

**IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF FIRST INSTANCE  
ACTION NO 1866 OF 2014**

BETWEEN

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TANG SAU LIN

Plaintiff

and

YOUNGFIELD LIMITED	1 <sup>st</sup> Defendant
WELLMAKE INVESTMENTS LIMITED	2 <sup>nd</sup> Defendant
BIXON INDUSTRIES LIMITED	3 <sup>rd</sup> Defendant
SILVERLITE COMPANY LIMITED	4 <sup>th</sup> Defendant
LAM YUM CHUNG	5 <sup>th</sup> Defendant
EASY PLUS DEVELOPMENT LIMITED	6 <sup>th</sup> Defendant
JODWELL PROPERTIES LIMITED	7 <sup>th</sup> Defendant
GLOBAL TOP PROPERTIES LIMITED	8 <sup>th</sup> Defendant
CAPITAL WHEEL INVESTMENT LIMITED	9 <sup>th</sup> Defendant
MILLION GRAND SUCCESS LIMITED	10 <sup>th</sup> Defendant
CHING MING INTERNATIONAL DEVELOPMENT LIMITED	11 <sup>th</sup> Defendant
RYSUN COMPANY LIMITED	12 <sup>th</sup> Defendant
QIAO WU (NOMINESS) LIMITED	13 <sup>th</sup> Defendant
WEALTHY CHANNEL DEVELOPMENT LIMITED	14 <sup>th</sup> Defendant
CHIK POON YIN	15 <sup>th</sup> Defendant
TAK MOU SHING COMPANY LIMITED	16 <sup>th</sup> Defendant
MEXAN TRADING LIMITED	17 <sup>th</sup> Defendant
UNITED SUMMIT VENTURES CORP.	18 <sup>th</sup> Defendant
GOLDEN ELEMENT LIMITED	19 <sup>th</sup> Defendant
WU YI CONSTRUCTION COMPANY LIMITED	20 <sup>th</sup> Defendant

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Before: Deputy High Court Judge R Ismail SC in Court

Dates of Hearing: 2 – 4 and 8 May 2018

Date of Judgment: 22 June 2018

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JUDGMENT

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*Introduction*

1. Tang Sau Lin, the plaintiff (“P”), is a hawker. She claims adverse possession of a certain area of land around a staircase in a tenement building in Jardine’s Crescent, Causeway Bay. The staircase is a common area co-owned by the owners of land at Nos 9 and 11 Jardine’s Crescent.<sup>1</sup>

2. The defendants are the legal owners of such land. There are 20 defendants:

(a) Only Asia Million Investment Limited (“D2”) and Jodwell Properties Limited (“D7”) have participated in the trial.

(b) The 1<sup>st</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup> – 18<sup>th</sup> and 20<sup>th</sup> defendants have agreed by way of *Tomlin* order with P to be bound by the final judgment/order in this action between P and the participating defendants (ie D2 and D7).

(c) The 3<sup>rd</sup>, 9<sup>th</sup> and 19<sup>th</sup> defendants have filed an acknowledgment of service but no defence. The 4<sup>th</sup> defendant has not filed an acknowledgment of service but there is evidence of service on it. None of these defendants have participated in the proceedings.

3. Shortly before the trial, legal aid was withdrawn from P, so she has appeared in person. D2 and D7 were represented by Ms Carol Shek. At the PTR, when P was legally represented, the parties were directed to translate all documents into English. By the time of trial, P was not legally

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<sup>1</sup> This is the address of the back of the relevant buildings; the address of the front of the buildings is No 50 and No 48 of Yun Ping Road

represented and could not speak English. The legal team for D2 and D7 produced Chinese translations of essential English documents (ie witness statements and closing submissions) for P's benefit.

4. The trial was heard over 4 days, 2 – 4 and 8 May 2018. The oral closing submissions of D2 and D7 were postponed by 1 day to allow their written closing submissions to be translated into Chinese and provided to P on 7 May.

5. During the trial, the following witnesses gave evidence:

- (a) For P: P and Lau Kai Ming, a stallholder in Jardine's Crescent ("Mr Lau");
- (b) For D2 and D7: Kwong Jimmy Cheung Tim, director of D2 ("Mr Kwong"), Wellington G Chung, director of D7 ("Mr Chung"), and So Kam Fai, employee of D6 and D20 ("Mr So").

