



26 OF 1973

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG (APPELLATE JURISDICTION)

B E T W E E N:

DAVID SEE CHAI LAM First Appellant

AND

THE KA WAH BANK LIMITED Second Appellant

AND

10 THE HOUSE OF DIOR LIMITED Respondents

CASE FOR THE APPELLANT

1. This is an appeal from the judgment of the Full Court of Hong Kong (Blair Kerr S.P.J. McMullen and Pickering JJ) allowing an appeal by the Respondent against the judgment of Simon F.S. Li J. given on the 12th day of March 1973 dismissing a claim by the Respondents for a mandatory injunction, a declaration as to the boundaries of land known as Section B of Lot No. 535 in Demarcation District 187, Tai Po, Hong Kong, possession of a portion of the said land, and damages. Page 98

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2. The facts, many of which were not in dispute, are as follows. On 15th July 1952 a plot of land described in the sale particulars "Lot 535 13490 square feet" was auctioned by the District Commissioner, New Territories. The lot was also shown in a sale plan consisting of two small diagrams one of which showed the dimensions as 71 feet x 190 feet with the words "Area 13490 square feet or .31 ac (about)". The sale was subject to the following general conditions among others:- Page 20

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"4. The purchaser of each lot shall when required by the District Officer and prior to the issue of a Crown Lease, if such is intended to be issued, pay the sum of 6 dollars

for each boundary Stone which shall be fixed by the Director of Public Works at each angle of the new lot marked with the Registry number of the lot, and the purchaser shall notify the District Officer when he is ready to have the boundary stones fixed.

5. The purchaser of each lot shall when such lot is sold as a building lot, build and finish, fit for occupation, before the expiration of 24 calendar months from the date of sale, in a good, substantial and workmanlike manner, one or more good and permanent messuage or tenement... as may be approved by the District Officer . . . 10

8. When the conditions herein contained have been complied with to the satisfaction of the District Officer the purchaser of each lot shall be entitled to and shall execute on demand a lease from the Crown . . . 20

13. In the event of the purchaser of any lot assigning the benefit of the agreement signed by him . . . all assignees shall be bound by the General and Special Conditions of Sale . . .

14. The exact area, boundaries and measurements of each lot shall be determined before the issue of the Crown Lease and Crown Rent shall be when adjusted in accordance with the area and the amounts of premium and Crown Rent at which the lot was sold! 30

3. Lot 535 was purchased on 15th July 1952 by Hotel Edinburgh Limited who built a house upon the southern portion in 1953/1954. There followed a number of assignments whereby the lot was divided into three parts referred to herein in Section "A", Section "B" and "the remaining Portion." On 16th February 1956 Section "A" was sold to one G.G.King being described in the plan annexed to the Memorandum of Sale as 71ft by 65ft, and the remainder was sold to one Li Mok Cheuk Yin on 23rd February 1956. Both plans show lot 535 as a rectangle. On 22nd June 1957 Li Mok sold Section "B" described as 71ft by 62ft 6ins. likewise shown as a rectangle to one Chan Yuen Foo, and on 22nd July 1958 Li Mok sold the Remaining 40

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10 Portion to the first named Appellants likewise described as 71ft by 62ft 6 ins. and shown as rectangular. In 1958 the first named Appellant employed an architect to draw up plans for the house on the Remaining Portion which was completed in May 1959, and at the same time a wall was built along what the Appellants contend is the southern boundary of the Remaining Portion. In about September 1962 Mrs. Y. F. Chen the widow of the owner of Section "B" gave permission to the First Appellant to clear and plant and fence Section "B". On 26th August 1965 her Executors sold Section "B" to one Peter Chan the Respondent's predecessor in title who by an Agreement dated 13th August 1970 agreed to sell Section "B" to the Respondents, the Conveyance taking place on 14th September 1970. Prior to that date Section "B" had not been occupied or developed.

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20 4. On 13th July 1959 after the house was built the First Appellant applied as he was required to by the General Condition No.8 for the issue of a Crown Lease; but none was ever issued nor at any time prior to the purchase of Section "B" by the Respondents was Lot 535 ever set out or boundary stones fixed. The only step taken was that on 15th October 1964 an official of the Crown Lands and Surveys Department wrote to the First Appellant as a result of which agreement was reached as to a demarcation between the Remaining Portion and other Crown lands to the North thereof between the First Appellant and the Department.

