

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO 968 OF 2022

IN THE MATTER of all that piece or
parcel of ground situate at Ngam Tau
Sha, Clear Water Bay, Sai Kung, New
Territories, Hong Kong comprising an
area of 1,070 square metres or
thereabouts as the same is shown
coloured pink on the plan annexed to
the Tenancy Agreement No DLO/SK
SX 1811 dated 4 February 1998 (the
“Garden”)

and

IN THE MATTER of Order 113 of the
Rules of the High Court (Chapter 4A)

BETWEEN

MARSPAN LIMITED

Plaintiff

and

CHIU MARGARET (邱美琪)

1st Defendant

All other persons now in occupation of all that piece
or parcel of ground situate at Ngam Tau Sha, Clear
Water Bay, Sai Kung, New Territories, Hong Kong
Comprising an area of 1,070 square metres or
thereabouts as the same is for the purpose of
identification shown coloured pink on the plan
annexed to the Tenancy Agreement No DLO/SK
SX 1811 dated 4 February 1998

2nd Defendant

TAN WAI KEE

3rd Defendant

Before: Hon Wilson Chan J in Chambers

Date of Hearing: 26 April 2023

Date of Judgment: 12 May 2023

J U D G M E N T

A. INTRODUCTION

1. By Summons dated 30 December 2022 (the “**Summons**”), the plaintiff applies for an interim injunction against the 1st and 2nd defendants in the following terms:

(1) An interim injunction be granted against the 1st defendant and the 2nd defendant that until the determination of this action or further order of the court:

(a) The 1st and 2nd defendants be restrained from using or permitting the use of the Garden or any part thereof for any purpose other than as private garden, storeroom and kitchen. In particular, the 1st and 2nd defendants (i) shall not use or occupy the Garden for any residential purpose, and (ii) shall forthwith remove all their dogs from the Garden;

(b) The 1st and 2nd defendants be restrained from erecting any structure on the Garden; and

(c) The 1st and 2nd defendants shall leave and deliver possession of the Garden to the plaintiff.

2. The injunction is essentially to restrain the 1st and 2nd defendants from living in a garden which the plaintiff holds under a short-term lease from the Government. It is the plaintiff's case that the 1st and 2nd defendants' living in the garden is causing the plaintiff to breach the express conditions of that lease.

3. At the call-over hearing of the Summons on 6 January 2023, Counsel for the 1st defendant said that there had not been enough time to take instructions and kept silent about whether the 1st defendant was indeed living in the garden. K Yeung J directed for the filing of further affidavit evidence.

4. In K Yeung J's view, however, the evidence was already clear that the 1st and 2nd defendants had erected an illegal metal wall and gate at the entrance to the garden in breach of the conditions of the plaintiff's lease with the Government. His Lordship granted an Order restraining the 1st and 2nd defendants from doing so.

5. At paragraph 51(3) of the 1st defendant's Skeleton Submissions lodged for this hearing, the 1st defendant stated that she is "contented that the interim-interim order granted by Keith Yeung J be continued". Mr Li SC, on behalf of the plaintiff, confirmed that this is acceptable to the plaintiff. In the circumstances, I need to say no more regarding paragraph 1(b) of the Summons.

6. The 1st defendant now admits to have stayed overnight in the garden “occasionally” but denies that she is living there. She says the 2nd defendant are domestic helpers acting as “watchmen” over the garden. Their exact identities remain unknown. She does not deny that they are living in the garden.

7. In any event, the plaintiff submits that the evidence is now clear. There is plenty to show that the 1st and 2nd defendants are living in the garden and forcing the plaintiff to breach its lease with the Government. At the very least it is causing an immediate and serious risk of irreparable harm to the plaintiff and also to the public interest. An injunction is necessary to stop the breach.

B. THE FACTS

B1. The Parties, the Property, the Garden, and the STT

8. The 1st defendant was a wealthy individual. The plaintiff was a holding company of hers.

9. The plaintiff owned and still is the registered owner of two parcels of land, being Lot Nos 2 and 630 in Demarcation District 238 in Clearwater Bay, Sai Kung (the “**Property**”). On Lot No 630 is a house (the “**House**”). The House was the 1st defendant’s residence.

10. Surrounding the House and the Property is an area of around 1,070 square metres (the “**Garden**”). The only access to the House and the Property is through the Garden. The plaintiff is the leaseholder of the Garden under a short-term Tenancy Agreement No DLO/SK SX 1811 with the Government dated 4 February 1998 (the “**STT**”).

