IN THE PRIVY COUNCIL No. 26 of 1973

ON APPEAL FROM THE SUPREME COURT OF HONG KONG

APPELLATE JURISDICTION

B E T W E E N:

DAVID SEE CHAI LAM First Appellant

THE KA WAH BANK LIMITED Second Appellant

- and -

THE HOUSE OF DIOR LIMITED Respondents

CASE FOR THE RESPONDENTS

Record

10 1. This appeal and the Respondents' proposed cross-appeal are appeals from an order made by the Supreme Court of Hong Kong (Appellate Jurisdiction) (hereinafter called the Court of Appeal) on the 1st June 1973, whereby the Court of Appeal allowed in part an appeal by the Respondents from a judgment of Mr. Justice Simon Li given on the 12th March 1973.

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p.35.

2. The action is an action between adjoining plot owners in Hong Kong. As appears below, the two plots had a common owner in the past, and had been auctioned
20 by the Crown in 1952. The nature of the Respondents' claim as Plaintiffs in the action is that the First Appellant has built a wall and other works on a strip of land which (the Respondents assert) forms part of the Respondents' land and belonged formerly to a predecessor in title of the Respondents at the time when the said wall and works were built. The Second Appellant's interest in the matter is that the First Appellant has since agreed to sell his plot to the Second Appellant. The Respondents claim that, by reason of the encroach-
30 ment, they have been prevented from developing their plot, that they have lost substantial rents and will now have to incur increased construction costs, and that if an injunction were not granted, the development potential of their plot would be seriously diminished. The extent of the encroachment is about 500 square feet. The Respondents purchased their plot for the purpose of development, with a view to letting the building or buildings to be constructed upon it.

3. By their action the Respondents claim

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pp.11-13 a declaration as to title as to the strip in question, possession of the strip, a mandatory injunction ordering the Appellants to remove the wall and other works, and substantial damages.

4. The three main issues in the case were:

(a) Where did the boundary between the two adjoining plots lie?

(b) If the First Appellant had encroached onto the plot which then belonged to a predecessor in title of the Respondents, was there laches or acquiescence on the part of that predecessor, and if so, were the Respondents bound by that? And were there other factors affecting the grant of an injunction?

(c) Have the Respondents in principle suffered substantial or only nominal damage by reason of the continuing trespass of the Appellants? (If the Respondents are entitled to substantial damages, the issue as to the quantum of such damage remains to be tried separately and no evidence was tendered at the trial as to such quantum).

pp.20-34 5. Mr. Justice Simon Li at first instance held that the Respondents had not established that the boundary between the two plots lies where they assert it to be, because no determination by the Crown of the relevant boundaries has yet taken place, consequently he dismissed the action as being premature. But he went on to hold that there was no laches or acquiescence on the part of the Respondents' predecessors in title and that a mandatory injunction should have been awarded if the trespass had been established. He also held that the Respondents, having completed the purchase after learning of the alleged encroachment, had "brought a law suit on themselves" and could not have recovered more than nominal damages, even if they had established the trespass.

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pp.98-109 6. The Court of Appeal by a judgment delivered by the Presiding Judge, Mr. Justice Blair-Kerr, held that the trespass was established in that the Respondents had proved that the boundary lay where they assert it to be, and granted a declaration as to title of the strip, made an order for possessuon, and ordered the Appellants to remove the wall and other works within two months. However, the Court of Appeal also held that the Respondents, having learnt of the encroachment during the period of about a month in 1970 between the time when they contracted

to purchase their plot and the time when they completed the purchase, could recover only nominal damages for the trespass.

7. The Respondents submit that the Court of Appeal were right in holding that the boundary between the two plots lies where the Respondents have asserted. The salient features of the evidence were :-

(i) When the plot which now belongs to the Respondents was first sold as a separate plot in 1957 to a predecessor in title of the Respondents, it was expressly stated to be 4,437½ square feet in area. But if the strip on which the offending wall and works are constructed does not belong to the Respondents, their plot is now only 3,940 square feet in area. Ex.C.6., p.215

(ii) The plot purchased in 1958 by the First Appellant was expressly stated to be 4,437½ square feet in area. But if that plot now includes the strip of land on which the offending wall and works are constructed, it is 4,935 square feet in area. Ex.C.5., p.213

