### **FAMV No. 50 of 2024**

**[2024] HKCFA 33**

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

**MIsCELLANEOUS PROCEEDINGS nO. 50 OF 2024 (CIVIL)**

(ON APPLICATION FOR LEAVE TO APPEAL FROM

CACV NO. 18 OF 2022)

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BETWEEN

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|  | **TSANG WOON MING (曾煥明)** | Plaintiff  (Applicant) |
|  | **and** |  |
|  | **TSAN HING TAT HEIDI (曾慶達)** | 1st Defendant  (1st Respondent) |
|  | **CHOI KAM CHE CECILIA,**  **the surviving spouse and intended administratrix of the estate of TSANG HING KWONG THOMAS**  **(曾慶光), deceased** | 2nd Defendant  (2nd Respondent) |
|  | **YAP HENRY FAT SUAN (葉發旋)** | 3rd Defendant  (3rd Respondent) |
|  | **YAP HENRIETTA CHUN WAH (葉俊華)** | 4th Defendant  (4th Respondent) |
|  | **YAP JASON CHUN YING (葉俊英)** | 5th Defendant  (5th Respondent) |
|  | **YAP CHUN HUNG ALEXANDER (葉俊雄)** | 6th Defendant  (6th Respondent) |

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| Appeal Committee: | Mr Justice Ribeiro PJ, Mr Justice Fok PJ and  Mr Justice Lam PJ |
| Date of Hearing and Determination: | 12 December 2024 |
| Date of Reasons for Determination: | 23 December 2024 |

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| **REASONS FOR DETERMINATION** |

**Mr Justice Ribeiro PJ:**

1. At the hearing, we dismissed this application for leave to appeal and now provide our reasons for so doing.
2. The plaintiff/applicant’s (“P’s”) claim for possessory title to a Lot in Tai O by adverse possession failed before HH Judge Simon Leung[[1]](#footnote-1) and in the Court of Appeal.[[2]](#footnote-2) They held that he had failed to establish the necessary possessory intention and that his occupation of the property had been pursuant to an implied licence from the registered owner. In our view, their decisions, based on largely uncontroverted evidence, were plainly correct. P is now asking the Court to review the evidence and to overturn the inferences drawn. He is also seeking leave in respect of questions that are properly subject to a *Flywin* objection[[3]](#footnote-3) and/or which do not arise on the facts. We do not think this application reasonably arguable.

A. The proposed questions

1. Four questions are put forward and said to be of great or general public importance, namely:

What is the correct test for implied licence in adverse possession cases; in particular, whether the paper owner need to communicate his permission to the squatter ie. whether the correct test is that there must be some acts or words on the part of the paper owner which would lead the squatter to understand that his possession is with the paper owner’s permission? [Question 1]

In the absence of any direct evidence of any acts or words of permission on the part of the paper owner, what is the minimum evidence required before the court is entitled to infer from other circumstances including e.g. the parties’ relationship, that there was/must be an implied licence; in particular, whether mere “acknowledged presence” of the squatter on the part of the paper owner without more would be enough? [Question 2]

In cases where the squatters consist of a household, whether the test laid down in the case of *Bannerman Town, Millars and John Millars Eleuthera Association v Eleuthera Properties Ltd* [2018] UKPC 27 is correct on the question who among members of the household are in possession? [Question 3]

Whether the Court of Final Appeal should take this chance to decline to follow *Wong Tak Yue v Kung Kwok Wai David & Anor* (1997) I HKCFAR 55, [1998] 1 HKLRD 241 (CFA) so as to bring the common law in HK on adverse possession in line with other common law jurisdictions; in particular having regard to the fact that in this case, the learned trial judge, though not the Court of Appeal, had still fallen into the error of requiring the squatter to prove an intention to own/oust rather than an intention to possess? [Question 4]