6. A single expert report dated 12 September 2015 was adduced into evidence. This report summarises the lay-out of the Building and Disputed Area (as defined below), and its contents are not controversial.

*The claim*

7. The claim concerns an area around the back staircase of No 9 Jardine's Crescent (also No 50 Yun Ping Road) (the "Building"), which staircase leads out on to Jardine's Crescent ("the Back Staircase").

8. From at least 1984 to 1994, the Back Staircase provided common access to both the Building and No 48 Yun Ping Road/No 11 Jardine's Crescent from Jardine's Crescent. In 1994, No 48 Yun Ping

Road/ No 11 Jardine's Crescent was demolished, and part of the Fortune Centre was built on the site. The Back Staircase no longer provides access to the Fortune Centre.

9. P claims that since about 1984, she has been in continuous and exclusive occupation of that part of the Back Staircase between the basement level and ground floor level of the Building and its landing and the area underneath the Back Staircase, as coloured pink on Plan A annexed to the Amended Statement of Claim ("the Disputed Area").

10. Alternatively, P claims that since about 1984, she has been in continuous and exclusive occupation of the four metal cabinets inside the Disputed Area, as coloured yellow on Plan B annexed to the Amended Statement of Claim ("the Cabinet Areas").

11. Essentially, P claims that she has been in adverse possession of the Disputed Area, or alternatively the Cabinet Areas, for a period over 20 years and has therefore obtained a possessory title to the same.

12. Both D2 and D7 deny that P has been in adverse possession of the Disputed Area and/or the Cabinets Areas. Their Defences are similar:

- (1) Any use or occupation of the Disputed Area and/or the Cabinet Areas by P does not constitute the factual possession or the intent to possess as required by the law for the purpose of adverse possession;
- (2) The Disputed Area is a common/necessary passage; and the owners, tenants, licensees of the Building and the Fortune Centre have been free to use the Disputed Area as an access (entrance/exit) of the Building;

(3) D7 also asserts that any occupation by P of the Disputed Area and/or the Cabinet Areas was done with the implied licence(s) granted by D7 or other co-owners of the Disputed Area.

13. D7 also brings a counterclaim for vacant possession of the Disputed Area.

*Factual background*

14. The relevant facts are largely undisputed.

15. P and her husband operated as hawkers selling ladies' clothes in the Jardine's Crescent area from about 1963. They did not have a fixed pitch hawker licence, and would be alert to run away from hawker patrols. A regular hiding spot was an area under and around the Back Staircase.

16. P realized that the Back Staircase area was not used by anyone but was full of rubbish. She cleared up the rubbish and started to use the area. At first she set up a few carton boxes and sold her merchandise from there, and after close of business at about 11 pm she would put her merchandise in her wooden cart and take it home.

17. In about 1970, P installed a cabinet with sliding doors at the Back Staircase basement level for storage, and she conducted business there as a fixed pitch selling ladies' clothes and accessories. At the end of the working day she would put her boxes of merchandise in the metal cabinet for overnight storage, so that she did not have to transport them home and back again the next day.

18. In 1984, P began to obtain a sole proprietor's business registration certificate for her fashion business with the business address stated as "Staircase, No. 9 Jardine's Crescent, Causeway Bay".

19. Also in 1984, P installed metal cabinets and an iron gate at the Back Staircase basement level as follows:

(a) The area under the staircase had sliding lockable metal doors fitted which would enclose the area under the staircase to become an iron storeroom. At night-time after close of business, P's clothing merchandise would be put inside the area and the doors were locked. The sliding doors were opened and the area left open during the day.

(b) A lockable metal cabinet of about 6 feet tall by 38 inches wide was installed against the wall opposite the storeroom. P confirmed during cross-examination that all cabinets were locked at night for safe storage of merchandise. There was no evidence as to whether this cabinet was left open during the day but I assume it was closed if not locked in the daytime in order to allow access along the passageway,

(c) In the ceiling above the passageway leading to the Back Staircase, two overhanging lockable metal cabinets were installed. P's evidence was that they were locked at night. Again, there was no express evidence as to whether the cabinet doors were left open during the day but the photographs attached to P's witness statement indicate they were closed if not locked in the daytime (which I would assume would be the case on an everyday basis to avoid merchandise falling down).

