Dr Lo Sook Ling Adela v Au Mei Yin Christina and Another
[2002] SGCA 11

Case Number : CA 600133/2001

Decision Date : 27 February 2002

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Tan Lee Meng J; Yong Pung How CJ

Counsel Name(s) : Sundaresh Menon and Choong Kean Hin Allen (Rajah & Tann) for the appellant; N Sreenivasan (Straits Law Practice LLC) for the respondents

Parties : Dr Lo Sook Ling Adela — Au Mei Yin Christina; Anor

Civil Procedure – Appeals – Findings of fact – Evaluation of evidence – Whether appellate court can examine evidence against inherent probabilities or undisputed facts

Evidence – Admissibility of evidence – Failure to put one's case to appellant – Whether failure to put its case precludes party from subsequently raising it

Land – Future interests – Adverse possession – Encroachment of fence onto respondents' property – Respondents' reliance on survey plan to show position of fence – Presumption of accuracy of survey plan – Whether presumption rebutted – Whether appellant has acquired ownership of disputed strip of land by adverse possession – s 85 Evidence Act (Cap 97, 1997 Ed)

Judgment

GROUNDS OF DECISION

1. This was an appeal against the decision of the High Court dismissing the appellant's defence that she was entitled to a strip of land which adjoins the appellant's property, located at No. 26 Leedon Road, and the respondent's neighbouring land at No. 24 Leedon Road, by way of adverse possession. At the close of the hearing, we allowed the appeal and confirmed the appellant's claim that she had acquired ownership of the disputed strip by adverse possession. We now give our reasons. For convenience we shall hereinafter refer to the two properties known as 26 Leedon Road and 24 Leedon Road as "No. 26" and "No. 24" respectively.

Background

2. On No. 26 is a house with garden purchased by one Mr CF Sawyer in 1962. In 1970, the appellant married Mr Sawyer and moved in to live with him. She has been living there ever since. Her two children, a boy aged 6 and a girl aged 8, also moved in to live there. In 1974, Mr Sawyer transferred ownership of the property to the appellant. Mr Sawyer passed away in January 1993.

3. No. 26 and No. 24 share a common boundary which is about 200 feet long. In July 1999, the respondents, who are husband and wife, purchased No. 24 from the previous owner (one Mr Tan) to build their new home. Towards that end, topographic surveys were carried out and it was discovered that the fence separating the two properties did not follow the boundary line as it curved in the middle section and encroached onto the side of No. 24, and at the broadest point the encroachment was up to some 10 feet. The fence deviated from the boundary line about 2/3 of the way. The encroached portion has an area of approximately 800 sq feet.

4. It was not in dispute that the encroachment was not done deliberately by the appellant. According to her, the fence had been in that position since she moved into the property in 1970 and

that the disputed strip had always been a part of the compound of No. 26. She was told by her husband that the fence was erected by Reckitt & Colman Singapore Pte Ltd, the then owner of No. 24. In the eighties Reckitt & Colman erected a wooden fence along a part of the mesh wire fence to enhance privacy.

5. In 1994, a significant change in the law took place in Singapore. By virtue of what is now s 50 of the Land Titles Act (Cap 147) no one may, after 1 March 1994, acquire any registered land by adverse possession. But the new law does not affect a person who has been in adverse possession of registered land for 12 years or more before 1 March 1994. In other words, the new law does not affect title already acquired by adverse possession: *Balwant Singh v Double L&T Pte Ltd* [1996] 2 SLR 726.

6. As far as the respondents were concerned, they had no idea as to the history of the fence. The previous owner, one Mr Tan, from whom the respondents bought the property, had only owned it for some three years. The owner previous to Mr Tan was Reckitt & Colman. Nevertheless the respondents commenced the present action to recover the disputed strip from the appellant on the ground that the later had not been in adverse possession of it for the required 12 years as at 1 March 1994. They relied on a plan known as Certified Plan No. CP 16587 (CP 16587) filed in the Chief Surveyor's Department. CP 16587 was based on a survey of No. 24 carried out in November/December 1983, at the request of the then owner to refix boundary marks which were out of position and lost, and the results of which survey were recorded in the Survey Department Field Book No. 22696. The survey was carried out, and the recording made, by Field Assistant Mr Lee Siah Hing (Mr Lee). The plan showed that in late 1983 the fence was running correctly along the full length of the boundary line. No deviation was noted. However, the appellant said that the plan did not correctly depict the position of the fence on site.

