Falcon Chambers

ANIMUS POSSIDENDI IN HONG KONG:

A REALIGNMENT WITH ORTHODOXY

Introduction

The classic formulation of the *animus possidendi* which a squatter needs to demonstrate remains that of Slade J in *Powell v McFarlane* (1979) 38 P & CR 452. We are required to look at the squatter's conduct to see if we can infer

> "[…] the intention, 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."

That was endorsed by the UK House of Lords in the classic decision of *JA Pye (Oxford) Ltd v Graham* [2003] 1 A.C. 419. Or, as Lord Hope put it at [71]: "… the animus which is required is the intent to exercise exclusive control over the thing for oneself … it is not necessary to show that there was a deliberate intention to exclude the paper owner or the registered proprietor… The only intention which has to be demonstrated is an intention to occupy and use the land as one's own".

The position in Hong Kong has been less clear. It is evident that in Hong Kong, there is still a debate to be had about the constitutionality of adverse possession and its relationship with the right to possessions, albeit that such cases as do consider this issue tend to favour compatibility (*Harvest Good Development Ltd v Secretary for Justice* [2007] 4 HKC 1*; Hong Kong Kam Lan Koon Ltd v Realray Investment Ltd (No 5)* [2007] 5 HKC 122). There is also continued unease about the interaction between adverse possession and land registration, and a reform to the law in relation to "new land" (that is, land held under newly-granted Government leases) to be registered under the Land Titles Ordinance (Cap 585) is in train, pursuant to the recently enacted Registration of Titles and Land (Miscellaneous Amendments) Ordinance 2025, amending the Land Titles Ordinance, Schedule 3 to insert new sections 117E – J. These

amendments will disapply adverse possession under the Limitation Ordinance (Cap. 347) in relation to "new land".

***Animus Possidendi* in Hong Kong: Wong Tak Yue**

It has been argued that the law of Hong Kong differs from the principles as set out in *Powell's* case due to the decision of the Hong Kong Court of Final Appeal in *Wong Tak Yue v Kung Kwok Wai (No 2)* (1997-98) 1 HKCFAR 55 ("*Wong Tak Yue*"). That case was about whether a squatter could succeed in an adverse possession claim where they would have been willing to make an offer to pay rent if asked to do so. In *Wong*, that was held to be fatal. The reason for this, it was stated in *Wong Tak Yue*, was because a willingness to pay rent: "… demonstrated that he was not intending to exclude the owner with the paper title but showed that he was treating himself as enjoying possession under a lawful title from the owners. His intention to possess was not 'as of wrong' but was 'as of right'" (per Li CJ). The effect of this ruling has been that, if such evidence was extracted, that ended any adverse possession claim.

The English Authorities

The position in relation to offers to buy or to pay rent is very different in the law of England and Wales. Unless the offer is in the form of signed writing during the limitation period so as to amount to an acknowledgment of title, or, perhaps, an offer coupled with subsequent negotiations leads to the inference of a licence, the mere making of such an offer does not negative the *animus possidendi*. The position is the same where a squatter never made such an offer, but admitted in evidence that they would have if asked. That, Lord Diplock explained in *Ocean Estates v Pinder* [1969] 2 A.C. 19, 24, is simply the answer any honest squatter hoping to acquire the land would give if asked (and see *Purbrick v Hackney London Borough Council* [2004] 1 P & CR 34 at [24] to like effect). Although an offer to pay rent was briefly thought to negative the *animus possidendi*, that view has since been disapproved (*R v Secretary of State for the Environment, ex p Davies* (1990) 61 P&CR 487, disapproved in *Pye* at [46]).

Given that the required intention is only to possess and not to own the land, there is nothing inconsistent with a squatter being prepared to accept a lease or purchase the land rather than lose it altogether: see *Pye*, at para [46]. Both of those continue to evidence an intention to possess, albeit a preparedness to do so lawfully, if it came to it.

Back to Hong Kong: Wong Chee Sing

The *Wong Tak Yue* decision was reconsidered by the Court of Final Appeal in *Wong Chee Sing v Hung Wah* [2026] HKCFA 33 ("*Wong Chee Sing"*). The effect of *Wong Chee Sing* is to bring the law relating to potential offers to pay rent (and by extension potential oral offers to buy) into line with the reasoning of the House of Lords in *Pye*.

The facts were as follows (see at [6] to [10] and [46] - [48]). Wong held a lease of a property and let out units in it. At some point in 1992, the squatter, Hung, began occupying and trading from a shop at the rear of the property. Although Wong thought that Hung occupied under "some sort of rental agreement", there was in fact nothing of that nature and Wong was not paid any rent in respect of the shop. Hung just continued to trade for the statutory 12 year period under section 7(2) of the Hong Kong Limitation Ordinance. Hung raised that as a defence to a possession claim. The trial judge found that as Hung had not paid business rates or government rents for the shop (which Wong had done), and had not complied with a demolition order issued by the Government, he had not acted as the true owner might have done. This was found to be irrelevant to the question of factual possession (see judgment of Court of Final Appeal, at [28]; [51]). For our purposes, it is material that the judge also found that Hung had decided to lie low and not pay rent to Wong, which conduct he considered engaged *Wong Tak Yue*, though he did not expressly appear to find that Hung would have offered to pay rent if asked (see at [48]).