- (d) The iron gate was installed at the basement level entrance to the Building from Jardine's Crescent. It has a swing lock. The gate will automatically lock when closed. It can be opened from the inside without a key. However, it cannot be opened from outside without a key.
- (e) Only P has the keys to the cabinets and gate.

20. In 1985, P became sick. She was diagnosed with a nasal cancer and had to attend Queen Mary's Hospital for treatment. Her husband accompanied her. In the period 1985 to 1989, P received treatments which made her very unwell and left her unable to work. Accordingly, she only worked her stall on a very intermittent basis, when she felt able to do so. In 1989, whilst P was still receiving treatment, her husband was diagnosed with cancer. He was hospitalized and after 28 days, he died. P was grief-stricken. She gave up her own treatment and went home. She then decided it would be better to return to work. She returned to the Back Staircase and found her merchandise safely locked up as she had left it. She returned to work. She has worked there from early in the morning until about 11 pm at night ever since, barring sick days and days of adverse weather conditions.

21. The photographs adduced by P show that she conducts her business from a stall on the pavement on Jardine's Crescent outside the entrance to the Back Staircase.

22. P locks up her merchandise in the Back Staircase area and closes the gate every night when she goes home. She has never slept or lived in the Back Staircase area.

23. As to the Back Staircase area:

- A
- B
- C
- D
- E
- F
- G
- H
- I
- J
- K
- L
- M
- N
- O
- P
- Q
- R
- S
- T
- U
- V
- (1) There are two staircases (one of which is the Back Staircase in dispute) and no lifts inside the Building.
- (2) There is no access to the Back Staircase from the basement units, which have their own direct access on to Jardine's Crescent.
- (3) There is no access from the unit on the ground floor to the Back Staircase, the same having been sealed.
- (4) There is a backdoor to each unit on the 1<sup>st</sup> to 4<sup>th</sup> Floor of the Building, with access on to the Back Staircase, and such backdoors have not been sealed.
- (5) It is possible for occupants of the units on the 1<sup>st</sup> to 4<sup>th</sup> Floors of the Building to exit their backdoors on to the Back Staircase and walk down to the basement level, walk through the passageway of the Disputed Area, and push open the iron gate to walk onto the pavement of Jardine's Crescent.
- (6) It is not possible to access the Disputed Area from Jardine's Crescent through the closed iron gate without a key.
- (7) When P is doing business during the daytime, the iron gate is not closed.

24. In about 1994, the Fortune Centre was built and its access to the Back Staircase was sealed. However, the Back Staircase remains commonly owned (on paper) by the owners of the Fortune Centre and the Building.

25. At some time thereafter, the owner of a shop at No 124 Jardine's Crescent allowed P to connect electricity from his shop to the basement level of the Back Staircase. P arranged for an electricity meter to be installed in order to record her electricity use so she could pay her fair share of the bill. I have not seen any electricity bills.



*Legal principles*

26. In this case, adverse possession is claimed to have commenced in 1984. That preceded the amendment to section 7(2) of the Limitation Ordinance in 1991. Accordingly, P must establish 20 years' of adverse possession.<sup>2</sup>

27. The key legal principles regarding adverse possession were set out by Slade J in *Powell v McFarlane and Another* (1977) 38 P&CR 452, as recognized by the Hong Kong Court of Final Appeal in *Wong Tak Yue v Kung Kwok Wai David* [1998] 1 HKC 1 at 12E-I:

(a) For the purpose of adverse possession, the squatter has to establish (a) factual possession of the land; and (b) *animus possidendi*, that is, the requisite intention to possess the land.<sup>3</sup>

(b) “*Factual Possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed. ... Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.*”

[emphasis added]<sup>4</sup>

(c) As regards the intention to possess (*animus possidendi*), it is an intention,

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<sup>2</sup> Section 38A of the Limitation Ordinance provides that the time for bringing proceedings in respect of a cause of action to recover land accrued before 1 July 1991 shall, if it has not then already expired, expire at the time when it would have expired apart from the provisions of the Limitation (Amendment) Ordinance 1991.