Evidence for the appellant

7. It is clear that in law the burden of proving adverse possession rests with the claimant: see ss 103 and 104 of the Evidence Act. According to the appellant, the fence had been in that position since 1969 when she visited Mr Sawyer at No. 26 before they were married. No change had been made to the fence. Shortly after she moved into No. 26, she and her late husband planted and maintained a hedge alongside a part of the fence and a portion of the hedge was on the disputed strip. The hedge was only 10-15 feet long. Later it was removed but the fence was left intact. She stated categorically that in her thirty years of residence there, the fence had never been moved.

8. The appellant also said that she and her husband planted trees in the garden. Among them were 14 clusters of MacArthur palms, a belimbing tree and a huge wild cherry tree (also called Salam tree) which were planted on the disputed strip. The Salam tree was cut down ten years ago and what remained was just a stump. Further, to improve the landscape of the garden, they obtained and placed several rocks/boulders on the disputed strip. A photograph taken in the seventies was produced by the appellant showing the rocks and beside them was a stone lantern. A recent photograph taken of the same location showed that the lantern was no longer there. The appellant could not recall when it was removed.

9. The appellant’s daughter very much corroborated what the mother told the court. She reiterated that the position of the fence had never been moved. She lived there from 1970 to 1989 when she moved out on her marriage. Although from 1981 to 1986 she was in England for studies she had returned home every year during her vacation. The disputed strip had always been a part of the garden of her house. She remembered the rocks which were placed there. However, in cross-

examination she admitted that if the fence had moved a foot or two while she was away, she would not necessarily have noticed the change upon her return.

10. The appellant's son also lived at No. 26 from 1970 to 1987 before he moved to stay at a university hostel. He was there during the relevant period. He also affirmed that the position of the fence had not been altered in all those years and he gave some reasons why he remembered the fence to be there. But for the purposes of this appeal we need not go into those reasons.

11. The appellant also called a retired professor of Botany from the NUS, Prof Rao Nagaraja Adisheshappa (Prof Rao), to shed light on the age of various trees/plants grown on the disputed strip. Of the 14 clusters of Macarthur palms grown there alongside a part of the wire fence, except for one cluster, all the others showed varying degrees of damage or of being disturbed. The one undamaged cluster had a full set of young and mature stems and many of the stems were more than three times the height of the wooden fence behind them, which was about seven feet. In his opinion, such a palm would normally grow at approximately 10 to 12 inches per year and this meant that the palm was over 20 years old.

12. The appellant's last witness was a registered surveyor, Mr Tang Tuck Kim, who had served a year in the Survey Department in the early seventies, followed by five years as a surveyor in the Registry of Land Titles & Deeds. The gist of his evidence was that the purpose of a plan such as CP 16587 was to accurately depict the boundary lines of a property and to verify and refix the boundary marks. It was not intended to accurately depict non-permanent features such as a fence. His examination of the Field Book No. 22696 confirmed that. Furthermore, from page 6 of the Field Book where there was a plan (plan page) one could see that the surveyor only recorded the measurements of the two extreme ends of the fence and nothing in between. In his view, the surveyor merely made an assumption that the fence line was straight without actually taking measurements to check it out. However, Mr Tang had to retract his assertion that the surveyor who prepared CP16587 was not concerned with non-permanent features such as a fence after he was shown the provisions of r 47(a) of the Land Surveyors' Rules 1976. But as will be seen later, the views of Mr Tang were consistent with a reply from the Survey Department dated 9 May 2001 (see 29 and 30 below).

Respondent's evidence

13. The respondents called a land survey technician, Mr Wong Tuck Kheong, to give an account of what he found on the land when his company, Acemap Survey Services Pte Ltd, was engaged to conduct a topographic survey of No. 24. He told the court that in August 1999, he went down to the site following an earlier survey carried out by another employee, one Haris Bin Ripin, which showed a crooked mesh wire fence. He climbed over to the side of No. 26. What he found was set out in a statutory declaration affirmed in January 2001 as follows:-

> "When I climbed over the mesh wire fence somewhere near to the swimming pool, I noticed that there was another damaged mesh wire fence (metallic in colour and rusty) amongst the dense vegetation that was at the area of the crooked boundary line was (sic). However, the metallic mesh wire fence was standing in part and broken in part. At the broken parts there were footings for a fence still on the ground. I surveyed this fence and I was able to ascertain that the boundary line was where the damaged fence was."

