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DCCJ 6000/2004

IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
CIVIL ACTION NO. 6000 OF 2004

BETWEEN

WINLY PROSPER LIMITED

Plaintiff

and

IN-TIME INTERNATIONAL
DEVELOPMENT LIMITED

Defendant

Coram : His Honour Judge Chow in Chambers (Open to Public)

Date of Hearing : 27th June, 2005

Date of handing down Decision : 20th September, 2005

DECISION

1. This is the Defendant's application for an order that:-

- (1) The Judgment ("the Judgment") entered in default of giving notice to defend on 20.1.2005 be set aside on the ground that the Judgment was irregular;
- (2) The present proceedings be stayed pending determination of the dispute by way of a vendor-purchaser summons.

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2. The Defendant contends that the Judgment was irregularly obtained because the Writ did not come to its notice even though the Plaintiff had served the Writ at the registered address of the Defendant, as the registered office of the Defendant had moved since August, 2004 and it was vacant at the time the Writ was served.

3. The Plaintiff served the Writ on the following two addresses:

- (1) Unit 22A, Coin Organize Centre, 13 Pennington Street, Causeway Bay, Hong Kong (“Address (1)”); and
- (2) Room 803, 8th Floor, Hang Seng Wanchai Building, 200 Hennessy Road, Wanchai (“Address (2)”).

Address (1) is the registered address of the Defendant. At the time the Plaintiff served its Writ on the Defendant on 1st December, 2004, this address was vacant. This address had been vacant since mid August, 2004.

4. Section 356 of the Companies Ordinance provides that “A document may be served on a company by leaving it at or sending it by post to the registered office of the company.” The Defendant submits that by serving on both addresses, the Plaintiff clearly sought to comply with the requirements for service as laid out in Order 10 r. 1 of the Rules of the District Court (“RDC”), as amended by O. 65, r. 3(2) of the RDC, namely, service on the registered or principal address of the Defendant. Order 10, r. 1 provides: “A Writ must be served personally on each defendant by the plaintiff or his agent”. Section 356 is a specific provision relating to the

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service of a writ on a company, whereas Order 10 r.1 of RDC is only a general provision relating to the service of a writ. The specific provision overrides the general provision and applies in this case. The Plaintiff has not said that it relies on Order 10 r. 1 of RDC to effect service of the Writ.

5. O. 10 r.1 (7) of RDC provides that “This rule shall have effect subject to the provisions of any Ordinance and these Rules and in particular to any enactment which provides for the manner in which documents may be served on bodies corporate”. In the case of *Treasure Land Property Consultants (a firm) v United Smart Development Ltd* (Civil Appeal No. 76 of 1995) the Court of Appeal referred to O. 10 r.1 (7) and held that O.10 r.1 is not intended to apply to service on a limited company.

6. The simple issue is: was the Writ served on the registered address of the Defendant at the material time? The simple answer is “Yes”. The fact that the Plaintiff served its writ on Address (2) would not alter this fact. The fact that the registered address was vacant is neither here nor there. There is no requirement under section 356 that, when the Writ was served, the registered must not be vacant. The Defendant also argued that the Plaintiff did not take any steps to enquire whether Alvin Liu & Partners (“ALP”, which represented the Defendant in the 2nd Provisional Agreement) were instructed to accept service on the Defendant’s behalf. There is not a legal requirement which the Defendant had to comply with before serving the Writ. I am satisfied that the Plaintiff satisfied the requirement of section 356 of the Companies Ordinance and that the Writ

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was duly served on the Defendant. Therefore the Judgment was a regular judgment.

7. The Defendant submits that its defence has a good prospect of success for two reasons:-

- (1) The Plaintiff's application is misconceived and without legal basis, alternatively,
- (2) The Defendant had satisfactorily provided answers to all the legitimate requisitions made on it by the Plaintiff.

Whether the Defendant has a real prospect of success

8. The Plaintiff's action against the Defendant was based on the wrongful repudiatory breach of a sub-sale agreement in respect of Ground Floor, No. 42, Tung Ming Street, Kowloon ("the Property"), in failing to answer the requisitions raised by the Plaintiff, and/or failing to prove good title of the Property prior to the completion date; and/or failing to return the initial deposit and further deposit to the Plaintiff after the termination of the sub-sale agreement.

Whether the Action is misconceived

9. The Defendant submitted that the Plaintiff's case is in essence a claim for return of deposit (HK\$260,000) relating to the initial and further deposits paid by the Plaintiff. But it never received the deposits.

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There are held and continue to be held by ALP, as stakeholder. Hence, whilst ALP retained the deposit monies as stakeholder, the Defendant could neither keep, return, refuse to return nor release something they did not have. The Plaintiff’s pleaded case is clearly misconceived. If ALP was not joined as a party, the appropriate remedy would be to seek a declaratory rather than an unfounded monetary relief against the Defendant. It is for this reason that the Defendant maintains that it would have been more appropriate for the Plaintiff to have proceeded by way of as a vendor-purchaser summons rather than a writ, being declaratory in nature. If the matter had proceeded by way of a declaration, then the Plaintiff would not have been entitled to a default judgment.