1. We shall return to them after setting out the facts and the findings of the Courts below.

B. The persons involved

1. The centrally important feature of this case is that it concerns an arrangement in relation to occupation of the Lot involving members of the same family. We are not concerned with strangers or unrelated persons “squatting” on a property.
2. We attach as Figure 1, a chart which is similar to that found in the first instance judgment. It shows the two branches of the Tsan (or Tsang) family involved.
   1. The common ancestor was Tsan Hei, whose wife was Madam Tsan Wu. They were P’s grandparents. Madam Tsan, P’s grandmother, had a prominent role in the story.
   2. Their two sons, Tsan Yung (P’s uncle) and Tsang Tung (P’s father) were at the head of two branches of the family. Tsan Yung led the branch on the left side of Figure 1. He was the eldest son and was described as the patriarch of the family. He acquired the Lot in 1916 and played a centrally important role in the relevant events. He and certain members of his branch of the family were successively the registered owners of the Lot and he gave financial help to his brother’s family when it was needed.
   3. Tsan Yung had a son (Tsan Wah) whose wife (Madam Luk) was also an important character in the plot. Two of their children and a son-in-law, as well as three grandchildren are the defendants (D1-D6) who have resisted P’s claim and obtained by counterclaim an order for vacant possession of the Lot.
3. The other branch of the family, headed by P’s father Tsang Tung, comprises P’s mother, P himself and Madam Cheung, who was adopted as a daughter by P’s grandmother but always treated by P as an elder sister.
4. Attached as Figure 2 is a chart showing the successive owners of the Lot above the line and the persons occupying the property below the line over the period in question.
5. The relevant members of Tsan Yung’s branch of the family were (themselves or via a family company called Yung Hing Investment Co Ltd (“Yung Hing”)) the owners of the Lot throughout. Those in P’s father’s branch, including P, P’s father and mother, and Madam Cheung, were the occupiers of the property at the material times.

C. The owners and the occupiers of the property

1. As Figure 2 shows, Tsan Yung acquired the property in 1916. He built two houses on it and remained the owner until 1969. After the houses were built, they were occupied by Tsan Yung’s mother (P’s grandmother), P’s father and one of his brothers. They were immediate family members and it is obviously to be inferred that Tsan Yung permitted them to live there.
2. Then in 1943, P’s mother moved in after marrying P’s father. Also at about that time, Madam Cheung became part of the household. P was born in 1949 and lived there with his siblings, initially until 1957. The courts below drew the inference that P’s father and mother, P’s siblings and Madam Cheung occupied the property with Tsan Yung’s blessing. They were again close relatives and it is wholly implausible to think that they took possession of the property adversely to Tsan Yung.
3. Unfortunately, P’s father died in 1955 and in 1957, P’s mother left the property with her children to take up employment in Kowloon. Madam Cheung stayed on. The evidence was that Tsan Yung provided financial help to P’s family which had fallen on hard times. Then in 1966, P’s mother returned (without P) and rejoined Madam Cheung in occupation of the property. Throughout this time Tsan Yung was the registered owner.
4. However, in 1969, he decided to assign the Lot (along with other properties) to Yung Hing, a company owned and controlled by members of the family. The shareholders included Tsan Yung, his wife (Madam Tsang Wong How Yuk), as well as their son Tsan Wah and his wife, Madam Luk.
5. P’s mother continued in occupation along with Madam Cheung while the Lot was in the registered ownership of Yung Hing. They remained there after Tsan Yung’s death in 1970.
6. In 1981, Yung Hing assigned the Lot to Madam Luk who simultaneously executed a declaration of trust over the same in favour of her three children D1, D2 and her daughter, whose husband subsequently became D3. P’s mother and Madam Cheung continued in occupation throughout these changes.
7. In 1984, P returned to take up residence at the property. At this stage, P’s mother had occupied the property for some 18 years along with Madam Cheung. The evidence showed that Madam Luk, who was then the legal registered owner (holding on trust for her children), had been in regular contact with P’s mother and evidently knew that she was in residence. She also must have known that P had joined her there since Madam Luk had on one occasion, contacted P for help regarding the removal of a tree in another property in Tai O, indicating knowledge of his presence at the property.