14. However, on the day he appeared in court to testify, he made a correction. He said there was,

> "no mesh wire fence standing on the footings. The footings were concrete debris found on the site. There were remnants of the mesh wire fence, one to two centimetres, stuck on what appeared to me as footings for a fence. The concrete on which the traces of mesh wire fence that were found were (sic) also sparsely spread out."

He also said in cross-examination that he saw concrete debris with traces of wire fencing at four points. But in view of the lapse of time, he could not indicate where the four points were.

15. Another witness called by the respondents was a registered land surveyor, Mr Anthony Lim, who had previously worked in the Survey Department (from 1963-1970), and the Jurong Town Corporation before commencing private practice in 1979. Mr Lim, upon examining the plan page of the Field Book came to the conclusion that on 1 December 1983 there was, in fact, a mesh wire fence running along the legal boundary between No. 24 and No. 26.

16. While Mr Lim admitted that the surveyor recording the plan page, Mr Lee, did not take any further measurements along the boundary in relation to the position of the fence, he was nevertheless of the view that Mr Lee did not make any assumption when he drew a straight line between the two end points of the fence. He further said, looking at page 10 of the Field Book, that it was clear that besides the two end points, Mr Lee was also at an intermediate position, marked 19 on that page and which had a circle around it (station 19), and from that position Mr Lee would have been able to see that the fence between the two end points was a straight line. He said the surveyor would have stood at station 19 and seen that the fence was a straight line between the two ends although a person standing at one end of the fence would not be able to see the other end. Relying on his own experience, he concluded that Mr Lee would have taken care to ensure the accuracy of his depiction of the position of the fence.

Decision below

17. The trial judge was not satisfied that the evidence adduced by the appellant had rebutted the presumption arising under s 85 of the Evidence Act on account of what was shown on CP 16587. She felt the appellant's evidence lacked objectivity and made the following observations:-

> "In cross-examination, the defendant came across as a person who was strongly attached to the disputed strip. She considered it to be, indisputably, her property and was resentful that what she called a 'ridiculous case' had come up and made her sit in the witness box in order to answer 'silly questions'. She did not agree that the disputed strip did not fall within the description of No. 24 as contained in the certificate of title which had been issued for No. 24. She was next asked whether she agreed that the disputed strip fell within the certificate of title held by the plaintiffs and her answer was that she did not know. When she was asked whether she agreed that the disputed strip fell on the plaintiffs' side of the boundary line, her answer was an emphatic 'no'. The defendant's lack of objectivity was revealed in these responses."

18. The trial judge also found the memories of the appellant and her daughter not to be entirely reliable. She referred to one aspect and here we would quote her:-

> "Another difficulty with the defendant's evidence was her statement that the cherry tree was well over 20 feet in height in 1970. Her daughter, Ms Teo,

> supported this testimony by stating that when she moved in as a child, the cherry tree had been 'huge' to her. The evidence of Professor Rao, the botanist, was that the stump of the cherry tree showed that it had been about 20 years old when it was cut down. According to the defendant, the tree had been cut down in about 1991. Taking these two facts together would mean that the cherry tree was either not yet in existence in 1970 or if it was that it was very young and not yet at a height that would allow it to be described as 'huge' even from the perspective of an eight year old child. This was one aspect at least, on which the memories of the defendant and her daughter were not reliable."

19. Furthermore, the trial judge did not feel that she could place much reliance on the evidence of the son and daughter because they had discussed the case with their mother. She suggested that they could have been influenced by the assertions of their mother.

20. As regards the evidence of Mr Tang, the trial judge was inclined to think that his report could be less objective as it was finalised in consultation with the appellant's solicitors. Furthermore, the way Mr Tang presented the matter seemed to be like someone putting forward a case rather than a person giving expert evidence. She referred to, inter alia, an aspect of his evidence touching on the significance of a stone marker laid by the then Singapore Telephone Board (predecessor of Singapore Telecommunication Ltd) on site where he tried very hard to place some significance on the marker when there was really no objective basis for him to do so.

