons.

Claim dismissed. Declaration made in defendant's favour.