<sup>3</sup> *Powell v McFarlane*, at 470

<sup>4</sup> *Powell v McFarlane*, at 470

“in one’s own name and on one’s own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow.”<sup>5</sup>

(d) “An owner or other person with the right to possession of land will be readily assumed to have the requisite intention to possess, unless the contrary is clearly proved. This, in my judgment, is why the slightest acts done by or on behalf of an owner in possession will be found to negative discontinuance of possession. The position, however, is quite different from a case where the question is whether a trespasser has acquired possession. In such a situation the courts will, in my judgment, require clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess, but made such intention clear to the world. If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite animus possidendi and consequently as not having dispossessed the owner.”<sup>6</sup>

(e) Statements made by a trespasser,

“on giving oral evidence in court, to the effect that at a particular time he intended to take exclusive possession of the land, are of very little evidential value, .... In general, intent has to be inferred from the acts themselves.”<sup>7</sup>

(f) “It is not, in my view, enough that the acts may have been done with the intention of asserting a claim to the soil, if they may equally have been done merely in the assertion of a right to an easement or to a profit à prendre. When the acts are equivocal—when they may have been done equally with either intention—who should get the benefit of the doubt, the rightful owner or the trespasser? I think it should be given to the rightful owner.”<sup>8</sup>

(g) “In view of the drastic results of a change of possession, however, a person seeking to dispossess an owner must, in my judgment, at least make his intentions sufficiently clear so that the owner, if present at the land, would clearly appreciate that the claimant is not merely a persistent trespasser, but is actually seeking to dispossess him.”<sup>9</sup>

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<sup>5</sup> Powell v McFarlane, at 471 – 472

<sup>6</sup> Powell v McFarlane, at 472

<sup>7</sup> Powell v McFarlane, at 476 – 477

<sup>8</sup> Powell v McFarlane, at 478, adopting the approach of Black J in *Convey v Regan* [1952] IR 56, 59

<sup>9</sup> Powell v McFarlane, at 480

28. For the purpose of adverse possession, the burden of proof lies with the person who claims adverse possession and the evidence he has to adduce must be compelling: *Wu Yee Pak v Un Fong Leung & Others* (2004) 7 HKCFAR 498 at 500D–E.

29. It is possible to establish adverse possession of only part of the area for which adverse possession is claimed: *Lee Theatre Realty Limited v Tong Wah Jor and Others* CACV 279/2009, 2 May 2013 (unreported), paras 33 and 37<sup>10</sup>.

*Issues*

30. P claims adverse possession of the Disputed Area, alternatively the Cabinets.

31. D2 and D7 dispute that P has established exclusive physical control of the Disputed Area or the Cabinets, and disputes that P had the necessary intention to exclude all others from either the Disputed Area or the Cabinets.

*Plaintiff's evidence*

32. Before analyzing the merits of the claim, I must record my views about P's own evidence. She is in her eighties, does not speak English, and had no legal representation or Mackenzie friend. She apparently struggled to read documents even in Chinese, and the Court interpreter assisted her by reading relevant parts of the documents to her. That said, P gave evidence in a manner which can only be described as painfully honest. I refer both to the painful truths concerning her own battle with illness and then the

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<sup>10</sup> I note that this authority was identified by Ms Shek in her closing submissions as a relevant authority which may assist P.

sudden death of her husband which are an important part of her personal story, albeit not directly relevant to the adverse possession claim. And I also refer to truths which were damaging to her case.

33. I have little doubt that P did not understand the legal requirements for an adverse possession claim but (as she said) had entrusted the entire matter to lawyers found for her by her district councillor.

34. On the critical issue of intention to exclude the owners from the Disputed Area, P honestly and clearly and immediately agreed that she had no intention of excluding the owners.

35. However, her evidence as to actual use of the Disputed Area at the material times was confused:

(a) In her opening and during her oral evidence, she forcefully stated that no one else had used the Back Staircase for over 30 years and/or until she made her adverse possession claim, and that she had not known at the outset that no one would use the Back Staircase for over 30 years.

(b) However, at the end of P's cross-examination, Ms Shek sought to put a summary of her case to P:

“ Q: Since the 1980's owners of No. 9 and their tenants have been using the Back Staircase as access to the Building?

A: I agree.

Q: To be fair to you, I put the question again [question repeated].

A: Their reasons are not my business.

Court: Counsel is not asking about their reasons. Please listen again to the question.

Q: I put the question again [question repeated]

A: Can I say something before I answer?

Court: Please answer the question then say what you want.