21. The trial judge held that the appellant had failed, on the balance of probabilities, to rebut the presumption laid down in s 85 of the Evidence Act that the plan (CP 16587) was accurate. She noted that the plan was cited in the certificate of title relating to No. 24 and it was a document on which any person having dealings with the property would rely. She accepted the evidence of Mr Wong relating to his discovery of concrete debris and footings of an old mesh wire fence at the boundary proper, as well as the views offered by Mr Lim as to how Mr Lee would have gone about carrying out the survey in late 1983.

22. The trial judge held the fact that the drains of the two properties converged at the fenceline was neither here nor there, bearing in mind, inter alia, that in the distant past the four properties, including the present two properties, were owned by the same entity and there was no fencing between the properties. Furthermore, there was evidence indicating that drains were laid to follow the terrain of the land rather than the boundaries. As regards a wooden fence built by the then owner of No. 24 which ran alongside the existing fence, she felt that that must have been erected after the 1983 survey, otherwise it would have been reflected on CP 16587. Furthermore, according to the son of the appellant, the wooden fence was erected during the period from early to mid-eighties.

23. As regards the MacArthur palms, the judge felt that the problem was in determining their age, bearing in mind Prof Rao's opinion that growth of the palms could be faster in the right condition.

The appeal

24. The central issue of this appeal was whether the trial judge erred when she held that on the evidence before her the appellant had not rebutted the presumption prescribed in s 85 of the Evidence Act that CP 16587 was accurate. The appellant did not dispute that the presumption in s 85 did arise in relation to the plan. However, she submitted that the trial judge was plainly wrong in the conclusion reached.

25. The thrust of the respondents' argument was that what was decided by the trial judge was a question of fact and on a question of that nature, an appellate tribunal should be slow to reverse such a finding unless the judge had misdirected himself or was plainly wrong on the evidence. All that the respondents need show was that as on 1 March 1982 the curved fence was not there. CP 16587 was proof of that. It was not for the respondents to show when, and by whom, the curved fence was installed.

Accuracy of CP 16587

26. We would observe that the entire case of the respondents rested on CP 16587. The trial judge also found corroboration for what was depicted in CP 16587 in the evidence of Mr Wong. It was therefore important to bear in mind which part of CP 16587 was being challenged. It would be recalled that CP 16587 was drawn based on the recording in the Field Book. The appellant did not assert that the entire plan was incorrect but only that part which depicted the common fence to be a straight line.

27. The accuracy of CP 16587 was questioned on the ground that the surveyor, Mr Lee, had assumed that the fenceline was straight when it was, in fact, curved. It could not be supported by the measurements recorded at the two extreme ends of the fenceline which showed that the fence was off marginally at one end. Both ends were not intervisible. Mr Lim placed importance on the notation of station 19 on page 10 of the Field Book to say that Mr Lee, from that position, would be able to see that the fence running from the two ends was a straight line. But the fact of the matter was that there was nothing to indicate what Mr Lee did at station 19 in relation to the fenceline. His task then was to ascertain the boundary markers. He did not even indicate what was the closest distance between station 19 and the fence. We entertained serious doubts whether a person standing at station 19, and not at a point along the fence nearest to station 19, could accurately ascertain whether the fence throughout its whole length was a straight line running along the legal boundary. Mr Lim asserted that to any person standing at station 19, <u>any</u> curvature of the fence would have been abundantly obvious. This must clearly be an over-statement or an exaggeration. Surely, much would depend on the degree of the curvature and the contour of the land itself.

28. Surveying is a precise science and if Mr Lee had intended to determine the exact position of the fenceline throughout its entire length, we would have expected him to indicate how he went about doing it. There was nothing of that at all except in relation to the two end points of the fence. The manner postulated by Mr Lim as to how Mr Lee could have gone about undertaking the survey of the fenceline was, at best, speculative. If indeed, that was the manner in which Mr Lee went about determining the direction of the fenceline, then, in our view, it was a pretty shoddy piece of work. Here, we would like to refer to rules 55 and 71 of the Land Surveyors Rules, 1976 which prescribed how title surveys were to be carried out. Under rule 55 all surveys for title, including relocations of boundaries, were required to be recorded in field books and submitted to the Chief Surveyor. Rule 71 provided that:-

> "71. The computations required to be submitted with the field notes and plan of a title survey shall be such as will –
>
> (a) prove the accuracy and adequacy of the field work;
>
> (b) determine the areas of the lots surveyed; and
>
> (c) relate the positions of the lots surveyed to those of

other existing surveyed lots in the neighbourhood."