11. The terms of the STT expressly state:
- (1) At clause 2(b): The plaintiff as tenant shall “Not ... use or permit or suffer the use of the Premises or any part thereof for any purpose other than such purposes as are specified in the First Schedule hereto”.
 - (2) In the First Schedule, the permitted purposes are as “Private garden, storeroom and kitchen”.
 - (3) At clause 2(c): the plaintiff shall “Not ... erect or allow to remain on the Premises any building or structure (other than those specified in the ... Second Schedule) without the consent in writing of the District Lands Officer, Sai Kung ... first had and obtained”.
 - (4) At clause 4(a), “... if there is any breach, non-performance or non-observance of any of the terms and conditions to be observed by and on the part of the Tenant herein contained”, the Government may “at any time ... re-enter upon the Premises or any part thereof in the name of the whole, and thereupon this Agreement shall absolutely determine, but without prejudice to any right of action ... in respect of any antecedent breach, non-performance or non-observance of the said terms and conditions ...”.
 - (5) In the First Schedule: the term of the STT was “Five years certain commencing on the 1st day of July 1996 and thereafter quarterly until such time as this tenancy is determined”.
 - (6) At the Third Schedule, condition 1: “... In the event [that the tenancy is not terminated after five years, thereafter] ... the tenancy may be terminated by either party giving to the other

at least three calendar months' notice in writing to that effect to expire at any time".

B2. The 1st defendant's Bankruptcy and the Trustees' Efforts to Preserve Assets

12. By around 2019, the 1st defendant was in serious debt and had defaulted on her liabilities. Pursuant to an Order of L Chan J dated 22 April 2020, she was adjudged bankrupt.

13. The 1st defendant held 999 of the 1,000 issued shares in the plaintiff. In law, upon her bankruptcy, title to the shares passed to her trustees in bankruptcy ("Ts").

14. The 1st defendant had caused the plaintiff to mortgage the Property which the plaintiff owned to secure a loan she borrowed. After she defaulted, the lender ("**CS Credit**") commenced a mortgagee action. The 1st defendant's ex-husband, ie the 3rd defendant ("**Tan**") and two companies related to her family ("**Far East**" and "**CIE**") intervened, alleging to have obtained from her some rights in the Property. By a Judgment dated 10 December 2021, Madam Recorder Sit SC found in favour of CS Credit.

15. Thus, the Property now beneficially belongs to CS Credit, whilst the plaintiff remains its registered owner.

16. The plaintiff is both the legal and the beneficial leaseholder of the STT for the Garden. Indeed, clause 2(g) of the STT expressly provides that no interest therein may be assigned, mortgaged, charged, demised, underlet, parted with or otherwise disposed of.

17. The 1st defendant refused to move out of the Property despite the court's Judgment. CS Credit had to issue a Writ of Possession and *Fieri Facias*. The 1st defendant then refused access and the court bailiff could not post the writ and notice on the Property. CS Credit had to apply for substituted service by posting on the Garden. When CS Credit went again with the court bailiff to take possession of the Property, the 1st defendant still initially refused and then delayed the matters for hours.

18. Later, the plaintiff tried to take possession of the Garden, but the 1st defendant's solicitors and counsel blocked the plaintiff's entry. The 1st defendant again refused to leave. The Police was called.

19. The 1st defendant went so far as to lock the gate of the Garden without the plaintiff's consent and hired security guards to guard the Garden.

20. The 1st defendant's ex-husband, Tan, intervened in the plaintiff's proceedings against the 1st defendant (as the 3rd defendant herein) to claim a 50% interest in the plaintiff, to put a halt to the plaintiff's action, and even to sue Ts personally.

21. On 7 July 2022, CS Credit took possession of the Property. The 1st and 2nd defendants simply moved to the Garden. On the plaintiff's case, they have been occupying the Garden and living there ever since.

B3. The Living Quarters in the Basement of the Garden

22. The evidence now clearly reveals that the Garden is being used for much more than just a private garden, storeroom, and kitchen.

23. There is a large basement under the Garden including a living area, a dining area, and an ensuite bedroom with a bathroom and a toilet. It is connected to, but falls outside the boundary of, the Property. Thus, it is not subject to CS Credit's possession, and is governed by the plaintiff's STT with the Government.