A: I agree. My purpose is when I close my stall there is some place for me to keep my goods. Therefore I made 2 overhead cabinets to keep the goods so as not to obstruct people's passage. I always made way for people to walk through. Whether they use the passageway is their business. So when I made the sliding doors they were made moveable so when I open the store those doors are open and when I close the store, those doors are closed. So the cockloft [ie overhanging cabinets] and cabinet under the staircase are fixed. When I close my stall they are locked. I have also got a cart to put clothes on, with wheels, and then there is a cabinet made close to the wall, 6 foot tall. In the video you could see that at the time of the video I had not opened my stall yet so the cart was parked at the side. When I open for business, I push my cart out with the clothes because it has wheels. The wall cabinet is not moveable.

Q: I put it you, you have never had exclusive physical possession of the Back Staircase.

A: I disagree"

36. What P said in this exchange was that other people did use the Back Staircase. However, having heard the rest of her evidence, and having seen that she was distracted by points other than the question being asked, my view is that she did not mean what she said. P was preoccupied with saying that she did not intend to block people's passageway, and that she did not regard it as her business as to what other people did.

(a) *The Disputed Area*

37. I consider that P has established factual possession of the Disputed Area from 1984 for at least 20 years until 2004. There is no evidence that anyone other than P and her husband used the Back Staircase to exit onto Jardine's Crescent from 1984 to 2008 (having discounted P's confused evidence on this point as addressed at para 35 above):

- (a) P gave evidence that no one else used the Back Staircase in the 30 odd years before she made an adverse possession claim; the Building's occupants used the front entrance on to Yun Ping Road.
- (b) Despite there being several owners in the building, there was not a single witness on behalf of the owners to say they had used the Back Staircase to exit on to Jardine's Crescent in the relevant time period.
- (c) There is evidence that in the period after 2008 (when the owners started trying to evict P), that Mr So, employed by D6 and D20, started to test the ability to use the Back Staircase. Mr So made a video for use in evidence in this action showing his ability to exit from the 4<sup>th</sup> floor unit onto the Back Staircase, descend the stairs and exit the metal gate installed by P at basement level onto Jardine's Crescent.
- (d) D2 and D7 accept that, apart from Mr So after 2008, there is no evidence of any use of the Back Staircase to pass through the Disputed Area between 1984 and 2008 by anyone other than P and her husband.
- (e) Mr Lau is a stallholder in Jardine's Crescent and is vice-chairman of the Federation of the Hong Kong Kowloon New Territories Hawker Association. He gave evidence that since starting to work on his father's stall in Jardine's Crescent in about 1980, he had never seen anyone other than P and her husband go in or out of the Jardine's Crescent entrance to the Back Staircase. Mr Lau openly acknowledged that his stall (in both of its locations since 1980) did not have a direct view of the entrance to the Back Staircase. However, he was quite clear that he had not seen anyone other than P and her husband

use the entrance to the Back Staircase and he stated that people would use the front entrance on Yun Ping Road. He was very credible. I accept it was possible that someone could have entered or exited without Mr Lau seeing, but his evidence is consistent with that of P, and with the lack of evidence from Ds that anyone used that rear entrance on an ordinary basis.

(f) Although Ms Shek correctly submitted that P could not disprove that anyone had gone down the Back Staircase through the Disputed Area at night when she was not there, (i) D2 and D7 had no evidence that anyone had done so; (ii) P's unchallenged oral evidence was that most (in fact all but one) unit was now in commercial use so that the occupiers of the units would not be in the Building at night (iii) the evidence from P and Mr Lau and indeed Mr Kwong was that the occupiers/owners of the Building units used the front staircase and front entrance to the Building on Yun Ping Road.

(g) For the relevant period of time starting in 1984, I am satisfied that only P has been using the basement level passageway at the Back Staircase, with locked cabinets and a gate at the entrance to which only she has the key. The fact that a co-owner might in theory have been able to use the passageway does not negate her actual possession.

38. The facts of this case are distinguishable from the two factual scenarios described in *Gotland Enterprises Limited v Kwok Chi Yau and Others* CACV 260/2014:

(a) at para 36 ie. planting fruit trees on land without excluding others from the land;

- (b) at paras 38 – 39 ie. no adoption of any measure to secure exclusive occupation of a pond, other than some instances of stopping unwelcome visitors from fishing at the pond, in particular no fencing.