It was therefore essential that there must be adequate field work to justify whatever conclusion was drawn.

29. There was, in this regard, a very pertinent letter dated 9 May 2001 from the Survey Department in answer to certain queries raised by the appellant's solicitors. It reads:-

> "Field observations in Field Book No. 23696 pages 3, 5, 7 and 9, and diagram pages 8 and 10 were checked by staff of the Survey Department. Field Book No. 22696 page 6 was not checked as it was a recording of the field details that were not permanent features, such as fences, wall, edge of metalled roads, coping of concrete drains, etc, in relation to the lot boundaries."

It would be noted that page 6 of FB 22696 was, in fact, the plan page, upon which CP 16587 was based and that page was not checked for the reasons given.

30. Mr Lim sought to explain this reply from the Survey Department, in the light of his previous experience in the Survey Department, where he had worked as a field assistant, draughtsman and chief draughtsman, that it only meant there was no mathematical check in respect of the survey of the fencing. We would have thought that the reply was clear enough: that the plan page was not checked. He also said CP 16587 would have gone through the hands of the district surveyor, who would inspect Mr Lee's work at site, and would have been checked by a draughtsmen, a draughtsman checker and the chief draughtsman. We did not think that was disputed. But the plain fact was that there was nothing on record to indicate that any one had checked Mr Lee's calculations or drawings insofar as the non-permanent features were concerned, and this would include the fence. In any case, there were insufficient data for any person to check on the accuracy of the fencing. That probably explained why the Survey Department replied the way it did.

31. In our judgment, Mr Lim was merely speculating as to what Mr Lee did in relation to the fence. He really had no idea what Mr Lee did. The experience which he relied on was something that occurred thirteen years before the survey carried out by Mr Lee in 1983. He seemed to suggest there was no change in the Department's practices between 1970 and 1983, without appreciating that the Land Surveyors Rules, 1976, were introduced some six years after he left the Department. Even the 1976 rules were subsequently replaced by new rules in 1991. Accordingly, his speculations could not stand in the face of the letter from the Survey Department stating that non-permanent features in CP 16587 (which included the fence) were not checked. There were no computations or field notes for any check to be undertaken. The appellant pointed out that even Mr Lim, who was engaged to survey No. 24 in relation to this dispute, got his facts wrong. In his topographical survey map, as well as in his affidavit, he represented that the wooden fence ran along the whole length of the mesh wire fence, which was not the case.

32. While it was true that Mr Lee spent some three days at No. 24 to survey the site and had taken measurements on numerous locations around the site, it could not be denied that as far as the fenceline was concerned, the measurements taken by Mr Lee were only in relation to the two end points and nothing more. With respect to the trial judge, we think she had given undue weight to the evidence of Mr Lim, which in the material respects, were mere conjectures on his part, based on what seemed like out-dated practices of the Survey Department. In the absence of objective evidence, like measurements and computations recorded in the Field Book, which were required to be kept under r 71, the probative value of the presumption in s 85 of the Evidence Act in relation to CP 16587 had been reduced to almost nothing at all.

Reliability of Mr Wong's evidence

33. We will at this juncture consider the evidence of Mr Wong, which was relied upon by the trial judge in coming to her conclusion that the existing fence was probably moved post 1983. In finding that Mr Wong was a credible witness, the trial judge observed "it was to his credit that he modified his original statement by making it clear that he had not found the fence still standing but simply concrete debris with small remnants of fencing". She seemed to think that Mr Wong made the clarification on his own volition.

34. In 13 above we have set out what Mr Wong stated in his statutory declaration. Because the appellant could not understand this statement, in April 2001 her solicitors sought clarification on it and asked for the details as to the "exact location of the alleged damaged mesh wire fence and the footings of the fence". The clarification sought was not forthcoming.