24. This basement is itself an illegal structure which, regardless of whether the 1st defendant and/or the 2nd defendant are living there, is already a serious breach of the STT.

25. The existence and the extent of this basement cannot now be disputed, in that:

(1) Tan in his application to intervene in these proceedings filed his first affirmation dated 31 August 2022. He referred to "a room (the "**Room**") located ... at the Lower Ground Floor ... which locates in the Garden and outside Lot No 630". He also reproduced a survey plan by Landscape Surveyors to make the point that "The Room is shaded in blue and is completely outside of the area of the Property and therefore not subject to the Writ of Possession issued by CS Credit".

(2) The area shaded in blue in the plan is large - even larger than Lot No 630, ie, the floor plan area of the House.

(3) Tan exhibited the full professional survey report. It contained 4 photographs which the surveyor took within the basement showing a large bedroom (with a large bed, a television, cupboards etc) as well as a bathroom and a toilet.

(4) Tan also exhibited a Witness Statement of a former domestic helper of the 1st defendant Gurang Lili Jang dated 9 July 2021,

which exhibited more photographs of the “Room”. The photographs show what is in effect a flat, with a living area, a dining area, and a bedroom, all furnished and lived in.

(5) The plaintiff, when still under the 1st defendant’s control, commissioned a Valuation Report by Dudley Surveyors dated 16 August 2017. The report, with plans and photographs, shows a basement which extends from under the House to outside and substantially under the Garden.

(6) An aerial photo recently downloaded from Google Maps gives a clear picture of the Property and the Garden. One can see that a large area of the Garden is raised, covering a large basement/lower ground floor extending from the House into the Garden.

26. The 1st defendant in her affirmation says the Garden remains a private garden, storeroom, and kitchen and “does not actually have residential facilities” so she could not have been living there and there is no breach of the STT. As the objective evidence shows - and this evidence emanates from the 1st defendant’s own side - what the 1st defendant says is not true.

27. The plaintiff has also adduced the logbooks and photographs taken by the security guards posted by CS Credit to the House. They again show that the 1st defendant, her dogs, and her helpers the 2nd defendant are living in the Garden. Her routine is simple: go out of the Garden to walk her dozen dogs in the morning, come back to change clothes before going out again, then come back in the evening, parking her

car just outside the Garden, staying overnight and leaving the car outside overnight.

28. That the 1st defendant is living in the Garden is corroborated by the high electricity bills for the Property from October to December 2022. Despite the House being vacant, the level of electricity usage was similar to when the 1st defendant was living there. There is only one explanation: the 1st defendant was living in the Garden and tapping electricity from the Property for her own use.

29. In sum, the evidence is now clear and all points one way: the 1st and 2nd defendants are living in the Garden and causing multiple continuing breaches of the terms of the STT. An injunction is necessary to arrest the situation.

C. THE LEGAL PRINCIPLES

30. The general principles applicable to applications for interlocutory injunction are well known.

(1) First, the plaintiff must show a serious issue to be tried. This is a low threshold. The plaintiff needs only show real prospects of success.

(2) Second, the court will consider the adequacy of damages - whether if the injunction is refused but the plaintiff succeeds at trial, he would be adequately compensated by an award for damages; and whether if the injunction is granted but the defendant succeeds, he would be adequately compensated by the plaintiff's cross-undertaking as to damages.

(3) Where there is doubt as to the adequacy of the respective remedies in damages, the question of balance of convenience arises.

(4) Where the court can see that the defendant has no arguable defence to the plaintiff's claim, it is unnecessary to consider (2) and (3).

See: *Hong Kong Civil Procedure 2023*, Practice Notes 29/1/10, 29/1/11, and 29/1/30.

31. Where the injunction sought is mandatory in nature, the plaintiff must show a strong *prima facie* case. The case needs not be so strong as to entitle the plaintiff to summary judgment. Where the plaintiff has not shown a strong *prima facie* case, the court may still grant the injunction where the balance of convenience is so much in the plaintiff's favour, or where the injunction is not difficult to comply with, or is not irreversible or would not pre-empt the trial: *Hong Kong Civil Procedure 2023*, Practice Note 29/1/29.

32. For injunctions concerning land and trespass, the specific principles below are also applicable:

(1) A landowner whose title is not disputed is *prima facie* entitled to an injunction (permanent or interlocutory) to restrain trespass. He does not need to show harm: *Billion Star Development Ltd v Wong Tak Chuen* [2012] 2 HKLRD 85 (CFI) §38(3); *Patel v WH Smith (Eziot) Ltd* [1987] 1 WLR 853 at 858F, 859D.