10. ALP was acting in two capacities: (1) as the legal representative of the Defendant in a provisional agreement dated 11th August, 2004 with the Plaintiff; (2) It was also the stakeholder in respect of the deposit monies. By way of a letter dated 13th September, 2004, ALP, acting on behalf of the Defendant, forfeited the Plaintiff’s deposit. The letter states:-

“AS SOLICITORS for and on behalf of IN-TIME INTERNATIONAL DEVELOPMENT LIMITED whose registered office is situate at Unit 22A, Coin Organize Centre, No. 13 Pennington Street, Causeway Bay, Hong Kong WE HEREBY GIVE YOU NOTICE that since you have failed to complete the sale and Purchase of the property known as No. 42 Tung Ming Street, Ground Floor, Kowloon, Hong Kong by 12.00 noon of 27 August 2004 as stipulated in Clause 2 of the

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Provisional Agreement for Sale and Purchase thereof dated 11 August 2004 (“the said Agreement”), the said Agreement is hereby rescinded and the deposit moneys in the total sums of HK\$260,000.00 paid by you to our client thereunder are hereby forfeited to our client absolutely as and for liquidated damages (and not as a penalty).”

(Underlines provided)

11. Paragraph 14 the affirmation of Wu Dick Ho, director of the Defendant, made on 16th February, 2005, read:-

“14. Through correspondences between ALP and KW Ng, ALP had confirmed to KW Ng that the deposit of HK\$260,000 was still held by ALP as stakeholder. There are now produced and shown to me marked “WDH-10” copies of correspondence between ALP and KW Ng dated 7th and 16th September 2004.”

12. The letter 7th September, 2004 contained in Exhibit “WDH-10” is a letter written prior to the forfeiture of the deposit monies by the Defendant. The letter dated 16th September, 2004 was written by the Plaintiff’s solicitors K.W. Ng & Co. to ALP. It reads:-

“We refer to the tele-conversation between your Mr. Lin and our Mr. Ng on 13th September 2004 whereby confirmation has been given to us that the deposits in the total sum of HK\$260,000.00 are still kept by you as

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stakeholders. On that basis, we are not going to join you as one of the defendants in the proceedings commenced by our client.

Our client reserves all its rights to claim for damages, loss and costs.”

13. There is nothing to show how the forfeited deposits can still be held by ALP as stakeholders. Once forfeited, the sum of HK\$260,000 could no longer retain the nature of deposit money, because from the moment of forfeiture it became the Defendant’s property. It could no longer be kept by ALP as stakeholders. Whatever label given to the sum of HK\$260,000, it was no longer deposit right after the moment of forfeiture, and even if it is still being kept by ALP, it can only be kept for the benefit the Defendant, because it is the Defendant’s money. To say that it is a deposit still kept by ALP is a total misconception of the legal effect brought about by forfeiture. Since the deposits were forfeited by the Defendant on 13th September, 2004, the present action was properly brought by the Plaintiff. Therefore the Defendant’s argument in this regard must fail.

Whether the Defendant answered requisitions satisfactorily?

14. On the 21st August, 2004, the Plaintiff raised the following 7 requisitions based upon the letter dated 13th August, 2004 issued by ALP on 14th August 2004. The requisitions raised were as follows:-

- (1) Conditions of Sale
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- (2) Assignment Memorial No. 414685 dated 25.09.1963
 The Assignment was executed by one of the Vendors Chan Sing Yuen by his attorney Chan Sing Lam. Please produce the relevant original Power of Attorney and if the same was created more than 12 months from the date of execution, the proper evidence to show that the same had not been revoked. It is trite law that the Attorney should not act in his personal interest, however, the Property was assigned unto the Attorney himself. Please produce evidence that the requirement has not been violated.
- (3) Partial Release Memorial No. 5455719 dated 30.09.1992
 The same was executed by the Attorney under a Power of Attorney dated 14.11.1989 and a Deed of Delegation dated 2.7.1990, however, the confirmation letter dated 30.9.1992 did not specified which powers had not been revoked. Please let us have a fresh Confirmation Letter for perusal.
- (4) Building Order ref CMS/TC/159438/01/K
 With reference to the additional terms of the Provisional Agreement dated 11.8.2004, please let us have the original Building Order and the relevant Letter of Compliance for perusal.
- (5) Illegal Structure and Alteration

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With reference to the additional term of the Provisional Agreement dated 11.8.2004, please let us know the nature and extent of the illegal structure and alteration. Please produce either evidence to show that the building works have been approved by the Building Authority or a certificate from an authorized person certifying that the building works fall within the exempted works under section 41(3) of the Building Ordinance Cap. 123. The case of Modern Sino Limited v Art Fair Company Limited is referred. Our client is entitled to raise requisition and the Vendor is required to answer to the satisfaction of the Purchaser's solicitors despite clause 3 of the Provisional Agreement.