(iii) The land, which comprises both the Appellants' plot and the Respondents' plot and in addition a further plot, were originally auctioned as one single "building and garden" Lot (Lot.535) on behalf of the Crown in 1952. There were conditions of that auction (which included other Lots as well) that the purchaser should build one house thereon within two years and that he should then be entitled and obliged to have a Crown lease granted to him. But it was also provided: Ex.C.2., p.207 Ex.C.1,pp.196-199

> "The exact area, boundaries and measurements of each lot shall be determined before the issue of the Crown lease and the Premium and Crown Rent shall be then adjusted in accordance with the area and the amounts of Premium and Crown Rent at which the lot was sold". Ex.C.1., p.200

These Conditions were incorporated from Official Government Notification. Ex.C.1., p.196

(iv) Although a house was built on one portion of the Lot within the following two years after the auction, no Crown Lease was ever granted, and no "determination" of the boundaries was sought or carried out until 1970. Ex.A.14., p.133

(v) The part of the Lot on which the house had been built was sold off in 1956 as a separate Ex.C.3., p.209-210

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Ex.C.1., p.196

Plot (Section A), which was expressly stated to be 4615 square feet in area. Since the whole Lot in 1952 had been expressly stated to be 13490 square feet in area, this meant that the residue of the Lot, after Section A was sold, was 8875 square feet in area.

Ex.C.6., p.215-216
Ex.C.5., p.213-214

(vi) Meanwhile the unbuilt portion of the Lot was split into equal halves in 1957. One Section was sold to a predecessor of the Respondents in 1957. The other Section was sold to the First Appellant in 1958. Each Section therefore constituted and was expressed to constitute 4,437½ square feet in area.

Ex. Q. p.259-260
Ex. B.3., p.182

(vii) The Respondents' predecessor did not personally occupy his plot, which remained in an unbuilt rural condition. But the First Appellant laid out and built a house on his plot, including the offending wall and other works. The result of his building the wall and other works on the strip in question was that the two plots became unequal in area, instead of equal as they had been when their division took place in 1957.

Ex. C.1., p.195

(viii) When the original whole Lot had been sold at auction in 1952, the auction plan was very small. It showed what appears to be a small rectangle. But it was a rectangle which was inclined west of north, and east of south. Further, when compared with the measurements shown on the plan, it is clear that the plan was only a sketch plan and not to any scale. The plan showed immediately to the south of Lot 535 another Lot, No. 524, which has always been owned by a third party. The boundary between the two contiguous Lots, i.e. Lots 535 and 524, is one of the essential factors in the case, because that boundary is fixed by reference to official marks and therefore constitutes a fixed base line on which the original Lot 535 can be and has been determined. There was no evidence that this boundary line between Lots 535 and 524 had ever changed, and Lot 524 had been in existence before the 1952 auction and was shown in the Auction Plan.

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p.51
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p.57
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Ex.C.1., p.195

Ex.A.7., p.123
Ex.H, p.239
Ex.A-9, p.125

(ix) When the Respondents had contracted to purchase their plot in August 1970 and had completed their purchase in September 1970, they at once applied to the Director of Lands and Survey for a determination of the Lot boundaries

in accordance with the original requirements of the Crown auction in 1952. A survey was carried out by the Crown and provisionally recorded on the 4th December 1970, and the boundaries of the Lot were finally determined by survey on 22nd December 1970. This survey is based on the established boundary and on the base line as delineated by 2 boundary stones between Lot 524 and the original Lot 535, and shows that Lot 535 must have been a parallelogram in shape.

Ex.A.10, p.126

Ex.B.8., p.187
Ex.B.9., p.188

(x) The intervening conveyancing plans between 1956 and 1970 had purported to show Lot 535 as a rectangle but these had all followed a common form which had been used in 1956 (when Plot A had been sold off) in the absence of any determination of the Lot boundaries and which was clearly not based on any actual survey and ignored the established boundary with Lot 524.

Ex.C.3., p.209

(xi) Even before the determination of the boundaries in December 1970, the District Officer (the agent of the Crown) had plans in his possession which showed the original Plot 535 not as a rectangle but as a parellelogram, and grants of permission (Crown Permits) over other neighbouring Crown land in 1961 and 1970 had been based on this premise.