35. It was only on the morning when Mr Wong came to be cross-examined that the respondents' solicitors filed a clarification statement by Mr Wong. The material part of the statement is set out in 14 above. The respondents' solicitors had met Mr Wong to prepare the clarification statement. But, as mentioned above, two months before this, the appellant's solicitors had already sought clarification on that precise point which request was simply ignored. In the circumstances, we seriously doubted it could be said that Mr Wong gave the clarification of his own volition.

36. Be that as it may, what struck us was the following four points made by the appellant which, in our opinion, gravely undermined the evidence of Mr Wong:-

> (i) Mr Wong said that the survey by his firm was first conducted by a colleague. The field data, which showed a crooked boundary, were no longer available as they were keyed into the computer directly. Mr Wong explained that he went to the site to inspect the fence on his own initiative because he thought boundary lines were seldom crooked. Yet following his investigations he made no report, prepared no field notes, took no photographs and was even unable to identify where along the boundary were the 4 points of concrete debris. He would have known the significance of his findings.
>
> (ii) In the statutory declaration, made almost two years after his alleged investigation, Mr Wong asserted that in 1999 another metallic wire fence was standing in part and broken in part along the boundary. He made no mention of the 4 points and yet he could remember during his cross-examination that what he saw in 1999 was in fact not a metallic wire fence standing in part and broken in part but 4 points of concrete debris with 1 or 2 cm remnants of an old fence.
>
> (iii) Prior to Mr Wong's clarification statement, the appellant had specifically stated in her affidavit that there was never any such fence which was standing in part or broken in part and that she never removed any such metallic fence and its footings at any time after 1999. The appellant was not challenged on this in cross-examination. In fact, the alleged findings by Mr Wong either as described in the original statutory declaration or his clarification statement were never even put to the appellant in cross-examination.
>
> (iv) If there were, in fact, 4 points of concrete debris with remnants of an old fence existing in 1999, they should still be there as the appellant clearly stated

> that she did not remove any such footings and she was not challenged on that. The trial judge, however, advanced an explanation in her judgment that the retained moisture would have contributed to the decay of the old fence. Not only was this explanation not advanced by the respondents in the court below, we had serious doubts that there was any scientific or objective basis for that proposition: could moisture disintegrate concrete debris?

37. It is trite law that an appellant court should be reluctant to overturn findings made by the trial judge because they are in a less advantageous position as compared to the trial judge who has had the benefit of hearing the evidence of the witnesses and observing their demeanour: *Clark v Edinburgh & District Tramways Co Ltd* (1919) SC (HL) 35. But an appellate court is entitled to examine the evidence against inherent probabilities or against uncontroverted facts: *Peh Eng Leng v Peh Eng Leong* [1996] 2 SLR 305.

38. In relation to the evidence of Mr Wong, unlike the judge, we were not able, testing his evidence against the objective facts, to conclude that he was a reliable witness. We did not think just because a witness made a clarification that he was thereby shown to be reliable. Obviously the circumstances under which the clarification came about, including its timing, and the substance of the clarification were critical. In his statutory declaration he stated, inter alia, there was a "damaged mesh wire fence … standing in part and broken in part. At the broken parts there were footings for a fence still on the ground." However, the so-called "clarification" he made was drastic – there was no mesh wire fence standing on the footings. No explanation was offered on how the mistake crept into the statutory declaration. Was he trying to mislead, and faced with the prospect of being cross-examined, decided to come clean? If he could not remember correctly at the time he made the statutory declaration what he found at the investigation, it was less likely that he would be able to recall correctly, some months later, what he had found. Accordingly, we were convinced, in the light of this and the other reasons mentioned in 36 above, that the corrected version of Mr Wong's evidence should not be accepted on its face value.

Was the fence moved?

39. We now turn to the question of the probabilities of the fence being moved after 1 March 1982. On this, only one of two persons could have done it, either the appellant or the previous owner of No. 24. Of course, the third possibility was that the fence was always in that position since the appellant moved into No. 26.

40. The evidence of the appellant was abundantly clear. The fence was in that position all the years she was there. She did not shift the fence. In none of the respondents' witnesses' affidavit of evidence in chief was it stated that the appellant shifted the fence post the 1983 survey. It was also not suggested to her in cross-examination that she moved the fence. Having regard to the rule in *Browne v Dunn* [1893] 6 R 67 it was no longer open to the respondents to assert that the appellant moved the fence. While we recognise that the rule in *Browne v Dunn* is not rigid, and it does not mean that every point should be put to a witness, the point which the respondents sought to make was at the very heart of the matter and it should have been put to the appellant, so that she could further clarify why she could not have moved the fence.

