Can Adverse Possession be Claimed in respect of Common Parts in a Building?

Introduction

In Adverse Possession and the Proposed Reform we discussed the doctrine of adverse possession and its recent development in Hong Kong. In the recent Court of Appeal decisions of Incorporated Owners of Mountain View Mansion v Heart Cuisine [2012] 4 HKLRD 628 (“Mountain View”) and Wong King Lim v Incorporated Owners of Peony House, [2013] 4 HKC 295 (“Peony House”), two differently constituted Court of Appeal expressed divergent views in respect of adverse possession over common parts in a building. This article seeks to analyse whether such adverse possession claims can succeed.

Case Background

The meaning of “common part” was touched upon in our article on Legal Risks in Converting Two Flats into One Single Unit in January 2010.¹ Converting common parts to personal use without consent from the owners’ committee is a contravention of section 34I of the Building Management Ordinance (Cap. 344), and therefore a breach of the Deed of Mutual Covenant (“DMC”). The incorporated owners (“IO”), on behalf of the co-owners of the building, may seek injunction to end such conversion.

However, when a person has been in possession (adverse to the co-owners) over a common part for twelve years or more, could the IO still enforce the mutual covenant against conversion of common parts in the DMC against him?

Co-owner as Adverse Possessor

If the claimant of adverse possession was also a co-owner, it is well settled that his claim for adverse possession cannot be a valid defence against the IO’s right of action. The claimant’s conversion must have been consented by himself in the capacity of a co-owner, and therefore not adverse to the co-owners, who possess the common parts as tenants in common. Further, as a party to the DMC, the claimant co-owner is bound by the terms of the DMC, including the covenant not to convert common part to personal use.

Therefore in such cases the IO would succeed in seeking a prohibitory injunction against further conversion of the common parts, further or alternatively a mandatory injunction to

¹ Section 2 and Schedule 1 to the Building Management Ordinance (Cap. 344)
remove the structures (e.g. walls, gates, fences, etc.) erected by the adverse possessor on the common parts.

**Other Persons as Adverse Possessor**

The position of an adverse possessor whom was not initially a co-owner and not a party to the DMC poses a difficult question. In fact the Court of Appeal's views differed in *Mountain View* and *Peony House* as to whether adverse possession by such claimants should be allowed.

In *Mountain View*, a shop tenant occupied a service lane adjacent to the building, and demolished the external wall of his shop. The service lane and the external wall were common parts. Cheung JA first ruled that the doctrine of adverse possession, based on Limitation Ordinance (Cap. 347), did not apply, since the IO was not claiming possession of (i.e. recovering) the service lane, but was seeking to enforce the co-owners’ right under the DMC. Second, whether or not the adverse possessor was a party to the DMC at the outset, upon acquiring title to the common part he was subject to the restrictive covenants in the DMC.

In the premise, the Court upheld the injunction restraining the shop tenant from using the service lane for his personal use. Further the shop tenant was ordered to restore the external wall of his shop.

Nevertheless in *Peony House*, the Court of Appeal allowed an adverse possession claim over a common part. The claimant of adverse possession in that case occupied a structure on part of a strip of land known as “the Lane” and operated a business from there. The Lane turned out to be a common part of the Peony House building, being described as a scavenging lane on the building plans. There are two entrances to the Lane: the claimant installed an iron door at one entrance, and an iron gate at the other; as such he blocked off access to the Lane from the streets on both sides of the building. The claimant’s occupation subsisted for not less than 20 years since 1988 before the IO took action against him.

Yuen JA pointed out that the adverse possessor here was never a party to the DMC. After the relevant period under the Limitation Ordinance had elapsed, the co-owners’ title to the converted common part was extinguished. The co-owners (and the IO) no longer had any right to the converted common part, and therefore no basis to enforce the DMC against the adverse possessor.

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2 Section 7(2) of the Limitation Ordinance provides “No action shall be brought by any other person to recover any land after the expiration of 12 years…” Section 17 also provides “…for any person to bring an action to recover land…” [Emphases added]
The Court distinguished the decisions in *Mountain View* and some earlier cases which held that adverse possession could not be claimed over common parts of a building.

As a result, the IO was denied any right of action to recover possession of the common part.

**Legacy**

It remains inconclusive if a person who is not a co-owner may claim adverse possession over common parts in a building. In *Yeung Mau Cheung v Incorporated Owners of Ka Ming Court, Castle Peak Road*, HCA 615/2010, the judgment of which was published on 9th August 2013, the Court of First Instance followed *Peony House*. Since *Mountain View* and *Peony House* were both Court of Appeal decisions, which of the divergent views prevails awaits an authoritative decision by the Court of Final Appeal.

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**Important**: The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.