39. Clearly, in this case, although the Disputed Area was not entirely enclosed by P, it was *de facto* enclosed as:

- (a) there was a locked gate preventing access by outsiders to the Disputed Area, and
- (b) no actual use of the Disputed Area by occupiers of units in the Building who had back doors onto the Back Staircase.

40. For the purposes of factual possession rather than the question of intention, it is not in my view relevant that P did not mind if occupiers of the Building passed through the Disputed Area. P was not merely “using” the Disputed Area where she had installed a gate with a lock.

(b) *The Cabinet Areas*

41. It follows from my finding in respect of factual possession of the Disputed Area that factual possession of the Cabinet Areas is also established. However, if I was wrong about factual possession of the Disputed Area, I would find factual possession of the Cabinet Areas to have been established from 1984 to date. P has used these enclosed areas as her own, exclusively, without any room for the paper owners to use these spaces:

- (a) This is beyond question for the metal wall cabinet and the two overhanging cabinets.
- (b) In respect of the storeroom, Counsel for D2 and D7 submitted that when the sliding doors were opened, the owners *could have* gone into that space, put things in that space, removed things



from that space. However, the point is that there is no evidence that anyone other than P *has* occupied that space.

- (c) This is not a situation where P has left belongings at the Back Staircase which have not been removed by the paper owner, which would be equivocal and could be mere use of the land rather than possession. Here, P has enclosed and locked the identified areas — that must be possession.

*The necessary intention to exclude all others*

42. P has not established the requisite intention for adverse possession of the Disputed Area. Her clear and honest evidence was that she did not intend to exclude the world from the passageway:

- (a) P frankly said that she did not install a gate at the landing at the bottom of the Back Staircase at the boundary of the Disputed Area because people had to walk there.
- (b) When asked about the Cabinet Areas, P answered that she had been careful to ensure that they would not block the passageway so that other people could pass through.
- (c) When asked “*You never had any intention of excluding others including the owners from [the Disputed Area]?*”, P replied “*Of course*”. (Although that answer might sound ambiguous, in the context it was clear that P was adamant that she had not intended to stop people walking through the Disputed Area).

43. However, P has established, in my view, the requisite intention for adverse possession of the Cabinet Areas.

- (a) The Cabinet Areas were enclosed areas used for P’s purposes only, and locked whenever P was not present. The paper

owners did not have a key and were excluded from these areas. Objectively, P's intention was to exclude the owners from the Cabinet Areas.

(b) The intention to possess those areas was communicated as clear as could be by installing metal enclosures to the Cabinet Areas, installing locks, using the Cabinet Areas and their locks, and not providing the paper owners with keys. There is nothing equivocal about the installation and maintenance of locked immovable cabinets for personal exclusive use for over 20 years.

(c) Counsel for D2 and D7 submitted that as P stated that she did not know she would be able to hold the Disputed Area/Cabinets for so long (which was P's reason for not having applied for her own electricity supply), then that negates an intention to possess the Cabinets Areas. However, I would have thought that a squatter never knows at the outset of his occupation whether he will be able to hold the land for long, but that does not mean he does not intend to use it to the exclusion of the paper owner for as long as he can get away with it. (See *Powell v McFarlane* at 471 at (4)).

44. Ms Shek also tried to distinguish the *Lee Theatre* case (where partial adverse possession was successfully established). She pointed to the fact that the family claiming adverse possession in that case had used the relevant area for both business in the day and living at night. However, it can be seen from paras 35 – 36 of the Court of Appeal judgment that:

(a) The family had used the cockloft area above ground level for living accommodation, and could not establish continuous occupation of the cockloft for the relevant period.

(b) The ground level area had been used for stalls which were open in the daytime to conduct business and boarded up at night-time.

(c) Cheung JA stated:

“The boarding up of the two stalls at night must be the strongest indication of the intention to exclusively possess those parts. During the day, in order to carry out business at the stalls, the boards had to be dismantled. But this does not mean that the defendants did not have exclusive possession of the area covered by these two stalls.”

*Conclusion*

45. Accordingly, I find that the adverse possession claim to the Cabinet Areas is established.

46. I do not find that the claim to adverse possession of the remainder of the Disputed Area is established.

47. I note that D2 has advanced no counterclaim at all, whereas D7 has advanced a counterclaim for vacant possession of the Disputed Area including the Cabinet Area to D7. Two (possibly technical) problems arise:

(a) There is no pleaded claim for an order for vacant possession of the Disputed Area excluding the Cabinets Area.