Ex.F, p.230-232
Ex.E, p.227-229
Ex.N, p.257-8

8. The Respondents submit that the Court of Appeal were correct in holding that the true construction of the Condition set out in Paragraph 7(iii) above is that it empowered the Crown to determine the boundaries of the original Lot, and that it did not mean that there was merely an agreement to agree, as the Trial Judge had held. The Crown has now determined the boundaries, which establish that the shapes of the Lot and therefore of the subsequent plots is and are parellelograms.

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9. Moreover such determination by the Crown was not an artificial determination, but was in accordance with all the material evidence, namely the original offset alignment of Lot 535, the boundary stones between Lot 535 and Lot 524, the alignment of the house which was built on Plot A, and the measurements shown on the various conveyancing plans. The only evidence of a rectangular shape was that of the original very small auction plan and the shape shown on the subsequent intervening conveyancing plans, which the Respondents contend were for identification purposes. Moreover

Ex.C.1.,p.195
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Ex.B.9, p.188
Ex.M. p.256
Ex.K. p.255

Ex.C.1.p.195

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the original conveyancing plan which adopted a rectangular shape, namely that in February 1956 when Plot A was sold, was itself based on a misalignment of the actual house built on that Plot. That misalignment can be seen by comparing that Plan and the Survey and Setting out plans made in December 1970 (which reflect the true facts on the site).

Ex.C.3., p.209

Ex.C.3., p.209
Ex.B.8., p.187
Ex.B.9., p.188

10. The correct angles of the boundaries could have been ascertained on the site by the First Appellant's Architect, when setting out the First Appellant's proposed house in 1958. The First Appellant's Architect, by not having the Lot surveyed before construction, took a risk as to the future boundaries of the Lot as determined by the Crown.

Ex.B.3., p.182

11. Insofar as the Appellants contend that no final determination of the boundaries was made by the Crown the Respondents submit that on the evidence the boundaries have in fact been set out on the ground and also in a final setting out plan which was notified to all official departments on the 22nd December 1970. Insofar as the Appellants rely on the oral evidence set out on page 105 of the Record, the Respondents respectfully adopt the reasoning of the judgment of the Court of Appeal on pages 105-6 of the Record.

Ex.A.10., p.126
p.105

p.105-6

p.16

12. The Appellants original contention in their Defence was that the shape of the Respondents' land is a rectangle, and not a parallelogram. But, as the Court of Appeal pointed out, the rectangular shape applied to the whole of Lot 535 would entail results which would be unacceptable even to the Appellants:-

(a) if it was based on the established boundary with Lot, 524, a rectangle would put part of the Appellants' land right over the adjoining road to the west;

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(b) if one ignored the boundary-stones and presumed the boundary with Lot 524 to be aligned in an East-West direction, it would entail that part of the Appellants' house would lie outside the rectangle.

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13. Accordingly the Respondents rely upon (a) the actual determination by the Crown of the boundaries, which has been carried out in accordance with the original requirement of the 1952 Auction, and (b) the evidence which, apart from the shape shown in the conveyancing plans, supports that determination. It is therefore wrong, the Respondents submit, to regard the action as

premature as the Trial Judge had held. The Trial Judge so held on the ground that the parties had still to negotiate or agree with the Crown about the boundaries, but the Respondents submit that the Court of Appeal's construction of the provision relating to determination of the boundaries is correct.

14. As regards the Appellants' contention that the Respondents' predecessor in title had acquiesced in the encroachment or was guilty of laches, the Respondents respectfully adopt the reasoning both of the Court of Appeal and of the Trial Judge in that respect. The authorities cited to both the Trial Judge and the Court of Appeal (which are referred to and dealt with in detail by the Trial Judge in the judgment) show that a person cannot be guilty of acquiescence or laches unless he knows of the facts relating to the encroachment and his own rights. There was no evidence that either of the Respondent's predecessors in title had been aware of the encroachment onto their land, and the evidence in a letter dated the 7th September 1962 from the First Appellant to the widow of one of those predecessors was to the contrary.