41. Two other factors also militated against the appellant being the person who moved the fence post 1983. There were plants/trees on the disputed strip. More will be said about these plants/trees later. If the appellant had sought to move the fence nearer to the other side, surely the occupiers of No. 24 would have known and protested. Nothing of that happened. Another significant fact was that

even the respondents themselves said that the appellant was unaware of the encroachment until they brought it to her attention. In the circumstances the only conclusion that could reasonably be drawn was that the appellant did not move the fence post 1983.

42. Then could it be that it was the predecessor in title of the respondents who moved the fence post 1983? Counsel for the respondents made such a suggestion in his cross-examination of the appellant who denied it. Two points may be made here. First, there was no evidence at all that any such predecessor in title moved the fence. Second, why should the previous owner make such a move, thus losing the enjoyment of a portion of the land amounting to some 800 sq feet? It is true that the previous owners erected the wooden fence but the wooden fence was on their side of the wire fence without affecting the position of the wire fence. The wooden fence only ran a third of the way of the fenceline along that portion where the appellant's patio was overlooking the swimming pool of No. 24. It was erected to obtain privacy for the occupants using the swimming pool.

43. The above aside, before us, the appellant relied in the main upon three objective features to reinforce the point that the fence was never moved since the early seventies. We will examine each of these features in turn.

Boulders/rocks

44. As mentioned before, two photographs were tendered to the court below which showed a part of the fence. One was taken in the seventies (photograph A) and it showed some rocks/boulders with a stone lantern. Another (photograph B) was taken shortly before the trial, and it showed the rocks but the stone lantern was no longer there. Neither the appellant nor her children could tell when the stone lantern was removed. The trial judge was not persuaded that a comparison of two photographs could prove that the fence was never moved. She seemed to think that as the stone lantern had been moved, the boulders could similarly have been moved.

45. It was the appellant's evidence that the boulders as shown in photograph B were on the disputed strip. This was not challenged by the respondents or their witnesses. It was apparent to us on a close examination of the two photographs that the boulders, which are non-symmetrical and not uniform in size or shape, were in exactly the same position. In both photographs, the distance between the fence and the boulders appears to be similar. The only thing missing was the stone lantern which the appellant could not recall when that was moved. We did not think this mattered, although if the lantern were still there, it would merely support the same point. It would be noted from photograph A that the lantern stood very much on its own, although adjacent to the boulders. It did not follow that just because the lantern had been removed, that the boulders must also have been moved. It was not suggested by the respondents in cross-examination that the fence was moved when the stone lantern was shifted. If the boulders had been moved, we could not imagine that they would be placed relative to each other in exactly the same formation. It must be borne in mind that the appellant then did not know anything about adverse possession. The respondents could only make a general allegation that there were differences in the positions of the boulders as shown in the two photographs, but they could not be more specific.

Hedge

46. The appellant's unequivocal evidence was that she and her husband planted and maintained a hedge from the early seventies till the early nineties. It was only about 10-15 feet in length. It ran alongside a small part of the fenceline. This evidence was unchallenged. One could see the hedge in

photograph A. There was no evidence or suggestions from the respondents that their predecessor-in-title planted the hedge. But for the sake of argument, even if they did, the hedge had become a part of No. 26 from the seventies. In the light of our views expressed above as to what photograph A and photograph B depicted, it must follow that the hedge was planted on the disputed strip.

Plants/Trees:

(a) Belimbing Tree

47. In a survey plan prepared by Mr Anthony Lim (the respondents' expert) a curry tree (also known as Belimbing tree, and its fruits are used to make curry) was depicted to be growing on the disputed strip. The appellant said she planted the tree. According to Professor Rao, this tree was about 20 years old when he inspected it. This meant that the tree was there since 1980. Accordingly, the fence could not have moved post 1983.