D. The present proceedings

1. Madam Luk died in 2014 and it was after her death that D1 to D6 found out about the property and its occupants. On 2 September 2015, their solicitors issued a letter demanding vacant possession from P, leading to P’s commencement of these proceedings on 29 July 2016. It is evident that as from 2014, the Ds did not consent to P’s continued occupation and that any implied licence granted by Madam Luk had not been renewed by them.
2. Ds contend however that prior to 2014, P’s possession of the property had been pursuant to an implied licence granted by Madam Luk and thus was not “adverse” for the purposes of extinguishing Ds’ title pursuant to sections 7(2) and 17 of the Limitation Ordinance.[[4]](#footnote-4) Ds’ case is that any adverse possession by P, starting in 2014, fell far short of the 12-year limitation period required for his purposes.
3. The key issue is therefore whether the occupation of the property by P, beginning in 1984, was pursuant to the permission, ie, an implied licence, of the registered owner, Madam Luk.

E. The Judge’s decision

1. P claimed possessory title for himself on the basis of having been in adverse possession since 1984 when he returned to take up residence at the property. The Judge found that on the evidence, that he had failed “to establish by compelling evidence that he has been possessing, with the requisite intention to possess, the Lot in his own name and on his own behalf to the exclusion of the world at large since 1984.”[[5]](#footnote-5)
2. The Judge found that an implied licence could be inferred in that Tsan Yung must have permitted P’s grandmother, P’s father, Madam Cheung and, when she married into the family, P’s mother, to occupy the property; and that they all knew that it was Tsan Yung’s property.[[6]](#footnote-6) He also found that the implied licence could be inferred to have been extended on the basis of subsequent events, especially from Madam Luk’s contacts with P’s mother and with P himself.[[7]](#footnote-7)

## *F. The Court of Appeal’s decision*

1. All three judges in the Court of Appeal found that the inference of an implied licence granted by Madam Luk to P should be upheld. Chu VP stated:

“On the evidence and facts as found by the Judge, an inference can properly be drawn that the initial occupation of the Lot by the plaintiff's family was with the permission and consent of Tsan Yung, and that when Madam Luk became the registered owner of the Lot in 1981, she had given an implied licence to the plaintiff and his mother to occupy the land.”[[8]](#footnote-8)

1. Cheung JA noted that P sought to raise three issues on the appeal: (1) Who carries the burden of proof on implied licence? (2) Does the licensor need to communicate the implied licence to the licensee? (3) The identity of the licensor?[[9]](#footnote-9)
2. As to (1), it was common ground that P had the legal burden to prove that he was in possession of the Lot without the consent or permission of the paper-title owner and that Ds had the evidential burden of showing that P’s occupation of the Lot is by way of an implied licence.[[10]](#footnote-10) So the question was whether that evidential burden had been satisfied.
3. Cheung JA set out the Judge’s findings at §§89-97 of the Judge’s judgment and held that those findings and the inference of implied licences could not be overturned.[[11]](#footnote-11)
4. While he noted that there was some debate in the decided cases on point (2) regarding the asserted need for communication of the licence by the owner to the occupant,[[12]](#footnote-12) he held that this point was not open to P since the question of communication had not been raised before the Judge nor in the Grounds of Appeal. If it had been raised, there could well have been evidence on that question, raising a *Flywin* objection. But in any event, he would have held that any such requirement was satisfied on the Judge’s aforesaid findings,[[13]](#footnote-13) with Tsan Yung, Yung Hing and Madam Luk as successive licensors in respect of point (3).[[14]](#footnote-14)
5. G Lam JA held that as a matter of law, the licence given by Tsan Yung to P’s family and to Madam Cheung terminated in 1969 when the property was assigned to the Yung Hing; and any licence given by the company ended in 1981 when the Lot was assigned to Madam Luk.[[15]](#footnote-15) The Judge had essentially held that *in fact*, permission to occupy the Lot continued to be given after such changes. But the key question was whether Madam Luk had given an implied licence to P’s family to occupy the Lot after she became registered owner in 1981.[[16]](#footnote-16)
6. His Lordship held that the uncontroverted facts or findings made by the Judge established the basis for the Judge to find that an implied licence was indeed granted by Madam Luk to P and his mother, defeating P’s claim.[[17]](#footnote-17)
7. We can see no reasonably arguable basis for overturning the above-mentioned findings of fact or the inferences drawn.