(b) There is no apparent authority of D7 to claim vacant possession of the Disputed Area on behalf of all legal owners of that land.

48. I raised the second point with Ms Shek before the end of trial and invited supplemental closing submissions on this point within short order. Thereafter Ms Shek submitted that *Jumbo King Ltd v Faithful Properties Ltd* [1999] 4 HKC 707 at 720D–E was authority to support D7’s ability, as a single co-owner of a common area, to claim vacant possession against P of the common area. I do not consider *Jumbo King* to assist D7. Certainly

the co-owners of the Building and Fortune Centre are the co-owners of the Disputed Area with the right to exert rights of possession against a trespasser. But that does not entitle D7 to bring such suit *alone* without the authority of the co-owners.

49. D3, D4, D9 and D19. I am satisfied that they have been served with the proceedings but have elected not to participate. I refer to the acknowledgment of service by each of D3, D9 and D19 (each of which give their registered offices as their addresses for service); to the affidavit of service of Yu Ronald H T dated 15 January 2015 as to service of the Writ dated 22 September 2014 on D4 by leaving it at its registered office; and the affidavit of Wong Hui Shang dated 16 June 2015 as to service of the case management summons of 17 April 2015 on D3, D4, D9 and D19 by posting the same to their registered offices. Accordingly, judgment may also be entered against these defendants.

50. Costs:

- (a) At my invitation, D2 and D7 have filed written costs submissions to address the possible outcomes of the trial. It is Scenario 2 (success of partial adverse possession claim) which applies.
- (b) D2 and D7 point out that:
  - (i) P's claim was for the whole of the Disputed Area until amendment of the statement of claim on 2 December 2016 to add the alternative partial case.
  - (ii) P maintained her primary claim to the Disputed Area until the end of trial, and the majority of the witness evidence was directed at the Disputed Area claim.

(c) However:

(i) A substantial part of the costs incurred before 2 December 2016 were incurred in respect of preparation which was required to address the Cabinet Areas claim eg P's witness statement of 26 September 2015 (which was in fact the most important evidence at trial), the expert report of 12 September 2016, and indeed the amendment to plead the Cabinet Areas claim.

(ii) Much of the dispute between the parties at trial was as to whether P had established factual possession of the Disputed Area—P won on this issue, although this was insufficient to win the adverse possession claim. However, the Disputed Area claim would have been dealt with much more quickly and at less cost if factual possession had been conceded.

(d) In the circumstances:

(i) I consider D2 and D7 should have the costs of defending the Disputed Area claim in full before the amendment, but only as to 50% thereafter when they maintained their dispute of the factual possession issue, such costs (including all costs previously reserved) to be taxed if not agreed;

(ii) I consider P should have the costs of the Cabinet Areas claim, and some of those costs were incurred before the amendment; costs (including all costs previously reserved) to be taxed if not agreed; and P's own costs before 29 March 2018 be taxed in accordance with the Legal Aid Regulations;

(iii) I apportion 50% of the costs before 2 December 2016 as costs necessary for the Cabinet Areas claim; and 50% of the costs incurred after 2 December 2016 as referable to the Cabinet Areas claim; the remaining 50% of the costs both before and after amendment are attributable to the Disputed Area claim, of which I attribute half such costs to factual possession, and half to requisite intention.

(e) Accordingly, I make the following orders as to costs:

(i) P is to pay D2 and D7 50% of their costs of the action prior to 2 December 2016 and 25% of their costs incurred after 2 December 2016, (including all costs previously reserved) to be taxed if not agreed;

(ii) D2 and D7 are to pay P 25% of P's costs incurred before 2 December 2016 and 75% of P's costs incurred after 2 December 2016 (including all costs previously reserved) to be taxed if not agreed; and P's own costs before 29 March 2018 be taxed in accordance with the Legal Aid Regulations

(iii) No order as to the balance of costs.

(Roxanne Ismail SC)  
Deputy High Court Judge

The plaintiff appeared in person

Ms Carol Shek, instructed by Hau, Lau, Li & Yeung, for the 2<sup>nd</sup> defendant

Ms Carol Shek, instructed by Alvan Liu & Partners, for the 7<sup>th</sup> defendant