48. It was true that the age of the Belimbing tree, being 20 years old, was only an estimate. Because it was an estimate, the trial judge could not accept the evidence of Prof Rao. In law, while a judge is not obliged to accept the opinion of an expert, even in a situation where there is no contrary expert evidence, such rejection must be based on sound grounds: see *Saeng Un Udom v PP* [2001] 3 SLR 1 at 8-9. We did not think just because the age given was an estimate, that that in itself was a good ground to reject the expert opinion. In the realm of expert evidence, it invariably involves a matter of judgment. This was a scientific issue outside the learning of a judge.

(b) MacArthur Palms

49. In the view of the trial judge the problem here was in determining the age of the palms and this could not be determined with any accuracy. Of the 14 clusters of MacArthur palms, only one cluster was not damaged. Upon examination of the cluster, which was 20 feet in height, Prof Rao concluded that it was well over 20 years old. He did also examine the other clusters, but because they were damaged or disturbed, he offered no concluded views on them.

50. The trial judge could not accept this expert opinion of Prof Rao as the latter also clarified that palms could grow 15 feet in 4 years "in good condition". This was where an error had crept in due apparently to the closing submission of the respondents. Probably counsel for the respondents had misunderstood the answer given by Prof Rao. According to the official notes of evidence furnished by the court, what Prof Rao said was this:-

> "Q: Is it possible for a MacArthur palm to attain the height of 15 feet in 4 years?
>
> A: It's possible if you change the conditions."

51. This clarification did not introduce any uncertainty to the opinion of Prof Rao that that palm was over 20 years old. Unless the conditions *changed* there was no way the palm could have grown at such a rapid pace. It must be remembered that Prof Rao was giving his opinion on the palm in relation to its actual condition at No. 26.

52. Another reason which seemed to have affected the trial judge's perception of Prof Rao's evidence on the MacArthur palms was that there was no explanation from the appellant why the 13 clusters were damaged or disturbed. She seemed to think that it was possible that the palms were

damaged when the fence was being removed. This was at best a speculation. There could be so many reasons why the thirteen clusters were damaged or disturbed. It need not be because of the removal of the fence. More importantly, the appellant was never asked why the 13 clusters were damaged. She would have had an answer to that point if she was asked. Prof Rao did categorically state that the one undamaged palm was at least 20 years old. It was the appellant's clear evidence (which the judge seemed to have accepted) that she and her husband planted all the palms, and they were, at the time of the trial, along the fence (although 13 were damaged). All these clearly militated against any suggestion that the fence had been moved post 1983. And if there was such a movement of the fence, then surely there would be a gap between the palms and the fence. But there was no such gap.

(c) Salam tree

53. We have earlier referred to a stump of a Salam tree. First, the trial judge seemed to think that there was no clear evidence that the stump was on the disputed strip. Furthermore, she felt the evidence of the children on this tree was unsatisfactory. They seemed to recall that in the seventies, it was a huge tree. But on the basis of Prof Rao's testimony, the tree stump which Prof Rao saw on the disputed strip could not have been a huge tree in the early seventies. Thus, the trial judge concluded that this could only mean one of two possibilities:-

> (i) the huge tree which the children remembered as having existed in 1970 was a different tree; or
>
> (ii) there was no huge tree in 1970 and their memories of a huge tree related to a much later period.

The appellant also thought that in the early seventies, this tree was about 20 feet high.

54. Perhaps the children had made a mistake as to the size of this tree. So did the appellant as to its height. But the fact of the matter was that as at the time of the trial, the stump of the Salam tree was there on the disputed strip near the fence. It was the appellant's evidence that this tree was cut down in about 1990 and according to Prof Rao, having examined the stump, it was at least 20 years old at the time it was cut down.

Judgment

55. In the light of the matters aforesaid, it was our view that the trial judge erred in concluding that the presumption raised in s 85 had not been rebutted. In our judgment, the evidence clearly established that the fence had not been moved post-1983.

56. In the result, we allowed the appeal and declared that the appellant had acquired ownership of the disputed strip by adverse possession. We also ordered that a resurvey be carried out in line with the decision reached by us in this appeal and that the cost of the resurvey be borne by the appellant. The security for costs, together with any accrued interest, was ordered to be refunded to the appellant's solicitors. The appellant was awarded costs of this appeal and of the action below.

Sgd:

YONG PUNG HOW
CHIEF JUSTICE

Sgd:

CHAO HICK TIN
JUDGE OF APPEAL

Sgd:

TAN LEE MENG
JUDGE