(2) Any difficulties in the enforcement of an injunction against trespass do not justify refusing it: *Canary Wharf Investments Ltd v Brewer* [2018] EWHC 1760 (QB) §12.

(3) An interlocutory injunction should be granted unless the defendant satisfies the court that he has an arguable case of having a right to do what the plaintiff alleges to be trespass. Only if the defendant could show such an arguable case should the court go on to consider the adequacy of damages, the balance of convenience etc: *Church of Jesus Christ of Latter-Day Saints Hong Kong Ltd v Jessica Park*, HCA 1167/2001 (unrep, 8/11/2001), per DHCJ Jeremy Poon (as he then was) §§8-9; *Patel*, Supra, 861D; *Canary Wharf*, Supra §12.

(4) The court is concerned with protection of property rights. Damage is not a prerequisite. Triviality of the interference will not justify a departure from the general rule of granting injunctions: *Billion Star*, Supra, §38(4); *The Incorporated Owners of Fu Fai Court v Henble Ltd*, HCA 2844/2003 (unrep, 8/08/2003), per DHCJ To (as he then was) §17.

(5) The court cannot stand by and permit a breach or continuing breach of a Government lease, no matter how the breach has come about. It would not be right for the state of affairs to continue. An injunction will be granted to restrain it: *Regency Power Enterprises Ltd v SCS Express International Ltd* [2010] 3 HKC 262 §§10-11.

33. In relation to the 2nd defendant, the other occupiers of the Garden whose identities are not known, the court has powers to grant an injunction against such unnamed defendants described only by reference

to their conduct, provided that the description is sufficient to identify only those who are necessarily included and exclude those who are not: *Hong Kong Civil Procedure 2023*, Practice Note 29/1/49; *Billion Star Development Ltd v Wong Tak Chuen* [2013] 2 HKLRD 714 (CA) §§69-75; *Gotland Enterprises Ltd v Kwok Chi Yau* [2022] HKCFI 625, per Cheng J at §1.

D. PARAGRAPH 1(a) OF THE SUMMONS

34. At the hearing, Mr Kwong on behalf of the 1st defendant sensibly accepted that there is evidence that the 1st defendant might be living in the Garden.

35. Mr Kwong further informed the court that the 1st defendant would give an undertaking that until the determination of the Originating Summons herein or further order of the court, the 1st defendant would refrain from using or permitting the use of the Garden or any part thereof for any purpose other than as private garden, storeroom and kitchen. In particular, the 1st defendant would not use or occupy the Garden for any residential purpose.

36. In other words, the only matter of contention under paragraph 1(a) of the Summons is sub-paragraph 1(a)(ii), namely, whether the defendants should be required to remove all their dogs from the Garden.

37. In this regard, it is important to carefully look at Tan's evidence as to why he says he has a right to enter and access the Garden.

38. Ms Liao, counsel for the 3rd defendant, directed me to paragraphs 4 and 5 of Tan's 3rd Affirmation, where Tan deposed as follows:

“4. As mentioned at paragraphs 17-24 of my 1st Affirmation, ever since the Short Term Tenancy was granted to [the plaintiff] in 1998, there has been a common understanding among [the 1st defendant], [the plaintiff] and myself that, for as long as [the plaintiff] remains a grantee under the Short Term Tenancy (whether as varied or renewed), I would have the right to enter the area covered by the Short Term Tenancy including the Garden, to carry out gardening activities and to occupy and use the Room.”

5. This common understanding among [the 1st defendant], [the plaintiff] and myself which arose since the inception of the Short Term Tenancy expressly and in any case necessarily entailed (and still entails) my right to authorise [the 1st defendant] and/or persons authorised by her to carry out gardening activities and/or maintain the plants and my personal paraphernalia in the Garden as my agent and/or on my behalf. The reason for this is obvious in the circumstances, since I had not lived in the Property since [the 1st defendant] and I separated in 1993. As a matter of practicality, I had asked [the 1st defendant] to help me take care of the plants, flowers, and personal items from time to time while I was away, which I understand she sometimes did personally and sometimes via domestic helpers arranged by her brothers.” (Emphasis added)

39. At paragraph 5(2) of his Skeleton Submissions, Tan puts his case as follows:

“Separately, D3 advances the defence of estoppel, based on a right granted by P to enter and access the Garden and the room (the ‘**Room**’) next to the dining area at the Lower Ground Floor of the Property which locates in the Garden. It is D3's case that it is inequitable for P to revoke the right granted to D3. D3's right since arisen expressly/by necessity or implication entails D3's right to authorise D1 or others to carry out gardening activities on his behalf.” (Emphasis added)

40. As submitted by the plaintiff, it is thus not part of Tan's case that he was permitted to keep a dozen or so dogs in the Garden. Such cannot be said to be part of the carrying out of “gardening activities”. On

Tan's own case, the alleged licence/estoppel would at most be for gardening activities, not the keeping of dogs.