G. The four proposed Questions

1. Question 1 asks whether the owner needs to communicate his permission to the squatter and what the “correct test” is of whether such communication has been made. We agree with the Court of Appeal that this issue cannot be entertained since, not having been raised below, serious procedural injustice would arise if the point were allowed to be run without affording the Ds the opportunity to adduce evidence and properly to address that issue. We also accept Cheung JA’s view that the findings of both Courts regarding the relationships and interactions between the owners and occupiers fully justify the inference that P’s family and Madam Cheung knew that they were occupying the property with the permission of the successive registered owners. It is not reasonably arguable that Ds’ have failed to discharge their burden of adducing evidence capable of supporting that inference.
2. Question 2 invites the Court to review the factual findings made below, by asking what is the “minimum evidence required” for the drawing an inference. That is a question which is not susceptible to a general answer. It obviously depends on the circumstances in each case and is not appropriate for the grant of leave. In any event, as noted above, it is not reasonably arguable that the findings and inferences drawn below are capable of being overturned on appeal.
3. Question 3 asks a question which does not arise. P claims possessory title for himself alone, so no question arises of having to determine who, among a household of “squatters”, has possessory title.
4. Question 4 also does not arise. It draws attention to certain differences regarding the requirements of factual possession and possessory intention which emerge from the judgments of this Court in *Wong Tak Yue v Kung Kwok Wai David & Anor (No 2)[[18]](#footnote-18)* and of the House of Lords in *J A Pye (Oxford) Ltd v Graham*.[[19]](#footnote-19) P suggests that leave to appeal should be granted to enable this Court to decide whether to depart from its earlier decision in favour of *Pye*.
5. However, Question 4 does not raise a competent ground of appeal. It states:

“... in this case, the learned trial judge, though not the Court of Appeal, had still fallen into the error of requiring the squatter to prove an intention to own/oust rather than an intention to possess.”

1. The application is for leave to appeal against the Court of Appeal’s judgment. Since no complaint is (or can be)[[20]](#footnote-20) made against the Court of Appeal’s approach on this ground, it does not disclose a basis for granting leave.
2. Moreover, the cases cited all refer to *Wong Tak Yue* and *Pye* differing on the question whether the occupier’s willingness to pay rent is consistent with an intention to possess for the purposes of adverse possession.[[21]](#footnote-21) However, as the Court of Appeal noted[[22]](#footnote-22) and as Counsel for P (Mr Benjamin Chain) was constrained to accept, this issue does not arise in this appeal.
3. For the aforesaid reasons, we dismissed this application with costs.

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| (R A V Ribeiro) | (Joseph Fok) | (M H Lam) |
| Permanent Judge | Permanent Judge | Permanent Judge |

Mr Benjamin Chain and Mr Chan Hei Ching Jacky, instructed by Zebra H Y Kwan & Partners (on a *pro bono* basis), for the Plaintiff (Applicant)

Mr Frederick HF Chan and Mr Dexter Leung, instructed by Keith Lam Lau & Chan, for the 1st to 6th Defendants (Respondents)

Tsang Tung

P’s mother

Plaintiff

D4

D5

D6

**Fig 1: The Two Branches of the Tsan Family**

**Yung Hing Investment Co Ltd**

Tsan Luk Yuk Yin

(Madam Luk)