30 On 2nd October 1970 the Respondent's Architect wrote to the District Officer asking him to set out the whole Lot No.535. A survey was carried out following which the District Officer on 22nd December 1970 approved a plan showing Lot 535 to be not rectangular but parallelogramatic with 71ft between the East and West boundaries, but with Northern and Southern boundaries of 72.45 ft. See Exhibit B.9. If this be correct it is not disputed that the Appellants' wall and outbuildings encroach onto Section "B" as alleged. No Crown Lease has yet been issued for any part of Lot 535 and at the trial at first instance Mr.A.J. Harland the Senior Estate Surveyor at District Office, Tai Po, gave evidence that until Crown Leases were issued the precise shape of the Lot remained negotiable and could not be stated

5. The issues which arise upon this Appeal are as follows:-

- (1) Whether the boundaries of Lot 535 and Section "B" and the Remaining Portion thereof are yet fixed with precision; or whether the Respondent's action is premature.
- (2) If the boundaries are determined or determinable, whether the shape of Lot 535 is a parallelogram or a rectangle. 10
- (3) Where the boundary between Sections "B" and the Remaining Portion lies.
- (4) Whether the Respondent's predecessors in title or any of them has been guilty of laches or acquiescence or whether the Respondents are estopped thereby or otherwise from asserting their right to the area of land in dispute.
- (5) Whether the Respondents are entitled to a mandatory injunction. 20
- (6) Whether the Respondents are entitled to damages other than nominal damages.

6. Simon F.S. Li J. held that the Action was premature, that the shape of Lot 535 had not finally been determined, and that the Respondents had failed to establish that its shape should be that of a parallelogram. It was only as a result of a survey in 1970, some 18 years after the original sale, that the shape of Lot 535 had been changed to that of a parallelogram. Up till then the Plaintiffs had not applied for a Crown Lease which on the evidence of Mr. A.J. Harland would involve negotiation between the Crown and the Crown Lessee and there was no certainty as to what would happen after negotiation between the parties. He had no jurisdiction to decide for the parties as to what they might or might not agree nor did he wish to usurp the function of the New Territories Administration. He further held that if he was wrong and Lot 535 was determined and parallelogramatic there had been an encroachment on the Respondents' land of about 500 square feet. 30 40

He would not have held the Respondents' predecessors in title guilty of laches or acquiescence or that the Respondents were estopped from asserting that there had been an encroachment but there was no evidence that they or their predecessors knew that Lot 535 was to be parallelogramatic. He held that damages would not have been an adequate remedy and that on the balance of convenience there should have been a mandatory injunction but that he would
10 have granted nominal damages only.

7. Upon appeal by the Respondents to the Full Court Blair Kerr S.P.J. giving the judgment of the Full Court held that the area boundaries and measurement of Lot 535 had been determined by the Crown and in all probability the plan attached to any Crown Lease would be B9. Thereafter the First Appellant had encroached on the Respondents' land by 497.5 square feet. The First Appellant and his architect had not exercised sufficient care
20 when developing the remaining portion in 1959. There had been no laches or acquiescence and the Respondents were entitled to a mandatory order but to nominal damages only.

8. The Appellants first submit that there are no fixed boundaries to Lot 535. The survey of October/November 1970 giving rise to Plan B9 has not fully determined the boundaries which remain subject to negotiation between the Crown and the owners of the three sections. Until such boundaries
30 have been determined the Respondents cannot establish that his land is parallelogramatic and there can be no question of establishing whether or to what extent there has been encroachment. Therefore the action is premature.

The Appellants also submit by virtue of the fact that the First Appellant had built the wall complained of in 1959 and that no action was taken or protest made by any of the Respondent's predecessors in title there has been laches or
40 acquiescence and the Respondents are estopped from now complaining of the encroachment. The Appellants also submit that if it be held that an action for wrongful encroachment is maintainable the balance of convenience is against the granting of a mandatory injunction.

Finally the Appellants submit that the Respondents continued with their purchase in the full knowledge that the Appellants' wall encroached upon

what they contend is their land and that in so doing they chpse to purchase a potential law suit and speculate upon its outcome and in the premises if they are entitled to a mandatory injunction their damages are nominal damages only.

9. The Appellants submit that the judgment of the Full Court should be reversed and the judgment of Li J. dismissing the action should be restored for the following among other

REASONS

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- (i) BECAUSE the boundaries of Lot 535 have not been fully determined and therefore the action is premature.
- (ii) BECAUSE it cannot be established that Lot 535 is parallelogramatic and that there has been any encroachment on the Respondents' land by the First Appellant.
- (iii) BECAUSE there has been laches or acquiescene by the Respondents' predecessors in title and the Respondents are estopped from claiming possession of the disputed land.
- (iv) BECAUSE the balance of convenience is against the granting of a mandatory injunction.

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NICHOLAS LYELL.

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DAVID SEE CHAI LAM

First
Appellate

- and -

THE KA WAH BANK LIMITED

Second
Appellate

- and -

THE HOUSE OF DIOR LIMITED

Respondent

CASE FOR THE APPELLANT

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