41. For the reasons stated above, I would grant an interlocutory injunction in terms of paragraph 1(a)(ii) of the Summons.

E. PARAGRAPH 1(c) OF THE SUMMONS

42. Paragraph 1(c) of the Summons asks that the 1st and 2nd defendants shall leave and deliver possession of the Garden to the plaintiff.

43. The defendants do not and cannot dispute that the plaintiff, as the tenant under the STT, is entitled to exclusive possession of the Garden.

44. As explained above, at most, the defendants are claiming a right to "enter the area ..., to carry out gardening activities and to occupy and use the Room".

45. The difference between "exclusive possession of" and "exclusive entitlement to occupy" a property is explained by the learned editors of *Megarry & Wade, The Law of Real Property*, 9th ed, at §16-017:

"A tenant who has exclusive possession can exercise the rights of a landowner. Exclusive possession entitles the tenant to exclude all others, including the legal owner, from the property, save where the landlord is entitled under the terms of the lease to inspect the premises and, eg carry out repairs. Exclusive possession must be distinguished from exclusive occupation, which may or may not amount to legal possession. Even if the grantee is exclusively entitled to occupy the premises, in the sense that no one else is entitled to live there, he or she may not have exclusive possession because the grantor may retain control of the premises. Conversely, a grantee may have exclusive possession, although not personally occupying the property, if he

or she is in receipt of the rents and profits as a result of subletting it.” (Emphasis added)

46. In other words, taking the defendants’ case at its highest, the defendants have not asserted a right to exclusive possession of the Garden.

47. For the above reasons, the plaintiff is clearly entitled to an order in terms of paragraph 1(c) of the Summons.

48. Moreover, the defendants’ position, in my view, is sufficiently protected by the undertaking offered by the plaintiff at the hearing, namely, that until the determination of the Originating Summons herein or further order of the court the plaintiff will allow the 1st and 3rd defendants daytime access to the Garden between 9 am to 5 pm every day.

F. DISPOSITION

49. For the reasons set out above, I make the following order:

“Upon the 1st defendant undertaking that until the determination of the Originating Summons herein or further order of the court, the 1st defendant do refrain from using or permitting the use of the Garden or any part thereof for any purpose other than as private garden, storeroom and kitchen. In particular, the 1st defendant shall not use or occupy the Garden for any residential purpose.

AND Upon the plaintiff undertaking until the determination of the Originating Summons herein or further order of the court to allow the 1st and 3rd defendants daytime access to the Garden between 9 am to 5 pm every day.

It is Ordered that:

(1) An interim injunction be granted against the 1st and 2nd defendants that until the determination of this action or further order of the court:

(i) the 1st and 2nd defendants shall forthwith remove all their dogs from the Garden; and

(ii) the 1st and 2nd defendants shall leave and deliver possession of the Garden to the plaintiff.

(2) The injunction granted under paragraph 1 of K Yeung J's order dated 6 January 2023 be continued until further order or the disposition of the Originating Summons herein."

50. I further order that the costs of and occasioned by the Summons be paid by the 1st and 3rd defendants to the plaintiff in any event, such costs are to be taxed if not agreed with a certificate for 2 counsel.

51. The above order as to costs is *nisi* and shall become absolute in the absence of any application within 14 days to vary the same.

52. Lastly, I express my gratitude to counsel for their helpful assistance in this matter.

(Wilson Chan)

Judge of the Court of First Instance
High Court

Mr Laurence Li, SC, leading Mr John Cheung, instructed by Messrs Anthony Siu & Co, for the plaintiff

Mr Alan Kwong and Mr Kwan Ping Kan, instructed by Messrs S K Wong & Co, for the 1st defendant

Ms Tara Liao, instructed by Messrs Hoosenally & Neo, for the 3rd defendant