Tsan Wah

**Cheung Sui Fan**

**(Madam Cheung)**

**(Adopted by P’s grandmother)**

Tsan Hei

Madam Tsan Wu

(P’s grandmother)

Tsan Wong

How Yuk

Tsan Wong

(P’s uncle)

D1

D2

Daughter

D3

**Registered Owners**

**Fig 2: Owners & Occupants**

**1916**

**1943**

**1957**

**1966**

**1969**

**1981**

**2014**

Tsan Yung

**Sept 2015**

**Dec 2015**

D1-D3

D1-D6

Madam Luk died

***2 Sep 2015***

***Ds’ demand for vacant possession***

***29 Jul 2016***

***P commenced proceedings***

**1984**

P returned

P’s mother

Madam Tsan

(Tsan Yung’s mother)

(P’s grandmother)

Tsang Tung

(P’s Father)

Another brother

of P’s father

P’s mother after marrying P’s father

P born in 1949 & siblings

Madam Cheung

***P’s mother & P left***

Madam Cheung

**Shareholders**

Tsan Yung

Madam Luk

Tsan Wong How Yuk

Tsan Wah

Madam Luk

Trust for D1, D2 & daughter

Yung Hing Inv Co Ltd

P’s mother returned

Madam Cheung

**Occupants**

1. [2021] HKDC 482 (27 April 2021). [↑](#footnote-ref-1)
2. [2024] 1 HKLRD 316 Chu VP, Cheung and G Lam JJA. [↑](#footnote-ref-2)
3. See *Flywin Co Ltd v Strong & Associates Ltd* (2002) 5 HKCFAR 356. [↑](#footnote-ref-3)
4. Cap 347. Section 7(2): “No action shall be brought by any other person to recover any land after the expiration of 20 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.” Section 17: “… at the expiration of the period prescribed by this Ordinance for any person to bring an action to recover land (including a redemption action), the title of that person to the land shall be extinguished.” [↑](#footnote-ref-4)
5. Judgment §§85 and 104. [↑](#footnote-ref-5)
6. *Ibid* §89. [↑](#footnote-ref-6)
7. *Ibid* §§93-95. [↑](#footnote-ref-7)
8. CA§3. [↑](#footnote-ref-8)
9. *Ibid* §18. [↑](#footnote-ref-9)
10. *Ibid* §25. [↑](#footnote-ref-10)
11. *Ibid* §§30-34. [↑](#footnote-ref-11)
12. *Ibid* §26. [↑](#footnote-ref-12)
13. *Ibid* §§27 and 34. [↑](#footnote-ref-13)
14. *Ibid* §§35 and 36. [↑](#footnote-ref-14)
15. *Ibid* §44. [↑](#footnote-ref-15)
16. *Ibid* §46. [↑](#footnote-ref-16)
17. *Ibid* §§47-48. [↑](#footnote-ref-17)
18. (1997-98) 1 HKCFAR 55. [↑](#footnote-ref-18)
19. [2003] 1 AC 419. [↑](#footnote-ref-19)
20. See CA§20 where the point is fully noted. [↑](#footnote-ref-20)
21. *Hong Kong Kam Lan Koon Limited v Realray Investment Limited* (unrep, HCA 15824 of 1999, 11 Oct 2007) at §87; *Lau Wing Hong v Wong Wor Hung* [2006] 4 HKLRD 671 at §33; *Yu Kit Chiu v Chan Shek Woo* (unrep, CACV 137/2010, 18 Feb 2011) at §23; *Gotland Enterprises Ltd v Kwok Chi Yau* (unrep, HCMP 4450/2003, 25 Nov 2014) at §78; and *Pang Moon Wan v Yu Chi Foon* (unrep, DCMP 2331/2015, 23 Jun 2016) at §58. [↑](#footnote-ref-21)
22. CA§21. [↑](#footnote-ref-22)