These findings were all reversed on first appeal. On a second appeal, the Court of Final Appeal was invited to reconsider the correctness of *Wong Tak Yue*, and to answer two certified questions: first, whether *Wong Tak Yue* was consistent with *Pye*, and, secondly, whether (notwithstanding the non-payment of rent) "the continued, unprotested dealing by a person occupying the property with the paper owner, knowing that, in such dealings, the latter believes he is acting in the capacity as the former's landlord, negative the requisite adverse intent to possess".

Adverse Possession and The Action to Recover Land: Two Sides of the Same Coin?

The Court proceeded to consider adverse possession, and made the following point (at [16]):

> "Sometimes lawyers debating the elements of adverse possession lose sight that adverse possession and the cause of action for recovery of land are two sides of the same coin. What constitutes adverse possession is the same as what constitutes possession that

> would give rise to a cause of action by the paper owner to sue for recovery of land. If the nature of occupation or use by a squatter or a trespasser of a piece of land is insufficient to give rise to a cause of action for recovery of land, that would not be sufficient to give rise to adverse possession by him. Conversely, if the nature of occupation or use is sufficient to give rise to a cause of action for recovery of land, that would be sufficient to give rise to adverse possession."

This should not be misunderstood as meaning that conduct rendering a trespasser liable to a trespass action will automatically satisfy the requirements for adverse possession, nor that an action for possession or an order for possession necessarily implies that the defendant is in possession rather than making use of the land in a way that falls short of possession. So, while the right to recover land and adverse possession are two sides of the same coin, we need to be clear about what the nature of that coin is.

Possession actions are brought against trespassers, and a trespass is an infringement of the right to possession. An infringement can occur by conduct falling significantly below the adverse possession threshold, such as a fleeting invasion by protesters on land which is temporarily and non-exclusively occupied by them (see e.g. Chapter 3, Falcon Chambers, *Land Injunctions*), or the temporary but unauthorised storage of building materials. Not every actionable trespass constitutes the taking of possession. Nor does an order for possession require that the defendant is in possession – it is sufficient that they are interfering with the claimant's possession. An order for possession vindicates the claimant's right to possession without implying that the defendant is necessarily themselves in possession: see e.g. *Williams Bros Direct Supply Ltd v Raftery* [1958] 1 QB 159 at 163.

It appears clear from the later discussion of the position that the Court of Final Appeal was in the main confining its observations to cases where the factual element of adverse possession was made out, and it was simply making the point that the non-consensual nature of use that makes time run for the squatter is also the very use that justifies the bringing of a possession claim: see at [24] and [25].

The Analysis of the *Animus Possidendi*

The Court of Final Appeal proceeded with an analysis of the English authorities at paragraphs [19] and following. In particular, it noted that the concept of *animus possidendi* had to be

understood in the context of a property law system founded on relativity of title. In that context, a squatter could not be required to intend that which is impossible. In particular, a squatter could only exclude those with a relatively weaker title than they enjoyed – meaning that the formulation of the relevant *animus* could not require them to seek to exclude the true owner, who, until the lapse of limitation, would always have a relatively better title and could not lawfully be excluded (see discussion at [20] – [23]; [29] - [35]). The intention is simply one to possess, and not to own (as that is impossible), is to be inferred from conduct, and, provided that there is the requisite level of factual possession, and the manifested intention to exercise exclusive control for one's own benefit, time will run in any case where that use is non-permissive (at [38]).

Was *Wong Tak Yue* A Wrong Turn?

The Court of Final Appeal clearly considered that *Wong Tak Yue* was to be understood as purporting to lay down the principle that even an unarticulated preparedness on the part of a squatter to pay rent if asked was sufficient to rebut the *animus possidendi* to be inferred from the squatter's exclusive possession. Particular weight was placed on the characterisation of such use by the squatter as always "as of right" in such circumstances, and incompatible with adverse possession. It ultimately decided that this approach was wrong in principle, misunderstanding the effect of *Ocean Estates* and *Pye*, and ignoring the abolition of ouster and non-adverse possession. The approach that had developed at the Bar, that the extraction of a concession by the squatter that they would have paid rent if asked ended any limitation based claim or defence, was no longer a valid approach (see at [45]).

Application to the Facts

As there was no longer a general principle that a preparedness to pay rent (whether or not articulated) negatived the *animus possidendi*, the next question was what impact this had on the facts. The Court of Final Appeal was clearly right to say that, absent deliberate concealment, simply lying low was not a basis for finding against Hung ([47] – [49]), and no estoppel or implied licence argument was run against him ([54] – [55]; [59]). Absent such arguments, a squatter is perfectly entitled to let sleeping dogs lie.

Conclusion

Our view, expressed in the Second Edition of Adverse Possession at 9-99, was that *Wong Tak Yue* was wrongly decided. We considered that an Ontario authority to like effect, *Re St Clair Beach Estates v MacDonald* (1975) 50 DLR (3d) 650, was similarly wrong. In Hong Kong, at least, what we consider to be the orthodox approach has now been restored. Once the *animus possidendi* is understood to relate to the intention to exercise requisite physical control and possession, and unrelated to questions of ownership, then it seems inevitable that articulated or unarticulated offers to pay rent, short of amounting to acknowledgments of title (where the Limitation Act 1980 applies) or material justifying a licence or an estoppel, do not negate the *animus possidendi*.

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