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p.31-32
Ex.Q, p.259

15. The Respondents submit that both the Court of Appeal and the Trial Judge (in his case, obiter) were right in holding that a mandatory injunction should be granted. The Respondents respectfully adopt the reasoning of both courts. Any inconvenience the Appellants might suffer by having to remove their works can be remedied by the use of further available Crown land. The evidence was that there was additional unused Crown land to the north and east of the Appellants' land, and that similar Crown Permits for the purposes of works being carried out had readily been granted by the Crown to the First Appellant in 1961, to the owners of Plot A in July 1970 and subsequently to the Respondents in 1972. As far as the Crown land to the north of the Appellants' land is concerned the Appellants have in fact been occupying the same for a considerable time.

p.108-109
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Ex.F, p.230-232
Ex.E, p.227-229
Ex.B.11.,p.190-191

16. As regards the Court of Appeal's refusal to award more than nominal damages, the Respondents submit that such a refusal was wrong in law. At the trial, by agreement, the quantum of damage was not dealt with. The only issue in relation to damages before the Trial Judge and the Court of Appeal was whether an inquiry as to damages should be ordered or whether the Respondents were only

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entitled to nominal damages. It was rightly held by the Court of Appeal that a trespass had taken place by reason of the First Appellant's encroachment. The Respondents submit that once that tort is established, an issue must then be ordered to be tried as to what damage the Respondents have suffered thereby. The Respondents discovered, during the course of completing the purchase of their land, that there might be an encroachment by the Appellants on to the land which they had contracted to purchase, and it was for this reason that they sought a determination of the boundaries by the Crown.

17. After the determination of the boundaries had been made in December 1970, the Second Appellant (who had agreed to purchase the First Appellant's plot) was notified as early as the 29th December 1970 that there was an encroachment onto the Respondents' land. Yet the Appellants have persisted since then in contending, in 1971 and subsequently throughout these proceedings, that there was and is no trespass. Having lost on that contention, they cannot in logic or law submit that the Respondents have suffered no damage by reason of their trespass. Whatever the quantum of the damage is which the Respondents have suffered, it has been caused by the delay to their development which is the result of the Appellants making a contention since 1970 on which they (the Appellants) have now lost. If, as has been held, the First Appellant had previously encroached onto land which the Respondents contracted to buy in August 1970, the Respondents owed no duty to the Appellants to relieve the Appellants of the consequences of the Appellants' subsequent and lengthy trespass, by making requisitions upon the Vendors who had contracted to sell the land, and then by suing the Vendors and/or by withdrawing from the contract.

Ex.A.11, p.128
Ex.A.17, p.136
Ex.A.27, p.155

18. Even if it were correct in law (which the Respondents submit that it is not) to say that the Respondents should be deprived of some damages because "they must have known that the Defendants would require time to rectify their mistake (or the consequences of their negligence.....)", it is submitted that this could not justify a decision that the Respondents should recover only nominal damages, when for over three years they have been kept out of a part of their site which was important for developing the site. It is significant that the Court of Appeal gave the Appellants two months for the carrying out of the mandatory injunction. The correct decision would have been to order the issue of the damage caused by the trespass to be tried.

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19. It is further submitted that the award of damages for a wrong at law, such as a trespass, cannot be decided by equitable considerations such as are embraced by the Court of Appeal's words ".....justice will be done if the boundaries are now rectified and the /Respondents/ be granted nominal damages only." In relation to a claim at law for damages for trespass, the questions are: "Has the wrong been done?" and "What damage has been caused thereby?" If a person on a mistaken view of his rights and the facts commits trespass, and further persists in his trespass after being called upon to remove himself, and then contests an action which takes more than two years to be completed, it is submitted that he does so at his own risk as to the damage which the landowner meanwhile suffers. p.109

20. The Respondents respectfully submit that the Appeal herein should be dismissed with costs and that the Cross-Appeal on damages (if special leave to make such Cross-Appeal be granted) should be allowed with costs, for the following (among other) :-

R E A S O N S

1. Because the boundary between the Appellants' and Respondents' plots lies where the Respondents have contended, and the First Appellant has encroached onto the Respondents' plot.

2. Because the true position of the said boundary follows from the determination made by the Crown in December 1970 of the boundaries of Lot 535.

3. Because such determination of the boundaries of Lot 535 was in accordance with the material evidence.

4. Because the Respondents' predecessor in title did not acquiesce in the First Appellant's encroachment and was not guilty of laches.

5. Because on the balance of convenience a mandatory injunction should be granted.

6. Because the Respondents have suffered substantial damage by reason of the Appellants' trespass.

7. Because the judgment of the Court of Appeal was right, save as to damages, and should be affirmed, save as to damages.

DAVID SULLIVAN

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CASE FOR THE RESPONDENTS

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