- (6)
- (7)

15. The Requisitions which I have to consider are those mentioned by the Plaintiff, namely:

- (a) The non-compliance of the Building Order before Completion;
- (b) a prima facie breach of the rule against benefiting oneself by an Attorney in the execution of the Assignment; and
- (c) illegal building structure and alteration.

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Failure to discharge building order CMS/TC159438/01/K (“the Building Order”)

16. In his second affirmation, Wu Dick Ho (“Wu”) stated that as the Defendant agreed to pay the expenses for discharging the Building Order under the Chinese Supplemental Agreement dated 11th August 2004 created no risk to the title of the Property. It is not an answer to the requisition, because, as provided in the Provisional Sale & Purchase Agreement dated 11th August, 2004, the Defendant expressly agreed to discharge the Building Order prior to completion and to pay the related expenses. There is no evidence shown by Wu that the Defendant had discharged the Building Order prior to completion.

Self-dealing by an attorney

17. Wu in his second affirmation stated that the Assignment dated 25th September, 1963 is a pre-intermediate root title document. The Assignment shows that the Attorney Chan Sing Lam was appointed by the Principal to be his Attorney to deal with and dispose of the Property. The Attorney assigned to himself part of the interest of the Property. The Defendant contends that the Defendant has no obligation to prove the title. The power of attorney under which the said Assignment was executed is presumed valid and irrevocable by virtue of section 13(4A) of the Conveyancing and Property Ordinance (“CPO”). The provision of the Assignment to the Plaintiff was merely to complete the chain of title and for verification of subsequent title deeds, and not for proving titled. The Defendant’s duty to give title in accordance with section 13 of the CPO

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does not require the vendor to prove title between the crown lease and the intermediate root of title.

18. The Plaintiff argued that when a purchaser detects a pre-intermediate root defect, a vendor is obliged to answer the requisition. The basis of the power of CSL to sell originates from the Power of Attorney. But this Power of Attorney contains no provision that CSL could sell any interest in the Property to himself. It is trite law that an attorney must not buy the principal property and must not act in such a way to give rise to a conflict of interest. In buying part of the interest of the Property CSL placed himself in a position where his duty to sell as an attorney conflicted with his position as a buyer to buy the Property. This was not allowed by law. If the Plaintiff takes the Property with notice of a breach of fiduciary duty of an earlier transaction, no period of limitation would apply: Section 20(1)(b) of the Limitation Ordinance. But section 20(1)(b) only applies to an action taken by a beneficiary under a trust, to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee converted to his use. There is no such action here.

19. The Defendant argued that since more than 40 years had lapsed since the Assignment in question, the title of the Property cannot be challenged, and that the relevant power of attorney under which the Assignment was executed is presumed valid and irrevocable by virtue of section 13(4A) of the CPO. I am satisfied that section 13(4A) of the CPO applies in this case. There has been no action in court to rebut the presumption. Therefore the power of attorney remains valid and

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irrevocable, and therefore the requisition in question was satisfactorily answered.

Alteration to the Property

20. The Defendant alleged that according to Clause 5 of the 2nd Provisional Agreement, the Property is sold to the Plaintiff on “as is” basis. Further, Clause 3 of the Chinese Collateral Agreement dated 11th August 2004 shows that the Plaintiff was fully aware of the existence and alteration of the Property and would not be entitled to postpone and/or refuse completion of the transaction on this basis. The Plaintiff did not waive his right to raise requisitions. In order for the Plaintiff to effectively waive such right, he must not only know if the alleged facts giving rise to the requisition, but must know the legal consequence of those facts. There is no evidence to show that the Plaintiff knew the legal consequences of the existence of the additional structure and alterations. Clause 3 states “the purchaser knows and accepts the additional structure and alteration, and cannot on this ground delay or refuse to complete the sale.” This clause does not refer to such additional structure and alterations as illegal structure and alterations. It does not say that the Plaintiff is to waive its right to postpone or delay the sale. This clause does not allow the Vendor to refuse to complete the sale on other ground, e.g. to raise proper requisitions or a failure to discharge the Building Order.

21. Save and except the Requisition relating to the Power of Attorney, the Defendant has failed to answer the Requisitions adequately. Therefore the Plaintiff was entitled not to proceed with the transaction

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prior to the completion date. The grounds raised by the Defendant to set aside to regular judgment cannot stand, and I dismiss its application accordingly.

Costs

22. I make an order nisi, to be made absolute in 14 days' time, that the Defendant is to pay costs of this application, to be taxed, if not agreed, with Certificate for Counsel.

(S. Chow)
District Judge

The Plaintiff : represented by Phobe Man instructed by M/S. K.W. Ng & Co. Solicitors.

The Defendant: represented by Donald Lee, instructed by M/S. Alvan Liu, Partners, Solicitors.